



COMMENTARIES

ON THE

LAW OF MASTER AND SERVANT

BY

C. B. LABATT, B. A. (Cantab.)

In Three Volumes

VOLS. I. AND II.—EMPLOYER'S LIABILITY.

VOL. III.—RELATION, HIRING AND DISCHARGE, COMPENSATION, STRIKES, ETC.

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TO
SEYMOUR P. THOMPSON, LL. D.,
FORMERLY A MEMBER OF THE ST. LOUIS
COURT OF APPEALS
THIS TREATISE IS DEDICATED,
AS A SLIGHT TOKEN OF THE ADMIRATION WHICH THE AUTHOR
FEELS FOR THE DISTINGUISHED SERVICES WHICH HE
HAS RENDERED TO THE LEGAL PROFESSION,
BOTH IN HIS JUDICIAL AND
LITERARY CAPACITY.

PREFACE.

The two volumes here offered to the profession deal with the nature and extent of a servant's right to maintain an action against his master for personal injuries, and form the first part of a treatise which, when finished, will be a complete commentary upon the law of master and servant. It has been the author's aim to cite every decision which has been rendered by a court of review in any of the countries in which the common law is the prevailing system of jurisprudence, and the materials collected represent the result of an exhaustive examination of all the reports, whether official, semi-official, or non-official, which have been published in the following countries: England, Scotland, Ireland, the United States, Canada, Australia, and New Zealand. A brief summary of the law of employers' liability under the systems which are founded upon the civil law has also been added.

The date of each case is always specified. The insertion of this detail has appreciably augmented both the cost and the bulk of the volumes; but its utility will be readily conceded by every lawyer who has learned to realize the fluctuating and unstable condition of the law of employers' liability, and the vital importance of gauging the significance and weight of each ruling with reference to the precise period of doctrinal evolution by which it was produced.

To prevent any risk of a misunderstanding, it is proper to mention that, as a general rule, no cases are cited which are of a later date than those collected in the volumes of the *General and American Digests* which were published in the spring of 1902. The manifest advantage of this arrangement is that it fixes a definite starting-point for such researches as it may be desired to make in the later volumes of those digests or elsewhere, and obviates the want of homogeneity which would have resulted from undertaking to utilize all the most recent cases in a treatise which has necessarily required a considerable time to put through the press. The chapter relating to the English Workmen's Compensation Act of 1897 constitutes the one important exception to the scheme thus adopted. The unique and novel

character of that remarkable statute, and the extraordinary amount of litigation which it has engendered during the few years of its existence, have been deemed to furnish a sufficient justification for stating the effect of all the decisions relating to it which have been reported up to the end of 1902.

The supplementary citations of reports other than those which belong to the official or semi-official class are, it is considered, sufficiently useful to compensate for the outlay and consumption of space which their insertion has entailed. Wherever the only citation given is that of a nonofficial series, the case is not found except in a report of that description.

The elaborate index which is appended to this portion of the treatise has been compiled by Mr. Cyrus W. Phillips, one of the associate editors of the *Lawyers' Reports Annotated*.

To some readers these volumes will, perhaps, appear unduly prolix. It may be advisable, therefore, to take this opportunity of explaining that the great length to which they have been extended is due to the impossibility of discussing adequately within a narrow compass the enormous mass of authorities bearing upon a subject which may, without any exaggeration, be said to enjoy the unenviable distinction of having been the occasion of a larger number of conflicting doctrines and inconsistent decisions than any other branch of law. In order to show with something like reasonable clearness and precision the conclusions at which the various courts have arrived, the author has found himself constrained to enter upon a far more minute and detailed analysis of the cases than is customarily undertaken in a commentary of this general character. Without such an analysis the development of the law even in a single state cannot be satisfactorily elucidated; and the necessity for an unusually microscopic examination of the authorities is rendered still more imperative by the fact that, as regards many of the more important of the principles discussed, the evolution of doctrines has proceeded in each jurisdiction upon lines which are, in some degree, at least, independent. Under these circumstances, it is clear that the subject cannot be handled with any thoroughness except by adopting a method of treatment which will enable the reader to understand not only the mutations and antagonisms of theory which are frequently apparent in the decisions rendered in the same state, but also the manifold points with respect to which the courts of the various countries hold discordant views. The most striking illustration of the difficulties which are entailed by the necessity of considering territorial lines is undoubtedly that which

is furnished by the chapters relating to common employment; but many other examples of the confusion, obscurity, and uncertainty which are traceable to the same source may readily be found in these volumes. If the anxiety of the author to produce a reasonably clear account both of the past and present condition of the law has sometimes occasioned what may seem an excessive diffuseness, he hopes that lawyers who consult these volumes will not be inclined to criticize very severely an error of judgment which must, at all events, inure to their advantage.

It will scarcely be disputed by anyone who is familiar with the law of employers' liability that the deplorably chaotic condition to which it has been reduced in the United States is due to a cause which is probably more potent than mischief in actions to recover damages for injuries received by servants than in any other class of cases involving the existence or nonexistence of negligence,—*viz.*, the differences of opinion which prevail with respect to the limits of the power of a court to override the verdicts of juries. In some of the states so large a measure of authority in this regard has been arrogated to themselves by appellate judges that the actual, as distinguished from the theoretical, system of procedure may fairly be described as being virtually one which compels a plaintiff to establish his case to the satisfaction, not of one jury, but of two. No arguments are needed to demonstrate that such a condition of affairs, instead of tending to produce that stability of doctrine which Blackstone and other writers have eulogized as being one of the most beneficial results of the delineation of the provinces of courts and juries, is certain to beget an interminable multitude of uncertainties and inconsistencies. In those cases—and they are by no means few—where a finding of facts or an inference from facts is rejected by a divided bench, the situation approaches perilously close to the ridiculous. It might be supposed that considerations of courtesy, if not of logic, should be sufficient to dissuade a portion of the members of a court from pronouncing a judgment which, under such circumstances, amounts essentially to a formal declaration that their dissenting brethren have, by accepting the conclusions of the jury, forfeited *ad hanc vicem* the right to be classed in the category of those typically reasonable and fair-minded men who are assumed, for the purposes of the decision, to be incapable of rendering such a verdict as the one in question.

A preface is not an appropriate place for the discussion of the important topic here touched upon. But it is not amiss to point out that, so far as the law of employers' liability is concerned, a large por-

tion of the opportunities for the perpetration of this abuse of judicial functions would be eliminated if the doctrine which, on the ground either of an implied assumption of the risk or of contributory negligence, precludes a servant, as a matter of law, from obtaining damages for an injury resulting from an abnormal risk of which he had knowledge, actual or constructive, before the accident occurred, were abolished by statute. That there is no class of cases in which courts of review have exercised such extensive powers, as regards the overriding of verdicts, as in those which turn on the question whether the servant appreciated, or should have appreciated, the given hazard, will be abundantly apparent to any one who collates, with reference to the facts involved, the cases which are collected in chapter XXI. It seems not unreasonable to suppose that, if the question whether the servant was chargeable with notice of the danger from which his injury resulted were no more than one of the elements of an investigation leading up to a mere issue of fact, the courts would not be tempted to scrutinize so minutely as at present the findings of juries with regard to such notice. It is obvious that, if this should be the result of the change in the law which is suggested above, one prolific source of disagreement would be to a large extent removed.

The consideration just adverted to is, however, not the only one which points to the expediency of abrogating the doctrine in question. Whether that doctrine is or is not sustainable on grounds of abstract logic, there would seem to be no escape from the conclusion that, under existing industrial conditions, it cannot be applied in employers' liability cases without frequently producing consequences which are intolerably harsh and severe. The author ventures to hope that the publication of these volumes which, by the simple process of showing in detail the circumstances under which it has prevented the recovery of compensation, have brought into clear relief its inherent unfairness, may induce a larger number of legislatures to follow the lead of those which have already enacted remedial legislation upon the subject.

Another doctrine which the author considers to be thoroughly inequitable in its essence is that which precludes a servant from recovering damages from his employer in cases where the injury was caused by the negligence of a coservant. It is little short of marvelous that a rule of law which rests upon such unsubstantial foundations (see §§ 472-475), and which presses so hardly upon the classes which form the most numerous section of every community, should have survived up to the present time. But, as it has already been

abolished in one state, and its domain has been greatly circumscribed in many others, there would seem to be good ground for anticipating that the day is not very far distant when it will be excised entirely from Anglo-American jurisprudence,—the only modern system, it should be observed, of which it has ever formed a permanent part. See chapter XLVII.

It may readily be conceded that, even if carried out, the reforms here outlined would still leave in the law of employers' liability numerous defects which it would be desirable to remedy. But the changes proposed would, at all events, remove its most repulsive excrescences; and it would be an immense gain if the courts were relieved once for all from the necessity of considering two doctrines which are not only unduly favorable to the employer, but have also engendered such an enormous mass of subtle and refined distinctions—often as unreasonable and paltry as those which have made medieval scholasticism a by-word—that they are no longer fitted to be a part of a practical science which is concerned with the elementary affairs of every-day life.

ROCHESTER, January, 1904.



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MASTER AND SERVANT.

CHAPTER I.

GENERAL PRINCIPLES BY WHICH THE EXTENT OF THE MASTER'S LIABILITY IS DETERMINED.

1. Introductory statement.

A. MASTER'S LIABILITY DETERMINED WITH REFERENCE TO THE RISKS WHICH ARE AND ARE NOT ASSUMED BY THE SERVANT.

2. Risks resulting from the master's negligence are not assumed by the servant.
3. Risks not resulting from the master's negligence are assumed by the servant.
4. Rationale of these two complementary principles.
5. Injuries due to known risks not generally actionable, even when they result from the master's negligence.

B. ANALYSIS OF THE MASTER'S DUTIES.

6. General statement.
7. Duty to see that the inorganic instrumentalities are suitable, both as respects quality and quantity.
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 - a. Servants.
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9. Duty to see that the instrumentalities are so used that the servants will not be exposed to unnecessary dangers.

C. LIMITS OF THE MASTER'S DUTY TO PROTECT THE SERVANT.

10. Master liable for his personal negligence, of whatever kind it may be.
11. Master who does not exercise personal supervision, not liable for the manner in which the details of the work are carried out.
12. Master not liable for injuries caused by abnormal conditions of which he has no notice, actual or constructive.
13. Extent of a master's duty to protect a servant against casualties not due to his negligence.

1. Introductory statement.—The doctrines which define the extent of a servant's right to recover damages for personal injuries received in the course of his employment represent, broadly speaking, the results of a compromise between the principle that a servant agrees to assume all the risks incident to the work undertaken by him, and the principle that a master is answerable for the consequences of any negligent acts which may be committed by himself or his agents. In the last analysis, therefore, every problem in the law of employers' liability consists essentially in the determination of the question

whether the facts under review shall be controlled by the one or by the other of these principles.¹

The remarkable conflict of opinion disclosed by the decisions is due, in the main, to three causes. In the first place, no criteria which are at once reasonably precise and universally accepted are available for the purpose of fixing the boundary line between the respective territories of the two antagonistic elements from the interaction of which this branch of law has been developed. In many instances, it should be observed, the divergence of views, so far as it arises from this circumstance, appears to be even greater than it actually is, owing to the fact that "the language of courts in the opinions delivered is sometimes shaded by the facts in the particular case then under consideration, and thus may sometimes give rise to an apparent difference in the rules applied, when none really exists."² In the second place, the difficulty of determining to which of two or more recognized rules the rights of the parties ought, in any given instance, to be referred, is unquestionably greater in this than in any other class of cases. In this connection, the numerous dissenting opinions in the reports, and the reasons assigned for the conclusions arrived at, are very instructive.³ The third, and perhaps the most prolific, source of uncertainty and discrepancy is the accident of liti-

¹In the more general statements of doctrine these principles are regularly mentioned together. The following passage from an oft-cited case is one of many hundreds of the same tenor which might be quoted: "While it is true, on the one hand, that a workman or servant, on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is to be engaged, among the negligence of other servants, yet, in similar services by the same master, it is also true, on the other hand, that the employer or master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and will also take due precaution to adopt and use such machinery, apparatus, tools, appliances, and means as are suitable and proper for the prosecution of the business in which his servants are engaged, with a reasonable degree of safety to life and security against injury." *Nunn v. Hunsatonic R. Co.* (1861) 8 Allen, 441, 85 Am. Dec. 720.

²*Texas & P. R. Co. v. Barrett* (1895) 14 C. C. A. 373, 30 U. S. App. 196, 67 Fed. 214.

³See, for example, such a case as *Thomas v. Missouri P. R. Co.* (1891) 109 Mo. 187, 18 S. W. 980. The opinion of the majority of the court proceeded on the theory that a switchman at a junction where foreign cars with all kinds of couplings are continually being received must be taken to have entered and continued in the service with the understanding that the perils arising from the difference between the couplings of any two cars which he is called on to handle are such as he must provide against by the exercise of care appropriate to the circumstances. Barclay, J., dissented on the ground that, as the switchman could not make the coupling without placing a part, at least, of his body between the cars, it made no difference to him, in contemplation of law, whether the action of the cars in closing on him was ascribable to a defective condition of the appliances, or to faults in their original construction, and that the true question was whether the machinery, as a whole, was reasonably safe, and whether

gation, from which it resulted that, in the earliest cases in which the extent of a master's responsibility was investigated, the questions presented were discussed from the standpoint of the servant's assumption of the risks of the employment, and not from that of the master's duty to protect the servant against those risks. The doctrines enunciated under such circumstances were such as naturally tended to emphasize the disabilities of the servant, rather than the obligations of the master, and the subsequent evolution of the law has consisted essentially in a process of defining and explaining the qualifications to which the sweeping general rules which were originally laid down are subject. Under any circumstances such a process must inevitably produce many inconsistent decisions and unsatisfactory distinctions, and in the present instance it has resulted in a doctrinal confusion even worse than usual, owing to the fact that it has been carried on simultaneously in a large number of separate states, and the question how far the various proposed limitations of principles should be admitted has been answered in many different ways.⁴

The outcome of the juristic compromise which has been effected along the lines indicated in the foregoing remarks is to be seen in the three fundamental principles which are stated in the following sections.⁵

ordinary care had been used to have it so. So far as this conclusion might be modified by the fact that the servant knew of the danger, the learned judge was of opinion that the evidence left the fact of such knowledge an open question, upon which the verdict of a jury was conclusive.

⁴The chaotic condition to which the law has been reduced by the operation of these causes is shown more particularly by the cases collected in chapters III.-VIII., *post*.

⁵The earliest case in which the notional and chronological relation of these principles is adverted to seems to be *Potts v. Plunkett* (1859) 9 Ir. C. L. Rep. 290, where Lefroy, Ch. J., after remarking that in *Priestley v. Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, it was laid down, in substance, that a master is not responsible for injuries occurring to his servant in the course of his employment generally, though being a result of it, because the servant is supposed to undertake the duty for which he is paid, subject to all the risks which may occur during its continuance, proceeded thus: "In process of time it came to be discussed whether that proposition

was to be adopted in those unqualified terms, and certain qualifications were then superadded to the rule so laid down,—as, for instance, where the injury is occasioned to the servant by that of which the master might be properly deemed to have been the cause, namely, when the injury arises, not from a merely accidental occurrence in the course of the servant's employment, but from gross negligence on the part of the master in respect of his duty towards the servant; and this qualification which was so engrafted on the original rule was this,—that a master should not employ his servant in a work which the master is aware is of such a nature as that no man could engage in it without incurring liability to the injury complained of. That appears to be a rational qualification of the rule which exempts the master from liability for injuries arising from accidents to those in his employment, and involves the existence of knowledge on the part of the master of the dangerous nature of the employment. But there is a further class of cases, in which it would appear that there was engrafted on this latter qualification somewhat of a limitation,

A. MASTER'S LIABILITY DETERMINED WITH REFERENCE TO THE RISKS WHICH ARE AND ARE NOT ASSUMED BY THE SERVANT

2. **Risks resulting from the master's negligence are not assumed by the servant.**— A proposition which has so frequently been enunciated by the courts as to have become axiomatic is that, *prima facie*, a servant does not assume any risks which may be obviated by the exercise of reasonable care on the master's part. In other words, the abnormal, unusual, or extraordinary risks which the servant does not assume as being incidental to the work undertaken by him are those which would not have existed if the master had fulfilled his contractual duties.¹

Occasionally the inference has been drawn that there was negli-

namely, that if the cause producing the injury be equally known and equally palpable to the person employed as to the master, then the servant cannot complain, for it may be said that he went into the danger with his eyes open. This, then, appears to me to have been the course of the decisions: First, laying down the general principle as to the master's nonliability; next, engrafting a qualification upon that principle; and, lastly, introducing a sort of limitation of that qualification."

¹The cases in which this doctrine is stated under its various aspects are collected in §§ 270 *et seq.*, *post*, and need not be reviewed here in detail.

This qualification of the general principle that a servant assumes all the risks ordinarily incident to his employment was more than half conceded in *Priestley v. Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987. In that case, as has been pointed out in *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612, the question whether the risk of the master's negligence was one of the risks assumed by a servant was not involved, or, at all events, was not determined in that case. The decision was placed by Lord Abinger partly upon the ground that, in the "sort of employment . . . described in the declaration, . . . the plaintiff must have known as well as his master and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely;" and although the court declared that it was not called upon to decide how far knowledge, upon the part of the mas-

ter, of vices or imperfections in the carriage used by the servant injured, would make him liable, it was said: "He (the master) is, no doubt, bound to provide for the safety of the servant in the course of his employment, to the best of his judgment, information, and belief." In Chief Justice Shaw's famous opinion in *Farrell v. Boston & W. R. Co.* (1842) 4 Met. 49, 38 Am. Dec. 339, language of a somewhat similar tenor is found. But a frank and unreserved acceptance of the simple notion that the existence of certain duties on the master's part created an exception to the doctrine of the servant's assumption of the risks of the employment seems to have been reached with some hesitation. In *Seymour v. Mad-dox* (1851) 16 Q. B. 326, 20 L. J. Q. B. N. S. 327, 15 Jur. 723, a chorus singer injured by falling through a hole in the floor of a passage in a theatre, owing to the want of light and fencing, was held unable to recover from the proprietor of the building, the court holding that a declaration setting out these facts showed no cause of action. This decision turns upon a point of technical pleading, and is therefore of a narrow scope; but, even when this fact is taken into account, it cannot be considered to be in harmony with later cases, — especially in the United States. See the criticisms in *Ryan v. Fowler* (1862) 24 N. Y. 410, 82 Am. Dec. 315. Language indicating a similar trend of judicial opinion is found in the following cases: *Dymen v. Leach* (1857) 26 L. J. Exch. N. S. 221; *Riley v. Barendale* (1861) 6 Hurlst. & N. 445, 30 L. J. Exch. N. S. 87, 9 Week. Rep. 347; *Clarke v. Holmes* (1862) 7 Hurlst. &

gence on the master's part, for the reason that the risk was an extraordinary one.² But this succession of ideas, considered as suggestive of the lines on which the inquiry into the rights and liabilities of the parties may be conducted, is open to objections similar to those which may be urged against the converse theory, that the exercise of due care may be inferred from the fact that the risk was an ordinary one. See next section.

3. Risks not resulting from the master's negligence are assumed by the servant.—A second proposition, which is also beyond the reach of controversy, is that every risk which an employment still involves after a master has done everything that he is bound to do for the purpose of securing the safety of his servants is assumed, as a matter of law, by each of those servants. This doctrine prevents recovery unless evidence is introduced which warrants the inference that the injured person was incapable of appreciating the risk from which his injury resulted.¹ According to the standpoint taken, such evidence may be regarded either as tending to show that one of the essential elements of an assumption or acceptance—*viz.*, knowledge—is lacking, or that the master exposed the servant to risks which he did not comprehend,—a situation which manifestly implies that the master did not fulfil all his duties (see chapters VII. and XVI., *post*).—and which, if it is established, indicates that the case is governed by the principle enunciated in the preceding section.

The risks which are thus considered to have been assumed are those which are commonly described as "ordinary." See §§ 259 *et seq.*

When stated with reference to the general rule which throws on the servant the burden of proving negligence on the master's part (chapter XLIII. B), this principle assumes the form that, in the absence of definite proof of such negligence, an accident is regarded as one of the hazards of the employment of which the servant takes the risk.²

Sometimes we find the courts deducing the conclusion that there was no negligence on the master's part from the consideration that the risk in question was an "ordinary one."³ This logical succession

N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405; *Mellors v. Shaw* (1861) 1 B. & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, 9 Week. Rep. 748; *McDermott v. Pacific R. Co.* (1860) 30 Mo. 115; *Buzzell v. Laconia Mfg. Co.* (1861) 48 Me. 113, 77 Am. Dec. 212.

Colorado Midland R. Co. v. Naylor (1892) 17 Colo. 501, 30 Pac. 249.

¹ For cases which explicitly state or recognize this doctrine, see §§ 259 *et seq.*

² *Mensch v. Pennsylvania R. Co.* (1892) 150 Pa. 598, 17 L. R. A. 450, 25 Atl. 31.

³ *Dartmouth Spinning Co. v. Achord* (1889) 84 Ga. 14, 6 L. R. A. 190, 10 S. E. 449; *Murphy v. Greeley* (1888) 146 Mass. 196, 15 N. E. 654; *Jackson v.*

of ideas is not unnaturally suggested when the evidence is such as to bring into special prominence the conception that the conditions which caused the injury are met with so frequently in the given employment that they may reasonably be regarded as normal, so far as the servant is concerned. See § 261, *post*. In many instances, however, the servant will inevitably be prejudiced to some extent by this mode of conducting the investigation, and it seems to be decidedly preferable to obtain a definite starting point by treating the existence or absence of culpability on the master's part as the essential point to be determined at the outset.

4. Rationale of these two complementary principles.—The distinction thus made between the risks which are and the risks which are not created by the master's negligence may be referred directly to the conception that the fact of the defendant's being the master of the plaintiff is not a reason for excluding the operation of the general principle of jurisprudence which is embodied in the maxim, *Culpa tenet auctores suos*. But it is also sustainable on the more special ground that, in view of the circumstances attending the contractual relations of the parties, the servant may reasonably be presumed to foresee that he will be exposed to risks of the latter class, but ought not to be charged with the consequences of an anticipation that risks of the former class will be encountered. There is, accordingly, no sufficient ground upon which the existence of an implied agreement not to hold the master responsible for the consequences of his defaults can properly be predicated. This conception is fully developed in a later chapter. See §§ 260, 272.

5. Injuries due to known risks not generally actionable, even when they result from the master's negligence.—The presumed knowledge or ignorance of the servant being the essential basis upon which rest the two principles by which he is charged with the acceptance of one class of risks incident to his employment, and the nonacceptance of another class, there is an obvious logical propriety in taking the position that in any case in which the presumption of ignorance which is entertained with regard to risks caused by the master's negligence is rebutted by positive evidence which establishes knowledge, actual or constructive, of the particular peril which caused the injury, it must, at the very least, be a question for the jury whether the servant did not, by continuing to expose himself to the peril thus known to him, show his intention to take upon himself the responsibility for any accident which might happen to him by reason of its existence, or, in

other words, to waive any right of action which, apart from such knowledge, he would have possessed. This position possibly represents the doctrine which, since the recent decisions as to the effect of the maxim, *Volenti non fit injuria*, prevails in England. See chapter xx., *post*, and § 276. But there does not appear to have been any deliberate and formal announcement of such a doctrine, in a case where the question of a contractual assumption of the risk was explicitly presented.

The doctrine applied in the older English cases and in all the American cases up to the present time, with a few possible unimportant exceptions, is that, in the case of all adult servants except seamen, the action must be declared not to be maintainable, as a matter of law, if the evidence leaves no reasonable doubt that the servant comprehended the abnormal risk which caused his injury. See §§ 273 *et seq.*

B. ANALYSIS OF THE MASTER'S DUTIES.

6. General statement.—From the foregoing sections it is abundantly manifest that although, as a mere matter of historical development, the law of employer's liability must be regarded as being essentially based on the conception of the servant's assumption of some risks and his nonassumption of others, the ultimate question to be first determined in every case is whether the master is guilty of a breach of duty to the servant who brings the action. The cases bearing upon that question, therefore, will be first considered.

It is well settled that the duties of a master to his servants arise out of the contract of employment, and are limited to those obligations which, under that contract, he has impliedly agreed to perform.¹

¹ *Wilson v. Merry* (1869) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30; *Smith v. Baker* [1891] A. C. 325, 362, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392, per Lord Herschell; *Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918; *Farwell v. Boston & W. R. Corp.* (1841) 4 Met. 49, 38 Am. Dec. 339; *Slater v. Jewett* (1881) 85 N. Y. 61, 73, 39 Am. Rep. 627; *Kain v. Smith* (1882) 89 N. Y. 375; *Larmore v. Crown Point Iron Co.* (1886) 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752; *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396, 398; *Fifield v. Northern R. Co.* (1860) 42 N. H. 225; *Harrison v. Central R. Co.* (1865) 31 N. J. L. 293; *O'Neill v. Chicago, R. I. & P. R. Co.* (1901; Neb.) 86 N. W. 1098. "The case [of *Priestley v. Fowler* (1837) 3 Mee. & W. 1. Murph. & H. 305, 1 Jur. 987], might have been rested upon the principle that there was no contract on the part of the master safely to carry the servant, and that, where there is no contract, there is no breach of duty for which an action will lie." Lawson, J., in *Hoy v. Dublin & B. Junction R. Co.* (1870) Ir. Rep. 5 C. L. 206, 18 Week. Rep. 930. "Culpable negligence on the part of one person as toward another always involves a breach of duty on the part of the former as toward the latter. Where there is no breach of duty, there can be no culpable negligence, and it is only for negligence of

Stated in their most general form, these duties are: (1) To see that suitable instrumentalities are provided; (2) to see that those instrumentalities are safely used.

Both on principle and authority it is clear that, in a broad sense, servants, as well as machinery, apparatus, premises, etc., may be described as instrumentalities, appliances, or agencies of the master's business.² But the qualitative attributes of the agencies of the master's business, which are animate and organic, are in some respects sufficiently unlike those of the agencies which are inanimate and inorganic to entail some corresponding difference between the courses of conduct which are obligatory, according as one or other of these classes of agencies may be the subject-matter of the duty of seeing that they are in proper condition for the performance of the functions assigned to them. For this reason it has been considered advisable to discuss separately the cases relating to each of these kinds of agencies. See the remarks at the commencement of chapter XIII., *post*.

7. Duty to see that the inorganic instrumentalities are suitable both as respects quality and quantity.—The plant which forms the subject-matter of this duty is usually treated as being divisible into two parts: (1) The place in which the work is done; (2) the machinery, tools, implements, etc., by which the work is done.

But, as a basis for a general classification of the cases, this method of division is open to two objections. First, the accidents are, in many instances, of such a nature that the instrumentalities which, as a mere matter of lexicographical definition, belong to the second of these categories, must, in a logical point of view, be regarded as being, *ad hunc vicem*, a part of the entirety described as the place of work, rather than as agencies for doing the work.¹ Secondly, it is

a culpable character that any person "can be held responsible in law." *Rush* (1890) 77 Wis. 51, 45 N. W. 807; *Tex. v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582. It would seem, however, that under the strict forms of common law pleading this theory is not carried to its logical conclusions, for, in *Riley v. Bezendole* (1861) 6 Hurlst. & N. 445, 30 L. J. Exch. N. S. 87, 9 Week. Rep. 347, it was held that the duty of the master had been improperly declared on as a contract. The difficulty pointed out by Pollock, C. B., was that this form of pleading rendered it impossible for the defendant to demur, because it was possible that there might have been such a contract in point of fact, whereas, if the obligation had been alleged as a simple duty, the defendant might have demurred.

See *Johnson v. Ashland Water Co.* (1890) 77 Wis. 51, 45 N. W. 807; *Tex. v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582. It would seem, however, that under the strict forms of common law pleading this theory is not carried to its logical conclusions, for, in *Riley v. Bezendole* (1861) 6 Hurlst. & N. 445, 30 L. J. Exch. N. S. 87, 9 Week. Rep. 347, it was held that the duty of the master had been improperly declared on as a contract. The difficulty pointed out by Pollock, C. B., was that this form of pleading rendered it impossible for the defendant to demur, because it was possible that there might have been such a contract in point of fact, whereas, if the obligation had been alleged as a simple duty, the defendant might have demurred.

See, for example, such cases as *Egan v. Dry Dock, E. B. & B. R. Co.* (1896) 12 App. Div. 556, 42 N. Y. Supp. 188, where a boiler exploded and injured a teamster, or the cases in which a machine is fractured and the pieces are thus converted into dangerous projectiles. *McAlpine v. Laydon* (1896) 115 Cal. 68, 46 Pac. 865; *Hall v. Emerson-Stearns Mfg. Co.* (1900) 94 Me. 445, 47 Atl. 924; *Ranley v. Collins* (1892) 90 Mich. 31, 51 N. W. 350; *Dempsey v. Sawyer* (1901) 95 Me. 295, 49 Atl. 1035.

often difficult, if not impossible, to say with confidence which of these two conceptions is appropriate to the facts in evidence. Thus, a locomotive, which is clearly a piece of machinery so far as the engineer and firemen are concerned, is just as clearly something which makes the place of work unsafe as regards a trackman who is run down by it. Under the circumstances here suggested, the duties of the injured person have no connection with the instrumentality which causes his injury. But it is obvious that the same ambiguous situation may also present itself where his duties have such a connection. For example, the same machine may, as regards the operation, be conceived of merely as a heavy object which, if not properly secured, is likely to fall on him, or as an apparatus which, if defective in certain ways, may injure him while it is performing the functions for which it is designed. Compare, also, the cases referred to in the last note.

These considerations suggest the advisability of basing the classification of the cases upon the principles which are applicable to all inorganic instrumentalities alike, rather than on an assumed essential distinction between the place of work and the appliances by which the work is done. The general discussion of the master's duties in chapters II, VII, has therefore been conducted along the lines thus indicated. But in chapter VIII, this discussion has been supplemented by collating the authorities with special reference to the concrete facts in evidence, for the purpose of bringing out with greater distinctness the effect of the principles involved, and the remarkably conflicting views which the different courts hold with respect to the liability of the master for injuries due to the same, or virtually the same, conditions.

Suitable instrumentalities are obviously not provided in any reasonable sense of the word, unless they are not only suitable when they are first brought into use, but also maintained in a suitable condition as long as they remain in use. Hence, it has uniformly been held that the duty now under review is continuous, and requires that the various instrumentalities should be kept up to the obligatory standard of safety by proper repairs, or by replacing worn-out or otherwise defective parts. See chapters IX., XI., and XII., *post*.

It is clear that neither the duty of original supply, nor that of subsequent maintenance, can be adequately performed without subjecting the instrumentalities to a more or less minute examination for the purpose of discovering such defects as may not be obvious and palpable. Hence, the duty of active inspection may be, and usually is, regarded as incidental to, and deducible from, those duties. But from a merely logical point of view it may evidently be considered

as one which arises out of the general duty to see that the business is conducted on a safe system. See chapter xv., *post*.

6. Duty to see that the organic instrumentalities are fitted for their functions and adequate in number.—The subject-matter of this duty consists of (1) the servants themselves; (2) such animals as may be used as a part of the business organism.

a. Servants.—(See also chapter xiii., *post*.) The duty of seeing that each servant is competent for his position is predicated with a view, both to his own security, and to the security of his fellow servants.

Under both of these aspects the duty suggests, as an incidental obligation, that of giving instructions to the servant in any case in which his ignorance of the proper methods of work is likely to be a source of danger either to himself or to other employees. But, like other incidental obligations, this may also be viewed as one of those which appertain to the main duty to see that the instrumentalities are safely used. See next section.

It should be observed, moreover, that, in so far as the obligation to instruct is concerned merely with the safety of the person to whom the instruction is to be given, it may also be deduced from the consideration that the imparting of information which enables a servant to appreciate fully the risks of the employment will, at the very least, entitle the master to go to the jury upon the question whether the action is not barred by one or other of the three defenses which are based upon the servant's knowledge, or, as most of the authorities hold, will absolutely prevent recovery, as a matter of law. In this instance, accordingly, the obligation may be viewed as one which is predicated either for the reason that an uninstructed servant is not competent for his position, or for the reason that, by discharging it, the master shifts to the servant the responsibility for such injuries as may result from the existence of the risks which are the subject-matter of the instructions.

The continuous nature of this duty is not less indisputable than in the case of inorganic instrumentalities. But, owing to the different character of the instrumentality to be dealt with, the performance of the duty must be effected in a different way. An incompetent servant cannot be converted into a competent one in the same way as a defective apparatus can be converted into a sound one, though perhaps it is theoretically possible to argue that, where a servant is hired for a definite period, and during that period his physical or mental faculties become so far impaired by sickness that his condition becomes

a source of abnormal danger to himself and to his fellow workmen, the proper course for the master to pursue is to suspend him from his functions until his health has been restored, and during such suspension to furnish him with suitable medical attendance. When the incompetency of a servant is discovered after he has entered the employment, the only remedies usually available are to give proper instructions, or to dismiss him. The duty associated with the former of these remedies has been already adverted to. If the latter remedy is applied, the master will ordinarily proceed to hire a new servant,—a situation which obviously charges him with the same obligations as those to which he is subject when he is hiring the original staff of assistants.

The conception that suitable servants are to be provided may reasonably be regarded as involving the conception that they shall not only be competent when considered as individual units in the business organism, but also sufficient in number for the proper performance of the work. But it is clear that this duty, like those of inspection and instruction, may also be deduced from the duty to conduct the business on a safe system. See chapter xv., *post*.

b. Animals.—(See also chapter xiv., *post*.) The methods by which dangers due to the viciousness of animals, or their physical incapacity for the work to be done, or the inadequacy of their number for that work, are customarily remedied, seem to bear a closer analogy to those which are applied in the case of dangers created by unfit servants, than to those which are produced by inorganic instrumentalities. In both instances there is practically no resource except to substitute a suitable instrumentality for the unsuitable one. For this reason the duty predicated with respect to the use of animals seems to be, for the purposes of classification, more appropriately associated with the duty of hiring suitable servants than with the duty of furnishing suitable machinery, etc.

9 Duty to see that the instrumentalities are so used that the servants will not be exposed to unnecessary dangers.—The distinctive and characteristic elements of the duty to see that the instrumentalities are safely used are obviously: (1) General orders issued for the guidance of the servants. (2) Particular orders with reference to the details of the work during its progress.

As regards general orders, the master may be conceived to be subject to three obligations: (1) To frame suitable rules and regulations. (2) To bring those rules and regulations to the knowledge of the servants for whose benefit they are framed. (3)

those rules and regulations in such a manner that the objects for which they are framed may be attained.

But it is obvious that, in practice, the responsibility of the master in respect to the second and third of these obligations—more especially the third—is considerably diminished by the operation of the doctrine of common employment. See chapters XXVI.-XXXII., *post*.

A similar remark is applicable to the duty of the master in respect to particular orders, except in those cases in which he is himself superintending the work; for, according to the theory accepted in most jurisdictions, a servant cannot recover for injuries caused by compliance with the directions of a superior servant who is not a vice principal. See chapter XXVIII., *post*.

Under this head, also, as already mentioned, may be classed, as subsidiary obligations, the duties of inspection, of imparting necessary information, and of seeing that the work is not undertaken with an inadequate number of servants. Frequently, indeed, the methods by which the proper performance of these duties shall be secured are a matter specifically provided for in the rules and regulations framed by the master.

Under one of its aspects the duty of imparting information is almost purely administrative,—that is to say, where its subject-matter is a transitory risk arising out of the details of the work. And here, again, it is proper to remark that the breach of the duty of warning servants as to such risks will, in most jurisdictions, seldom constitute a cause of action, for the reason that in practice it is ordinarily discharged by employees who are not vice principals.

C. LIMITS OF THE MASTER'S DUTY TO PROTECT THE SERVANT.

10. Master liable for his personal negligence, of whatever kind it may be.—There is no exception to the rule that the violation by the master himself of any of the duties enumerated in the foregoing sections constitutes a cause of action in favor of a servant who is injured thereby.¹ A *prima facie* right to indemnity exists, therefore,

¹“For his own personal negligence a master was always liable, and still is liable, at common law, both to his own workmen and to the general public who come upon his premises at his invitation on business in which he is concerned.” Bowen, L. J., in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 691, 57 L. T. N. S. 537, 35 Week. Rep. 555, 56 L. J. Q. B. N. S. 340, 51 J. P. 516. “If injury results to the servant from the direct act or negligence of the master, —as, where he is personally present, superintending the work and giving orders,—he is answerable for the damages to the same extent as if the relation of master and servant did not exist.” *Lorentz v. Robinson* (1883) 61 Md. 64. “Whenever the injury results from the actual negligence or misfeasance of the principal, he is liable as well in the case of one

whether the master's culpability was, under the doctrine prevailing in the jurisdiction where the accident occurred, one appertaining to the performance of a duty belonging to the non-delegable class,² or a mere detail of the work.³

An obvious corollary of this principle is that the defense of common employment is not available where the person whose negligence caused the injury is a partner of the defendant, as well as a fellow workman of the injured person.⁴

So, also, a corporation is liable for the personal negligence of a director.⁵

of his servants as in any other." *Keegan v. Western R. Corp.* (1853) 8 N. Y. 175, 180, 59 Am. Dec. 476. "The doctrine that a servant on entering the service of an employer takes on himself, as a risk incidental to the service, the chance of injury arising from the negligence of fellow servants engaged in the common employment has no application in the case of the negligence of an employer. Though the chance of injury from the negligence of fellow servants may be supposed to enter into the calculation of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master when engaged with him in their common work enters in like manner into his speculation. From a master he is entitled to expect the care and attention which the superior position and presumable sense of duty of the latter ought to command." *Ashworth v. Stanvix* (1861) 3 El. & El. 701, 7 Jur. N. S. 467, 30 L. J. Q. B. N. S. 183, 4 L. T. N. S. 85.

² *Roberts v. Smith* (1857) 2 Hurlst. & N. 213, 3 Jur. N. S. 469, 26 L. J. Exch. 319 (master builder directed scaffold to be constructed from poles known to be unsound); *Kaspari v. Marsh* (1889) 74 Wis. 562, 43 N. W. 368 (master supervised erection of defective scaffold); *Scott v. Craig* (1862) 24 Se. Sess. Cas. 3d series, 789, 34 Se. Sess. Jur. 401 (similar facts); *Stanvix v. Butler Run Co.* (1896) 93 Wis. 430, 67 N. W. 723 (master specially directs the use of a defective stringer in a particular place in a scaffold); *Mellars v. Shaw* (1861) 1 Best. & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 815 (mine owner who was his own manager held liable where a large stone fell from the side of a shaft on a miner while he was ascending a shaft in a hoisting cage which was not properly

protected by the customary bonnet); *Bradbury v. Goodwin* (1886) 108 Ind. 286, 9 N. E. 302 (negligent construction of an anchorage to be used in moving a heavy safe); *Sterons v. Howe* (1890) 28 Neb. 547, 44 N. W. 865 (defective scaffold erected under defendant's own superintendence); *Scott v. Craig* (1862) 24 Se. Sess. Cas. 3d series, 789 (same facts); *Sweenin v. Donahue* (1899) 105 Wis. 142, 81 N. W. 119 (skid which was being pulled out of its bed suddenly became loose and swung around and struck the plaintiff, who had not been duly warned by the master as to what was going on); *Finneghan v. Peters* (1861) 2 Se. Sess. Cas. 2d series, 260; *Haley v. Case* (1886) 142 Mass. 316, 7 N. E. 877; *Flynn v. Harlow* (1892) 46 N. Y. S. R. 872, 19 N. Y. Supp. 705 (building contractor subjected floor of scaffold to twice the weight it was intended to bear); *Wood v. Pitfield* (1887) 26 N. B. 210 (master held liable for a defective rope). A declaration is not demurrable which is susceptible of being construed in such a sense that the injury may have been caused by the negligence either of the defendant himself or of one occupying the position of general manager. *Macdonald v. Dick* (1874) 34 U. C. Q. B. 623.

³ *Folk v. Schaeffer* (1898) 186 Pa. 253, 40 Atl. 401; *Moran v. Harris* (1884) 63 Iowa, 390, 19 N. W. 278 (master operated machinery negligently).

⁴ *Ashworth v. Stanvix* (1861) 3 El. & El. 700, 7 Jur. N. S. 467, 30 L. J. Q. B. N. S. 183, 4 L. T. N. S. 85; *Webster v. Foley* (1892) 21 Can. S. C. 580; *Rhodes v. Varney* (1898) 91 Me. 222, 39 Atl. 552.

⁵ *Harrison v. Detroit, L. & V. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034; *Warner v. Eric R. Co.*

The master cannot, of course, be made liable on the ground of his personal interference in the work, unless, while so interfering, he was guilty of some specific act of negligence, and that act was an efficient cause of the injury in suit.⁶

The right of a servant to recover for injuries caused by positive acts of negligence on the master's part while the work is in progress cannot be defeated by showing that he has frequently done similar acts on previous occasions. The doctrine of assumption of risks has no application to such a case.⁷

11. Master who does not exercise personal supervision, not liable for the manner in which the details of the work are carried out.— Except in the cases in which the master is himself directing the work in hand, his obligation to protect his servants does not extend to protecting them from the transitory risks which are created by the negligence of the servants themselves in carrying out the details of that work. In other words, the rule that the master is bound to see that the environment in which a servant performs his duties is kept in a reasonably safe condition is not applicable where that environment becomes unsafe solely through the default of that servant himself, or of his fellow employees. It is obvious that this is merely an alternative way of stating the effect of the doctrines of contributory negligence and common employment.¹ The limits of the master's responsibility in this direction will, therefore, be more appropriately treated in that portion of the treatise in which those defenses are discussed. (Chapters XIX., XXVI.-XXXII.) It will be seen, from the cases collected in chapter XXXII., in which the subject of vice principalship as

(1867) 49 Barb. 558, Reversed, but not as to this point, in (1868) 39 N. Y. 468; *Texas Mexican R. Co. v. Whitmore* (1883) 58 Tex. 276. In *Matthews v. Hamilton Powder Co.* (1887) 14 Ont. App. Rep. 261, it was held that, where a director of a company instructs the superintendent of the works to have certain machinery repaired, and a servant is injured owing to the failure of the superintendent to make the repair, the intervention of the director in respect to the giving of the order is not such as to take the case out of the general rule that a master is not liable for the defaults of a co-employee.

⁶*Tarrant v. Webb* (1856) 18 C. B. 797, 25 L. J. C. P. N. S. 261, per Jervis, Ch. J., (declaring incorrect an alternative direction by which the jury were told that if the defendant interfered in the erection of the scaffolding which fell, or the servant whose negligence caused the injury was incompetent, they must find for the plaintiff). ⁷*Gulf, C. & S. R. Co. v. Brentford* (1891) 79 Tex. 619, 15 S. W. 561. The logical connection of ideas is indicated by the following passage in an oft cited case: "The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty . . . of keeping a building which they are employed in erecting in a safe condition at every moment of their work, so far as its safety depends upon the due performance of their work by them and their fellows." *Armour v. Hahn* (1884) 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433.

deduced from the character of the act is dealt with, that under certain circumstances, the master is free from liability for negligence committed by the servants themselves, not only in the use, but even in the selection, preparation, and maintenance, of the instrumentalities.

12. Master not liable for injuries caused by abnormal conditions of which he has no notice, actual or constructive.—Another principle which qualifies very largely the responsibility of a master is that no action can be maintained against him for an injury caused by abnormal risks, unless he knew, or ought, as a reasonably prudent man, to have known, of the existence of those risks. This subject will be fully discussed and developed in chapters x. and xi.

13. Extent of a master's duty to protect a servant against casualties not due to his negligence.—The cases under this head fall into two classes: (1) Those in which the question was whether the master was bound to provide means to lessen, alleviate, or prevent the harmful results of such an event as that which caused the injury complained of; (2) those in which the point to be determined was whether, after some catastrophe had actually occurred, he did all that a prudent man could have done to minimize its consequences.

As regards the first class, it is well settled that, apart from statute, a master is not required to construct his instrumentalities, or so to arrange the place where his servants work, that they shall be protected from the consequences of a casualty for which he is not responsible.¹

¹In *Jones v. Granite Mills* (1878) 126 Mass. 84, 30 Am. Rep. 661, it was argued that the defendant was negligent for the reason that he had not constructed proper fire escapes. But this contention was rejected. "We know of no principle of law," said the court, "by which a person is liable in an action of tort for mere nonfeasance by reason of his neglect to provide means to obviate or ameliorate the consequences of the act of God, or mere accident, or the negligence or misconduct of one for whose acts towards the party suffering he is not responsible. If such a liability could exist it would be difficult, if not impossible, to fix any limit to it. And we are therefore of opinion that it is no part of the duty of a master to his servant, employed in a building properly constructed for the ordinary business carried on within it, in the absence of a statute requirement, to provide means of escape from it, or to have remedial agencies at hand to alleviate the results, or to insure the safety of the servant from the consequence of a casualty to which his negligence does not directly contribute. The common law gives a remedy to a servant who is injured by the wrongful or negligent act of the master; the liability arises upon the doing of the act. But the common law goes no further: it does not provide a remedy when the master is not responsible for the act, on the ground that he has omitted to provide means to avoid its consequences." In another case arising out of the same accident, *Keith v. Granite Mills* (1878) 126 Mass. 90, 30 Am. Rep. 666, the plaintiff requested the judge to instruct the jury that it was the duty of the defendant (1) to provide proper and suitable means of extinguishing fire, (2) proper and suitable ways and means of escape, and (3) of giving alarm to its servants in case of fire. The judge instructed the jury that it the room in which the plaintiff was at work was a suitable place, and there were proper and suitable means

The true doctrine applicable to the second class of cases is, in one of its aspects at least, equally clear. If the conditions which caused the injury supervened suddenly, and were such that the master was not bound to anticipate that they would arise, he cannot be charged with negligence, unless he had notice, actual or constructive, of the danger, at least long enough before the injury was inflicted to have enabled him to form an intelligent opinion as to the means by which the injury might be avoided and to apply the appropriate remedy.² Compare the cases in chapter ix. with regard to the obligation to remedy defective conditions. But there seems to be some divergence of opinion as to the master's liability where the effect of the catastrophe was to put the servant in jeopardy for some considerable period of time, and the gravamen of the complaint is that the master did not take proper measures to extricate him. Some cases proceed upon the theory that, when an employee, without fault on the master's part, is placed in a dangerous or painful situation, the master is under no positive legal duty of exercising all reasonable care and diligence to effect such employee's speedy release. Being in no way responsible for the unfortunate occurrence, the master, it is declared, cannot be said to be guilty of a tort for the reason that he does not promptly take active steps in coming to the rescue. The only duty arising under such circumstances is deemed to be one of humanity, and for a breach thereof the law does not impose any liability.³

of extinguishing fire, and the means of egress and escape were suitable and proper, and in order and ready for use, the plaintiff could not recover. Commenting on this instruction, the court said that, as applied to the first request, it was sufficiently favorable to the plaintiff, and proceeded thus: "Even if it was the duty of the defendant, in a case like this, to provide proper means of extinguishing fire, and to have the same ready for use, the jury have found the duty to have been performed. Upon the second request, the instructions were also sufficiently favorable to the plaintiff. For the reasons stated in *Jones v. Granite Mills*, the presiding judge might properly have declined to submit that question to the jury. . . . The third instruction requested was properly refused. It is no part of the master's duty to his servants to provide special means of notifying them of a fire or other casualty occurring on his premises. The duty here sought to be imposed upon the master is of the same kind as that of providing means of escape, and is to be governed by the same principles."

²*Independent Tug Line v. Jacobson* (1898) 84 Ill. App. 684; *United States Exp. Co. v. McCluskey* (1898) 77 Ill. App. 56, citing *Chicago, R. & Q. R. Co. v. Johnson* (1882) 163 Ill. 512.

³*Allen v. Hixson* (1900) 111 Ga. 460, 36 S. E. 810. In *Stager v. Troy Laundry Co.* (1901) 38 Or. 480, 53 L. R. A. 459, 63 Pac. 645, where a servant sued for an injury received by her hand being caught between the rollers and the drum of a mangle, and it was shown that the injury was aggravated by the fact that it remained in the machine for some time because the managers did not know how to operate the machine to release it, but that they did what they could to extricate the plaintiff,—it was held to be error to instruct the jury that, if the plaintiff was in fault, and brought the injury on herself, she was still entitled to recover if the defendant failed to do any act which would minimize her injury. Upon the whole, the case last cited

It seems that, under some circumstances, culpability may be predicable of the failure to warn a servant who is endangered by the occurrence of a casualty of the class discussed in this section. See § 209a, *post*.

seems to embody the more correct principle. Questions of this type ought, it is submitted, to be decided by the jury, and should not be treated as if they were concluded by an absolute rule of law absolving the master under such circumstances. That the owner of a mine may be held liable if his superintendent fails to adopt proper methods for saving the lives of laborers caught in the mine in which a fire has broken out, was held in *Bessemer Land & Improv. Co. v. Campbell* (1898) 121 Ala. 50, 25 So. 793.

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CHAPTER II.

WHAT DEGREE OF CARE A MASTER IS BOUND TO EXERCISE FOR THE PROTECTION OF HIS SERVANT.

A. GENERALLY.

14. Master bound to exercise as much care as a prudent man would exercise under the circumstances.
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16. Care exercised is to be proportioned to the dangers to which the servant is exposed.
 - a. Rule applied to the disadvantage of the master.
 - b. Rule applied to the advantage of the master.
- 16a. Master's violation of, or compliance with, a rule made by himself; implication from.
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B. STANDARD OF DUE CARE; HOW FAR QUALIFIED BY THE MINORITY OF THE SERVANT.

18. Negligence not inferable from the mere employment of a minor to do dangerous work.
19. Greater care must be exercised for the protection of young servants.
20. Limits of this obligation.
21. Employment of minor without his father's consent; effect of.

A. GENERALLY.

14. Master bound to exercise as much care as a prudent man would exercise under the circumstances.—The rule defining the nature and extent of the master's obligation with respect to the condition of the agencies of his business may be stated in its most general form as follows: The degree of care required of an employer in protecting his employees from injury is the adoption of all reasonable means and precautions to provide for the safety of his servants while in the performance of their work.¹ What shall be deemed "due care" is to be

¹ *Dobbins v. Brown* (1890) 119 N. Y. N. S. 918. A master "is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief." *Priestley v. Forster* (1837) 3 Mces. & W. 1, Murph. & H. 305, 1 Jur. 987.
Romer, L. J., in Williams v. Birmingham Battery & Metal Co. (1899) 2 Q. B. 338, 345, 68 L. J. Q. B.

"estimated on a consideration of the facts of each particular case."² It is "such care as reasonable and prudent men would use under similar circumstances."³ The care which such a man is, for the purposes of this rule, assumed to exercise, is that which he would exercise for his own safety if the instrumentality in question was furnished for his own personal use.⁴ That is to say, a master is required to furnish "such [appliances] as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances."⁵

²*Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, per Byles, J.

³*Bertha Zinc Co. v. Martin* (1895) 93 Va. 791, 22 S. E. 869. "The test of negligence is the presence or absence of that degree of care which ordinarily prudent persons are accustomed to observe about the same or similar affairs in the same or similar circumstances." *Guinard v. Knapp-Stout & Co. Co.* (1897) 95 Wis. 482, 70 N. W. 671. To same effect, see *Bergquist v. Chandler Iron Co.* (1892) 49 Minn. 511, 52 N. W. 136. The standard of the duty to use care "is fixed by reference to what we should expect in like case from a man of ordinary sense, knowledge, and prudence." Pollock, Torts, p. 24. A few variants of this form of expression may be quoted for purposes of illustration: "The care of an ordinarily prudent person." *Ellis v. New York, L. E. & W. R. Co.* (1884) 95 N. Y. 546. "Such care as a prudent man would exercise under similar circumstances." *Houston & T. R. Co. v. Oram* (1878) 49 Tex. 341; *International & G. N. R. Co. v. Bell* (1889) 75 Tex. 50, 12 S. W. 321; *The Oriental v. Barclay* (1897) 16 Tex. Civ. App. 193, 41 S. W. 117; *Gulf, C. & S. F. R. Co. v. Schrabbe* (1892) 1 Tex. Civ. App. 573, 21 S. W. 706; *Quintana v. Consolidated Kansas City Smelting & Ref. Co.* (1896) 14 Tex. Civ. App. 347, 37 S. W. 369; *Huhn v. Missouri P. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937. "Such care as would reasonably be expected of a prudent master under the same circumstances." *Warner v. Chicago, R. I. & P. R. Co.* (1895) 62 Mo. App. 184. "The reasonable care which the ordinarily prudent and careful man exercises in like or similar work." *Jungnitsch v. Michigan Malleable Iron Co.* (1895) 105 Mich. 270, 63 N. W. 296. A master is "held to the employment of every pre-

caution which a reasonably prudent man would exercise under like circumstances." *Pullman Palace Car Co. v. Leuck* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285; *Chicago & A. R. Co. v. Mahoney* (1879) 4 Ill. App. 202. It is not error to refuse an instruction to the effect that a master is released from liability to an employee working in a dangerous place, simply because the injury was not wilfully inflicted. *St. Louis & T. H. R. Co. v. Eggmann* (1895) 60 Ill. App. 291. Affirmed in (1896) 161 Ill. 155, 43 N. E. 620. The degree of diligence due, respectively, between employer and employee under the laws of another state will be held to be only ordinary diligence, in the absence of evidence to the contrary. *Richmond & D. R. Co. v. Mitchell* (1893) 92 Ga. 77, 18 S. E. 290.

⁴*Harley v. Buffalo Car Mfg. Co.* (1894) 142 N. Y. 31, 36 N. E. 813.

⁵*Marsh v. Chickering* (1886) 101 N. Y. 396, 5 N. E. 56. No negligence is established where the master "took as much care for the safety of his servants as for his own safety." *Sykes v. Packer* (1882) 99 Pa. 465. Compare the statements that the care exacted of a master is that which "a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own" (*Hoffman v. Dickinson* [1888] 31 W. Va. 142, 6 S. E. 53); or, "all the care and caution which a prudent man would ordinarily take for the safety and protection of his own person under the same circumstances" (*Brymer v. Southern P. Co.* [1891] 95 Cal. 496, 27 Pac. 371 [approving of an instruction which described the employer's standard of duty as being the exercise of "reasonable and ordinary care, skill, and diligence"]); or, "such care as a prudent man would exercise for his own protection if his own person or life were exposed to the danger which would

In the case of a corporation the obligation is to use "such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise."⁶

The phrases used by judges in describing the nature of the care which this ideally prudent man may be supposed to employ are quite numerous and diversified. For purposes of illustration, some of these phrases are tabulated in the note below; but it is scarcely necessary to say that the list of authorities does not pretend to be exhaustive as regards the simpler and more common combinations of words. Additional examples of similar terminology will be found in the subsequent chapters which deal with the master's duties as to *Inspection* (xi.), *Employment of Servants* (xiii.), and *Rules* (xv.).⁷

result from their use" (*Shuppenfield v. Main Street & Agri. Park R. Co.* [1891] 91 Cal. 48, 27 Pac. 590); or, "the care and diligence which a man of ordinary prudence, engaged in a like business, would exercise for his own protection, and the protection of his property" (*Smoot v. Mobile & M. R. Co.* [1880] 67 Ala. 13, 18; *Louisville & N. R. Co. v. Allen* [1885] 78 Ala. 494); or, "that degree of care which very careful and prudent men exercise in their own affairs" (*Louisville & N. R. Co. v. Davis* [1890] 91 Ala. 487, 8 So. 552). In *Louisville & N. R. Co. v. McCoy* (1883) 81 Ky. 403, the plaintiff in error had obtained from the trial judge an instruction to the effect that "ordinary care is that degree of care which an ordinarily careful and prudent man usually exercises under like or similar circumstances in taking care of himself, his family, or his property, or in the transaction of his business, when the same may endanger the safety of others." But this attempt to enlarge the obligations of the master did not succeed. "It is against the laws of nature," said the court, "to expect a man of the greatest prudence to take the same care of an adult engaged in the dangerous employment of brakeman, which he has voluntarily taken upon himself, and agreed to perform with that degree of care upon his own part which ordinarily prudent persons of his class usually take in protecting themselves from danger, as he would of his family placed in a like predicament. For what would not a husband and father hazard to protect his own family from the ordinary dangers to which a brakeman is exposed?"

⁶ *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932. Or "such reasonable care as a corporation managed by prudent men could use." *Union P. R. Co. v. O'Brien* (1892) 1 C. C. A. 354, 4 U. S. App. 221, 49 Fed. 538. Or, as another case has it, the directors are required to exercise that "reasonable care, skill, and foresight over the affairs of the corporation which reasonable and prudent men occupying such positions ordinarily exercise under the same circumstances." *Warner v. Erie R. Co.* (1868) 39 N. Y. 468.

⁷ Care (without any qualifying epithet—rather loosely used, *arguendo*). *Ayers v. Richmond & D. R. Co.* (1888) 84 Va. 679, 5 S. E. 582.

Care and prudence. *Voges v. Smith* (1856) 28 Vt. 59, 65 Am. Dec. 222.

Diligence and circumspection. *Connelley v. Richmond & D. R. Co.* (1881) 84 N. C. 309, 37 Am. Rep. 620.

Skill, care, and caution. *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 36 Am. Rep. 454; *Muirhead v. Hannibal & St. J. R. Co.* (1885) 19 Mo. App. 634 (instruction to that effect approved in these two cases).

Ordinary care. *Tarrant v. Webb* (1856) 25 L. J. C. P. N. S. 261, 18 C. B. 797; *Texas & P. R. Co. v. Rhodes* (1895) 18 C. C. A. 9, 30 U. S. App. 561, 71 Fed. 145; *Brown v. The D. S. Cope* (1872) 1 Wood. 401, Fed. Cas. No. 2,002; *Erskine v. Chino Valley Beet-Sugar Co.* (1895) 71 Fed. 270; *Smoot v. Mobile & M. R. Co.* (1882) 67 Ala. 13; *Southwestern Teleph. Co. v. Woughter* (1892) 56 Ark. 206, 19 S. W. 575; *Matthews v. Bull* (1897) Cal. 47 Pac. 773; *Wells v. Coe* (1886) 9 Colo.

159, 11 Pac. 59; *Diamond State Iron* which the declaration in *Priestley v. Co. v. Gibby* (1887) 7 Houst. (Del.) *Fowler* (1837) 3 Mies. & W. 1, Murph. 550, 11 Atl. 189; *Chicago Anderson Pressed Brick Co. v. Subkowiak* (1892) 45 Ill. App. 317; *Consolidated Coal Co. v. Scheller* (1892) 42 Ill. App. 619; *Indianapolis & St. L. R. Co. v. Watson* (1888) 114 Ind. 20, 15 N. E. 824; *Louisville, N. J. & C. R. Co. v. Bates* (1896) 146 Ind. 564, 45 N. E. 108; *Greenleaf v. Illinois C. R. Co.* (1879) 29 Iowa, 14, 4 Am. Rep. 181; *St. Louis, Ft. S. & W. R. Co. v. Irwin* (1887) 37 Kan. 701, 16 Pac. 146; *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149; *Cherokee & P. Coal & Min. Co. v. Britton* (1896) 3 Kan. App. 292, 45 Pac. 100; *Illinois C. R. Co. v. Hilliard* (1896) 99 Ky. 684, 37 S. W. 75; *Britton v. Northern P. R. Co.* (1891) 47 Minn. 340, 50 N. W. 231; *Keown v. St. Louis R. Co.* (1897) 141 Mo. 86, 41 S. W. 926; *Burns v. Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 41, 31 S. W. 347; *Williams v. St. Louis & S. F. R. Co.* (1893) 119 Mo. 316, 24 S. W. 782; *Wright v. New York C. R. Co.* (1858) 28 Barb. 80; *Chesson v. John L. Roper Lumber Co.* (1896) 118 N. C. 59, 23 S. E. 925; *Gibbes v. Greenville & C. R. Co.* (1883) 19 S. C. 492; *East Tennessee, F. & G. R. Co. v. Aiken* (1890) 89 Tenn. 245, 14 S. W. 1082; *Gulf, C. & S. F. R. Co. v. Silliphant* (1888) 70 Tex. 623, 8 S. W. 673; *Gulf, C. & S. F. R. Co. v. Wells* (1891) 81 Tex. 685, 17 S. W. 511; *Southwest Virginia Improv. Co. v. Andrew* (1889) 86 Va. 270, 9 S. E. 1015; *Baltimore & O. R. Co. v. McKenzie* (1885) 81 Va. 71; *Chesapeake & O. R. Co. v. Lash* (1896; Va.) 24 S. E. 385; *Hoffman v. Dickinson* (1888) 31 W. Va. 142, 6 S. E. 53. An instruction defining the extent of the master's duty by this epithet is unexceptionable. *Gibbes v. Greenville & C. R. Co.* (1883) 19 S. C. 492. In *Ex parte Johnson* (1883) 19 S. C. 492, counsel contended that the true measure of liability was "all reasonable and proper care," and that these words should have been used in the instruction. But the court said it did not see any appreciable difference in the two phrases. The rule that ordinary care satisfies the requirements of the law necessarily involves the corollary that an employer is not culpable where the evidence shows that a "very high degree of care" had been exercised. *Albion Packing Co. v. Egan* (1877) 86 Ill. 253. In *Fifield v. Northern R. Co.* (1860) 42 N. H. 225, the grounds upon

Reasonable care. *Smith v. Baker* [1891] A. C. 325, 362, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392; *Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918; *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524; *Mackey v. Baltimore & P. R. Co.* (1890) 8 Mackey, 282; *Colorado Midland R. Co. v. O'Brien* (1891) 16 Colo. 219, 27 Pac. 701; *O'Keefe v. National Folding Box & Paper Co.* (1895) 66 Conn. 38, 33 Atl. 587; *Quinn v. Johnson Forge Co.* (1892) 9 Houst. (Del.) 338, 32 Atl. 858; *Edward Hines Lumber Co. v. Ligas* (1898) 172 Ill. 315, 50 N. E. 225, Affirming (1896) 68 Ill. App. 523; *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92; *Pioneer Fireproof Constr. Co. v. Howell* (1901) 189 Ill. 123, 59 N. E. 535; *Pennsylvania Co. v. Witte* (1896) 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377; *Clark County Cement Co. v. Wright* (1897) 16 Ind. App. 630, 45 N. E. 817; *Corson v. Coal Hill Coal Co.* (1897) 101 Iowa, 224, 70 N. W. 185; *Hannah v. Connecticut River R. Co.* (1891) 154 Mass. 529, 28 N. E. 682; *Tierney v. Minneapolis & St. L. R. Co.* (1885) 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229; *Brown v. Hershey Land & Lumber Co.* (1896) 65 Mo. App. 162; *Comben v. Belleville Stone Co.* (1896) 59 N. J. L. 226, 36 Atl. 473; *Coppins v. New York C. &*

- H. R. R. Co.* (1890) 122 N. Y. 537, 25 N. E. 915; *Alfarming* (1888) 48 Hun, 292; *Bailey v. Rome, W. & O. R. Co.* (1893) 139 N. Y. 302, 34 N. E. 918; *Nutt v. Southern P. Co.* (1894) 25 Or. 291, 35 Pac. 653; *Philadelphia, W. & B. R. Co. v. Keenan* (1883) 103 Pa. 124; *Wannemaker v. Bucke* (1880) 111 Pa. 423, 2 Atl. 500; *Moore v. Pennsylv. R. Co.* (1895) 107 Pa. 495, 31 Atl. 734; *Houston & T. C. R. Co. v. Myers* (1881) 55 Tex. 110; *Bonner v. La Nave* (1891) 80 Tex. 117, 15 S. W. 803; *Oliver v. Ohio River R. Co.* (1896) 42 W. Va. 703, 26 S. E. 444.
- Due care. *Heritt v. Flint & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 650; *Sanders v. Etivan Phosphate Co.* (1883) 10 S. C. 510; *Little Rock & Ft. S. R. Co. v. Eubanks* (1886) 48 Ark. 400, 3 S. W. 808; *Cullen v. National Sheet Metal Roofing Co.* (1887) 46 Hun, 562; *Rice v. King Philip Mills* (1887) 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101; *Roth v. Northern Pacific Lumbering Co.* (1889) 18 Or. 205, 22 Pac. 842.
- Proper care. *Rynn v. Fowler* (1862) 24 N. Y. 410, 82 Am. Dec. 315. That the phrases "ordinary care" and "proper care" are identical in meaning, see *Louisville & N. R. Co. v. Kelly* (1894) 11 C. C. A. 260, 24 U. S. App. 163, 63 Fed. 407; *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932, § 16, note 15, and § 22a, note 5, *post*.
- Suitable care. *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497.
- Ordinary diligence. *Missouri P. R. Co. v. Lyde* (1882) 57 Tex. 505; *Quintana v. Consolidated Kansas City Smelting & Ref. Co.* (1896) 14 Tex. Civ. App. 347, 37 S. W. 369; *Jones v. Shan* (1897) 16 Tex. Civ. App. 290, 41 S. W. 690.
- Reasonable diligence. *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; *The France* (1894) 8 C. C. A. 185, 20 U. S. App. 212, 59 Fed. 479; *Bennett v. Syndicate Ins. Co.* (1888) 39 Minn. 254, 39 N. W. 488; *Chicago & E. I. R. Co. v. Driscoll* (1897) 70 Ill. App. 91.
- Proper diligence. *Anderson v. Bennett* (1888) 16 Or. 515, 19 Pac. 765.
- Ordinary care and diligence. *Warner v. Erie R. Co.* (1868) 39 N. Y. 468; *Bohn v. Chicago, R. I. & P. R. Co.* (1891) 106 Mo. 429, 17 S. W. 580.
- Ordinary care and prudence. *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497; *Mansfield Coal & Coke Co. v. McEnery* (1879) 91 Pa. 185, 38 Am. Rep. 462.
- Ordinary skill and care. *Pennsylvania Co. v. Whitcomb* (1887) 111 Ind. 212, 12 N. E. 380; *Chesnut v. John I. Roper Lumber Co.* (1896) 118 N. C. 59, 23 S. E. 925.
- Ordinary diligence or common prudence. *Central R. & Ry. Co. v. Luning* (1880) 83 Ga. 587, 10 S. E. 279.
- Ordinary care, skill, and diligence. *Trinity County Lumber Co. v. Donham* (1892) 85 Tex. 50, 19 S. W. 1012.
- Reasonable care and caution (or precaution). *Missouri, K. & T. R. Co. v. Baker* (1896) Tex. Civ. App. 37 S. W. 94 (instruction embodying this phrase is wrongly refused); *Burlington & C. R. Co. v. Liche* (1892) 17 Colo. 280, 29 Pac. 175; *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 36 Am. Rep. 454.
- Reasonable care and diligence. *Atchison, T. & S. F. R. Co. v. Napoh* (1895) 55 Kan. 401, 40 Pac. 669; *Hall v. Houtley* (1856) 6 Cal. 209; *Southern P. R. Co. v. Aglward* (1891) 79 Tex. 675, 15 S. W. 697; *Babcock v. Old Colony R. Co.* (1890) 150 Mass. 467, 23 N. E. 325; *Cleveland, C. C. & St. L. R. Co. v. Schor* (1894) 55 Ill. App. 685. No higher measure of care than that expressed by this phrase can be demanded, even where the handling of the appliance which caused the injury was outside the scope of the servant's employment. *Mary Lee Coal & R. Co. v. Chambliss* (1892) 97 Ala. 171, 11 So. 897.
- Reasonable care and prudence. *Washington & G. R. Co. v. McDade* (1890) 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; *The France* (1894) 8 C. C. A. 185, 20 U. S. App. 212, 59 Fed. 479; *Louisville & N. R. Co. v. Orr* (1882) 84 Ind. 50; *Marshall v. Widdieab Furniture Co.* (1887) 67 Mich. 175, 34 N. W. 541; *Harley v. Buffalo Car Mfg. Co.* (1894) 142 N. Y. 31, 36 N. E. 813; *Probst v. Dehnamer* (1885) 100 N. Y. 266, 3 N. E. 184.
- Reasonable care and skill. *Rogers v. Leyden* (1890) 127 Ind. 50, 26 N. E. 210.
- Reasonable skill and diligence. *Plefka v. Knapp-Stout Lumber Co.* (1897) 72 Mo. App. 309.
- Reasonable care, skill, and diligence. *Chicago & E. R. Co. v. Lee* (1897) 17 Ind. App. 215, 46 N. E. 543.
- Due care and diligence. *Painton v. Northern C. R. Co.* (1880) 83 N. Y. 7;

A master is bound to exercise ordinary care in furnishing instrumentalities, whether they are of a simple character, or unusually dangerous and complicated.⁸

15. Master not bound to exercise more care than a prudent man.—

Ballard v. Hitchcock Mfg. Co. (1889) 51 Hun, 188, 4 N. Y. Supp. 940.

Due care and skill. *Union P. R. Co. v. O'Brien* (1892) 1 C. C. A. 354, 4 U. S. App. 221, 49 Fed. 538.

Ordinary and reasonable care. *Wormell v. Maine C. R. Co.* (1887) 79 Me. 397, 10 Atl. 49; *Carlson v. Phonic Bridge Co.* (1890) 55 Hun, 485, 8 N. Y. Supp. 634; *Union P. R. Co. v. Fray* (1890) 43 Kan. 750, 23 Pac. 1039; *Joseph Garneau Cracker Co. v. Palmer* (1889) 28 Neb. 307, 44 N. W. 463; *Ambrose v. Angus* (1895) 61 Ill. App. 304; *Consolidated Coal Co. v. Scheller* (1891) 42 Ill. App. 619; *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312. An instruction is not erroneous in which the word "judgment" is added to this phrase, as it is regarded as synonymous, in this connection, with "prudence." *Joseph Garneau Cracker Co. v. Palmer* (1889) 28 Neb. 307, 44 N. W. 463.

Reasonable and proper vigilance. *Atchison, T. & S. F. R. Co. v. Holt* (1883) 20 Kan. 149.

Ordinary and reasonable care and diligence. *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582; *St. Louis & S. F. R. Co. v. Weaver* (1886) 35 Kan. 412, 5, Am. Rep. 176, 11 Pac. 402; *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312; *Camp Point Mfg. Co. v. Ballou* (1874) 71 Ill. 417; *Missouri, K. & T. R. Co. v. Young* (1896) 4 Kan. App. 219, 35 Pac. 967; *Mangum v. Bullion, B. & C. Min. Co.* (1897) 15 Utah. 534, 50 Pac. 834; *Missouri, K. & T. R. Co. v. Kirkland* (1895) 11 Tex. Civ. App. 528, 32 S. W. 588; *Wabash, St. L. & P. R. Co. v. Fenton* (1883) 12 Ill. App. 417; *Warner v. Chicago, R. I. & P. R. Co.* (1895) 62 Mo. App. 184.

Ordinary and reasonable care and supervision. *McKee v. Chicago, R. I. & P. R. Co.* (1891) 83 Iowa, 616, 13 L. R. A. 817, 50 N. W. 209.

Reasonable and ordinary care and skill. *Hannibal & St. J. R. Co. v. Kanabey* (1888) 39 Kan. 1, 17 Pac. 324.

Ordinary and reasonable care and foresight. *Krampe v. St. Louis Brewing Asso.* (1894) 59 Mo. App. 277;

Corey v. Hannibal & St. J. R. Co. (1885) 86 Mo. 635.

Reasonable and ordinary care and prudence. *Union P. R. Co. v. Daniels* (1894) 152 U. S. 684, sub nom. *Union P. R. Co. v. Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 750; *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497. Reasonable and ordinary care, skill, and diligence. *Bryner v. Southern P. Co.* (1891) 90 Cal. 496, 27 Pac. 371.

Reasonable and proper care and diligence. *Ardesco Oil Co. v. Gibson* (1869) 63 Pa. 146; *Reilly v. Campbell* (1894) 8 C. C. A. 438, 20 U. S. App. 334, 59 Fed. 990.

Reasonable and ordinary care and diligence. *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312.

Reasonable and proper foresight, knowledge, care, and discretion. *Gulveston, H. & S. A. R. Co. v. Davis* (1893) 4 Tex. Civ. App. 468, 23 S. W. 301. Affirmed on rehearing in 23 S. W. 1019.

Suitable care and foresight. *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497.

Ordinary precautions. *Burns v. Gaston Gas Coal Co.* (1885) 27 W. Va. 285, 55 Am. Rep. 304.

Reasonable precautions. *Moran v. Carliss Steam Engine Co.* (1899) 21 R. I. 386, 45 L. R. A. 267, 43 Atl. 874.

All reasonable precautions. *Petersen v. Wallace* (1854) 1 Macq. H. L. Cas. 748, per Ld. Cranworth; *Buzzell v. Locomotive Mfg. Co.* (1861) 48 Me. 113, 77 Am. Dec. 212; *Cooper v. Central R. Co.* (1876) 44 Iowa, 134. See also the cases cited in note 1, *supra*.

Proper attention and skill. In *Knoxville Iron Co. v. Dobson* (1881) 7 Lea, 367, it was held that the jury were properly instructed that it is the duty of the employer to see that his machinery is always, while in use, kept in perfect repair, "so far as that can be done by the application of the proper attention and skill."

Ordinary care, prudence, and skill. *Chicago & A. R. Co. v. Du Bois* (1894) 56 Ill. App. 181.

⁸ *Warner v. Chicago, R. I. & P. R. Co.* (1895) 62 Mo. App. 192.

As the master is deemed to be culpable if he fails to exercise that degree of care which is denoted by one or other of the expressions used to describe the hypothetical conduct of a man of ordinary prudence, on the other hand, he is not required to satisfy any higher standard of diligence or skill than that which such a man may be supposed to exercise under the circumstances.¹ Any instruction is correct which embodies this principle.² On the other hand, it is a misdirection to charge the jury in language the effect of which is to subject the master to more extensive obligations than those indicated by the phrase "ordinary care" or its equivalents.³ Similarly, any declara-

¹ All that can be required of the master is "that he shall use due and reasonable diligence in providing safe and sound machinery, and in the selection of fellow servants of competent skill and prudence, so as to make it reasonably probable that injury will not occur in the exercise of the employment." *Wander v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143. If the master "employs such reasonable care and prudence in selecting or ordering what he requires in his business as every prudent man is expected to employ in providing himself with the conveniences of his occupation, this is all that can be required of him, and he is only responsible where he has failed to use such care in securing the making of such machinery by competent and skillful persons, or in the selection thereof." *Marshall v. Widdicomb Furniture Co.* (1887) 67 Mich. 175, 34 N. W. 541. "Extraordinary vigilance" is not exacted of the master. *Adeson Oil Co. v. Gilson* (1869) 63 Pa. 146. There is no obligation incumbent upon him to use the highest skill, the greatest foresight, extraordinary care. *Cooper v. Central R. Co.* (1876) 44 Iowa, 134. Compare the language used in *Price v. Clarin* (1897) 27 C. C. A. 227, 53 U. S. App. 492, 82 Fed. 550; *Atchison, T. & S. F. R. Co. v. Meyers* (1894) 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 743; *Reed v. Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186; *Louisville & N. R. Co. v. Johnson* (1897) 27 C. C. A. 367, 53 U. S. App. 381, 81 Fed. 679; *Little Rock & Ft. S. R. Co. v. Duffey* (1880) 35 Ark. 602; *North Chicago Rolling Mills Co. v. Monka* (1879) 4 Ill. App. 664; *Missouri, K. & T. R. Co. v. Young* (1896) 4 Kan. App. 219, 45 Pac. 963; *Atchison, T. & S. F. R. Co. v. Winston* (1896) 56 Kan. 456, 43 Pac. 777; *Lin-*

coln Street R. Co. v. Cor (1896) 48 Neb. 807, 67 N. W. 740; *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312; *Hannibal & St. J. R. Co. v. Kanelly* (1888) 39 Kan. 1, 17 Pac. 324; *Nutt v. Southern P. Co.* (1894) 25 Or. 291, 35 Pac. 653; *Trans & P. R. Co. v. McCoy* (1890) 90 Tex. 261, 38 S. W. 36; *Missouri, K. & T. R. Co. v. Hauer* (Tex. Civ. App. 1897) 13 S. W. 1078. In one case it was remarked that the master is bound to provide for the servant's safety "to the best of his skill and judgment." *Baltimore & O. R. Co. v. B. Kentz* (1885) 81 Va. 71. But the cases cited in the next note show that this phrase would, in many courts at least, be considered misleading if used in an instruction to a jury. The mere fact that a corporation, an employee in whose machine shop was killed, was also the owner of a railroad which it operated, and was sued as such in its corporate name, does not fix upon it a different or higher degree of liability than that of other machine owners towards their employees in shop work. *East Tennessee, V. & G. R. Co. v. Aiken* (1896) 89 Tenn. 245, 14 S. W. 1082.

² An instruction that an employee of a railroad company cannot recover for an injury caused by a defect common to railroads, and such as could not have been avoided by reasonable care and attention on the part of the company, was approved in *Little Rock & Ft. S. R. Co. v. Eubanks* (1886) 48 Ark. 460, 3 S. W. 808.

³ An instruction that a master is bound "to do everything that can be reasonably done for the safety of his employees" is erroneous. *Galveston, H. & S. A. R. Co. v. Gormley* (1898) 91 Tex. 393, 43 S. W. 877. A charge that a railway company should protect its employees from injury by reason of la-

tion is had which is based on the assumed existence of a duty to use any higher degree of care than that described as "ordinary;" but it will be construed as a whole, and if, when subjected to this test, it does not propose an excessively high standard, it will stand against a demurrer.¹

A mere error of judgment does not import culpability.²

A master is not bound to take into account the contingency that either his servants or third persons will fail to use ordinary care. See chapter iv., *post*. Nor is he required to anticipate improbable occurrences. See chapter x., *post*.

16. Care exercised is to be proportioned to the dangers to which the

tent defects, "so far as human care or foresight" can do it, is erroneous. *Missouri P. R. Co. v. Lytle* (1882) 57 Tex. 505. To the same effect is *Cherokee Land, C. Co. & St. L. R. Co. v. Seabor* (1894) 55 Ill. App. 685, where an instruction declaring the defendant to be bound to do "all that human care, vigilance, and foresight can do" was disapproved. An instruction that negligence on the part of defendant is the want of such care and prudence as persons "skilled in that business" observe under similar circumstances, and that want of ordinary care on the part of plaintiff is the absence of such care as ordinary persons "skilled in the business" he was engaged in ordinarily observe under similar circumstances, is erroneous. *English v. Galbreath, H. & S. A. R. Co.* (1895) 22 Tex. Civ. App. 3, 53 S. W. 57. A requested amendment of an instruction with reference to the degree of care which a master must exercise, by the addition of the words "to the best of his skill and judgment," is properly refused. *Herrington v. Norfolk & W. R. Co.* (1897) 10 Va. 98, 27 S. E. 821. It is not the duty of a railway company to keep its track in the condition necessary to cause injury, so far as this can reasonably be done, in an action for negligently causing the death of one of its brakemen, is erroneous as imposing on the company the duty to use the "highest degree of diligence." *Missouri P. R. Co. v. Gibson* (1896) 56 Kan. 661, 44 Pac. 612. An instruction that a railroad company owes the "highest degree of care" to its employees is erroneous. *Texas C. R. Co. v. Lyons* (Tex. Civ. App.; 1896) 34 S. W. 302. In *Forde v. Culver* (1893) 2 Tex. Civ. App. 569, 22 S. W. 237, one of the instructions was to the effect that a railway

company's duty is not performed simply by employing competent men to repair and inspect its cars, but it must see that they are actually kept in repair; and its failure to do so will render it liable for any injury to an employee resulting therefrom. In another it was also laid down that the measure of the company's duty was to exercise "ordinary care." It was held that, taken as a whole, the instruction did not impose any greater duty upon the company than that of exercising ordinary care.

A complaint is not demurrable on the ground that it alleges that the employer was bound to use a degree of care higher than the law requires, where one count declares that it was his duty "to use due and proper care for the safety" of the plaintiff, and "to the extent of his ability, by due and proper skill and care, so to provide . . . as that the plaintiff could safely work;" and another count declares that it was the employer's duty to keep the machinery, etc., "in as good order, safe condition, and under as good control as human care, foresight, and prudence could reasonably provide." The words "due and proper care," in the first count, and the word "reasonably," in the second, qualify the remainder of the expressions, and permit the complaint to be construed in such a sense that it charges the employer merely with a duty to use "reasonable" care. *South West Improv. Co. v. Smith* (1888) 85 Va. 306, 7 S. E. 365. ³*Hughes v. Oregon Improv. Co.* (1898) 20 Wash. 294, 55 Pac. 119, where the stopping of the air shaft of a fan in a mine under the influence of the excitement and confusion occasioned upon the discovery of fire caused the death of some of the miners.

servant is exposed.—*a. Rule applied to the disadvantage of the master.*—The well-known definition of negligence by Willes, J., as being “the absence of care according to circumstances”¹ is applicable to cases involving injuries to servants.² The degree of care, therefore, which the master is bound to exercise, is measured by the dangers to be apprehended or avoided,³ or, as another case puts it, “must be proportionate to the dangerous nature of the means, instruments, and machinery used;”⁴ or, in the words of the Supreme Court of the United States, the “master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter.”⁵

¹ *Vaughan v. Taff Vale R. Co.* (1860) 5 Hurlst. & N. 679, 688, 29 L. J. Exch. N. S. 247, 6 Jur. N. S. 899, 2 L. T. N. S. 394, 8 Week. Rep. 594.

² Cases in which it was expressly adopted are *Gates v. Pennsylvania R. Co.* (1893) 154 Pa. 566, 26 Atl. 598; *Dell v. Phillips Glass Co.* (1895) 169 Pa. 549, 32 Atl. 601.

³ *De Graff v. New York C. & H. R. Co.* (1879) 76 N. Y. 125.

⁴ *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 72, 36 Am. Rep. 454 (instruction approved); *Muirhead v. Hannibal & St. J. R. Co.* (1885) 19 Mo. App. 634.

⁵ *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612. Other statements of a similar tenor are the following: “The measure of skill and care required of those who use and control such agencies of power and danger must bear proportion to the consequences liable to follow from the want of such care and skill.” *Texas & P. R. Co. v. Barrett* (1895) 14 C. C. A. 373, 39 U. S. App. 196, 67 Fed. 214. “The amount of care required is measured by the circumstances of each case, depending upon the kinds of machinery used, the risks incident to its use, and the hazard of the business in which used.” *Jones v. New York C. & H. R. Co.* (1880) 22 Hun. 284. The duty of the master is “to exercise greater care, when . . . [the machinery] in use was known, or might by inquiry and inspection have been ascertained, to be dangerous, than when it was comparatively safe under all circumstances.” *Turner v. Goldsboro Lumber Co.* (1896) 119 N. C. 387, 26 S. E. 23. What is reasonable and ordinary care depends on the nature and character of the im-

plements, and the dangers to be encountered in their use. *Carrey v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 635.

“In determining the question of reasonable care on the part of the master, . . . regard must be had to the risks and dangers attending the use of the instrumentality furnished the servant in his employment.” *Anderson v. Minnesota & N. W. R. Co.* (1888) 39 Minn. 523, 41 N. W. 104.

“The care that the law requires for the safety of the employee is that care which is regarded by the good common sense of mankind as reasonably due under all the circumstances of the case.” *Columbus & X. R. Co. v. Webb* (1861) 12 Ohio St. 475.

“The measure of a master’s duty to his servant is reasonable care, having relation to the parties, the business in which they are engaged, and the exigencies which require vigilance and attention.” *Oliver v. Ohio River R. Co.* (1896) 42 W. Va. 703, 26 S. E. 444.

In *Reed v. Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186, the court, in speaking of the duty of the master to provide a reasonably safe place in which the servant may perform his work, and to keep it in such suitable condition, said: “This duty is not absolute, but relative. It is measured by the nature and character of the employment, the location of the premises and their surroundings. There are employments that of themselves are necessarily dangerous, in connection with which no position can be made secure. In such case the law requires of the master that he shall use ordinary care that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are cus-

The cases in which this principle suggests itself as the appropriate criterion of the master's fulfilment or nonfulfilment of his legal obligations may be said to fall into three categories:

(1) Those in which the business carried on by him is, as regards its ordinary incidents, unusually dangerous, such as that of a railway company,⁶ or of mine owners,⁷ or of persons operating an elevator,⁸

tomarily employed in the performance of like hazardous service, so that the servant exercising proper care may render his service without exposure to dangers that are not within the obvious scope of the employment as usually carried on." In *Harroun v. Brush Electric Light Co.* (1896) 12 App. Div. 126, 42 N. Y. Supp. 716, the court approved a charge, that "the care and prudence [exercised by the employer in the selection and provision of appliances for the use of the employee] must be proportioned to what may properly be expected of him under the circumstances, and increase in a corresponding ratio with the danger and hazard necessarily connected with the use of the appliances." Compare the language used in *New York & C. Mining Syndicate & Co. v. Rogers* (1887) 11 Colo. 6, 16 Pac. 719; *Ashland Coal & I. R. Co. v. Wallace* (1897) 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; *Wood v. Heiges* (1896) 83 Md. 257, 34 Atl. 872; *Lincoln Street R. Co. v. Cox* (1896) 48 Neb. 807, 67 N. W. 740; *Anderson v. Bennett* (1888) 16 Or. 515, 19 Pac. 765; *Missouri P. R. Co. v. Crenshaw* (1888) 71 Tex. 340, 9 S. W. 262 (approving a charge that "the care to be used is to be considered with reference to the risk to be incurred, and must be reasonably proportioned to such risk"); *Croker v. Pusey & J. Co.* (1900) 3 Penn. (Del.) pt. 1, p. 1, 50 Atl. 61; *Trihay v. Brooklyn Lead Min. Co.* (1886) 4 Utah, 468, 11 Pac. 672; *Stockwell v. Chicago & N. W. R. Co.* (1898) 106 Iowa, 63, 75 N. W. 665. It has, however, been held that an instruction that it was the duty of the defendant to exercise that degree of care, caution, and vigilance which the circumstances justly demanded is objectionable as submitting to the jury, as the standard of care required, their own opinion as to what caution and diligence were demanded by the circumstances of the particular case. The trial judge should state that ordinary care is the standard, and then define what ordinary care is. *Texas Midland R. Co. v. Taulor* (1898; Tex. Civ. App.) 44 S. W. 892.

⁶"The managers of railroad companies are engaged in conducting for profit a business which at the best is hazardous to human life. In providing sound tools and safe appliances for the use of their employees, their plain legal duty, to say nothing of the dictates of humanity, requires great vigilance. They cannot be heard to excuse themselves from taking all reasonable care on the ground that care involves labor or expense." *Morton v. Detroit, R. Co. & A. R. Co.* (1890) 81 Mich. 423, 46 N. W. 111. See also *Louisville & N. R. Co. v. Davis* (1899) 91 Ala. 487, 8 So. 552; *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266, a case in which the injured servant was exposed to the "extreme" dangers of the work of car repairing. So it has been said to be the duty of a railroad company to exercise "the highest degree of diligence" to construct a safe roadbed, and furnish safe and sound machinery. *Columbus, C. & I. C. R. Co. v. Troesch* (1873) 68 Ill. 545, 18 Am. Rep. 578. In other Illinois cases the phrases used in regard to railway companies are "highest degree of vigilance" (*Chicago & A. R. Co. v. Shannon* [1867] 43 Ill. 339), and, a "high degree of care" (*Toledo, W. & W. R. Co. v. Fredericks* [1874] 71 Ill. 294). These statements seem to be inconsistent with that of the Illinois court of appeals in a very recent case, where it was laid down that the master is not bound to exercise a "high degree" of diligence. *Wabash R. Co. v. Farrell* (1898) 79 Ill. App. 508.

⁷*Ashland Coal & I. R. Co. v. Wallace* (1897) 101 Ky. 626, 42 S. W. 744, rehearing denied in 101 Ky. 644, 43 S. W. 207. An instruction that a mine-owner must use "all appliances readily attainable, known to science, for the prevention of accidents arising from the accumulation of gas or other explosive substances in the mine," was approved in *Western Coal & Min. Co. v. Berberich* (1899) 36 C. C. A. 364, 94 Fed. 329.

⁸*McGregor v. Reid, M. & Co.* (1898) 76 Ill. App. 610 (master bound to use

or engaged in the preparation, storage, or handling of explosive and inflammable substances,⁹ or using steam-boilers,¹⁰ or using electrical appliances.¹¹

"great care"). In *Wise v. Ackerman* (1892) 76 Md. 375, 25 Atl. 424, the court held that, as an elevator is a dangerous machine in many respects, an employer is bound to exercise "great care" to render "as free from danger as careful foresight and precaution may reasonably dictate" an elevator which is intended primarily for freight, but which employees are authorized to use. A contrast was drawn between such an elevator and freight elevators which servants are allowed to use as mere licenses, in which case they can only demand the exercise of "ordinary" care. "All occupations producing articles or works of necessity, utility, or convenience may undoubtedly be carried on, and competent persons familiar with the business and having sufficient skill therein may properly be employed upon them; but in such cases, where the occupation is attended with danger to life, body, or limb, it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible, and mulcted to the extent of the injury inflicted. . . . Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that, in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable, known to science, for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon." *Mather v. Rillston* (1894) 156 U. S.

391, 39 L. ed. 464, 15 Sup. Ct. Rep. 461. "Persons and corporations using dangerous and explosive chemicals in experimental processes are charged with the highest degree of care to prevent accident and injury to others. The law imposes upon them the employment of all reasonable safeguards against danger from explosion. Not only should the machinery be safe, but all persons engaged in working about it should be informed of the dangerous character of the appliances and material used." *Decatur Cereal Mill Co. v. Boland* (1900) 95 Ill. App. 601-604. It may properly be found to be negligence to carry dynamite and caps in sawdust, in an exposed condition, on a locomotive, where they are unprotected from sparks. *Schwartz v. Shull* (1898) 45 W. Va. 405, 31 S. E. 914. Compare, also, *Myrberg v. Baltimore & S. Min. & Reduction Co.* (1901; Wash.) 65 Pac. 539, where it was held that the exposure of dynamite to the weather for two months, within a few feet of the entrance to defendant's mine, where plain-tiff and other employees were daily required to pass, constituted negligence. (The evidence was that exposure rendered the dynamite more liable to explode.) "What is due care and ordinary diligence will much depend on the kind of business which is carried on and the sort of material which is handled. The proprietor of a powder mill must exert more precaution than the master of a blacksmith shop. So, in such an establishment as that carried on by the defendants below,—in refining oil from crude petroleum, a material highly inflammable and explosive—we are bound to examine the question of negligence with a regard to this circumstance." *Ardesco Oil Co. v. Gilson* (1869) 63 Pa. 146.

⁹ *Texas & P. R. Co. v. Barrett* (1895) 14 C. C. A. 373, 30 U. S. App. 196, 67 Fed. 214 (explosion). Compare *Johnson v. Boston & M. Consul, Copper & S. Min. Co.* (1895) 16 Mont. 164, 40 Pac. 298 (similar accident).

¹⁰ In view of the subtle and dangerous nature of electricity, a master who makes use of it to operate a crane is bound to exercise a "very high degree of care" to see that any part of it which is liable to come in contact with

(2) Those in which the perils incident to working with one particular instrumentality or set of instrumentalities are greater than those incident to working with other instrumentalities employed in the same concern.¹²

(3) Those in which the necessity for exercising an unusually high degree of care is predicated for the reason that, on some particular occasion, the servant's environment is rendered specially perilous by some cause which is not operative under the normal conditions of the employment.¹³

the workmen is properly insulated. *Moran v. Corliss Steam Engine Co.* (1899) 21 R. L. 386, 45 L. R. A. 267, 13 Atl. 874. A "trolley wire . . ." is charged with an agency of exceeding danger to life; and . . . when the legislature authorizes a corporation to use such an agency in the public streets the law implies a duty of using a very high degree of care in the construction and operation of the appliances for the use of that agency, requiring the corporation to employ every reasonable precaution known to those possessed of the knowledge and skill requisite for the safe treatment of such an agency, for providing against all dangers incident to its use, and holds it accountable for the injury of any person due to the neglect of that duty, whether the person injured is or is not one of its own employees." *McAdam v. Central R. & Electric Co.* (1896) 67 Conn. 445, 35 Atl. 341. In *Chairman v. Western C. Teleg. Co.* (1888) 40 La. Ann. 178, 3 So. 625, it was laid down that the "greatest care and diligence" are demanded where the employment is a dangerous one, like that of a lineman. See also *Denver Consol. Electric Co. v. Simpson* (1895) 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499.

¹² In *Columbus & X. R. Co. v. With* (1861) 12 Ohio St. 475, it was laid down that "reasonable care for the safety of the employee, which requires of the employer always an attention, in a measure, commensurate to his exposure to danger, for the reasonable protection and safety of the employee, would evidently require of the employer greater vigilance and care in regard to the roadworthiness of an express train, or even a common passenger train, than of a freight train." A railway company is bound to use more care in keeping the surface of a large and busy yard in safe condition than is incumbent upon it in this respect where the

yard is a small one. *Rifley v. Minneapolis & St. L. R. Co.* (1898) 72 Minn. 169, 75 N. W. 704. The "ordinary care" to construct a safe track, required of a railroad company, includes the duty of making provision against the increased risk arising from its being built in proximity to a mountain range. *Union P. R. Co. v. O'Brien* (1892) 1 C. C. A. 354, 4 U. S. App. 221, 49 Fed. 538. In a mining case it was said: The care required of a master in respect to machinery and appliances is much less where the service required to be performed is on the surface of the earth, in open day, and its character and appliances are simple, than when the machinery used is dangerous and complicated, or the work is performed in a place and at a time when the surrounding dangers are not so obvious. *Gowen v. Harley* (1893) 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 973. A brakeman is entitled to assume that the company will take that degree of care of a switch commensurate with the increased danger of its location on a grade and a curve in its track. *International & G. N. R. Co. v. Johnson* (1900) 23 Tex. Civ. App. 160, 55 S. W. 772.

¹³ *Inter-State Consol. Rapid Transit R. Co. v. Fox* (1889) 41 Kan. 715, 21 Pac. 797 (a case where men were at work on a trestle over which trains were run at intervals, and the company did not take such precautions as were proper in view of the morning being very foggy). The fact that there is a greater likelihood of accident if the buffers of foreign cars overlap has been referred to as a special reason for seeing that there is no such overlapping. *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462, 3 N. E. 344. Where a railroad company locates a switch on a grade and curve in its track, so that the danger to employees in the operation of its road is increased,

It will be observed that, in the formulation and discussion of the principle that the master is bound to exercise a degree of care commensurate with the dangers to be apprehended, the courts have not infrequently used language which, if taken literally, would imply that, where the work is such as to subject the servant to unusually great perils, the master does not satisfy his legal obligation by exercising that degree of care which is described by the phrase "reasonable and ordinary," or any of the various equivalents of that phrase which are enumerated in § 14, *ante*. But manifestly this is not the true import of the principle. The correct juristic concept is that which is indicated by the remark that "reasonable care is care proportioned to the danger to be guarded against, and, in dangerous situation, means great care."¹⁴ In other words, ordinary or reasonable care varies with the circumstances.¹⁵ Any instruction which is inconsistent with this concept is regarded as erroneous.¹⁶ But an in-

it must exercise a commensurate degree of care for the safety of its track at that point. *International & G. N. R. Co. v. Johnson* (1900) 23 Tex. Civ. App. 160, 35 S. W. 772. The implied assumption of the risks incident to the operation of trains on the rough and unfinished track of a railway which is under construction (see § 20, *post*) is predicated, subject to the proviso that such trains are operated in a reasonably careful manner. *Mcloy v. Chicago & N. W. R. Co.* (1889) 77 Iowa, 744, 4 L. R. A. 287, 42 N. W. 563. A railway company which permits its track to become unsafe will be held to an increased responsibility towards its employees for the manner in which its trains are run on such track. *Wilson v. Louisiana & N. W. R. Co.* (1899) 51 La. Ann. 1133, 25 So. 961. Observe that in Louisiana a conductor is a vice principal.

¹⁴ *Sprague v. New York & N. E. R. Co.* (1896) 68 Conn. 345, 37 L. R. A. 638, 36 Atl. 791. It is not uncommon to find judges passing, in the same opinion, from one of these forms of expression to the other. See, for example, *Richardson v. Cooper* (1878) 88 Ill. 270, where the judge lays it down in one place that the master must use "all reasonable precautions," and in another place requires him to exercise "a degree of care and skill."

¹⁵ *Union P. R. Co. v. O'Brien* (1892) 1 C. C. A. 354, 4 U. S. App. 221, 49 Fed. 538. What is "ordinary care" must be measured by the character of the business and the risks attending its prosecution. *Brann v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5. "Ordinary care in the selection and retention of servants and agents implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered." *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454, 27 L. ed. 602, 2 Sup. Ct. Rep. 932. "The duty of a railway company is to exercise due, that is ordinary, care, in the selection and employment of its servants and agents, having respect to their particular duties and responsibilities and the consequences that may result from their want of competence, skill, or care in the performance of their duties." *Baulce v. New York & H. R. Co.* (1874) 59 N. Y. 356, 17 Am. Rep. 325; *Wall v. Delaware, L. & W. R. Co.* (1889) 54 Hun, 454, 7 N. Y. Supp. 709.

¹⁶ *Galveston, H. & S. A. R. Co. v. Gormley* (1898) 91 Tex. 393, 43 S. W. 877, declaring erroneous a charge that "the degree of care of all parties is higher when the lives and limbs of themselves or others are endangered than in ordinary cases;" *Bertha Zoo Co. v. Martin* (1895) 93 Va. 791, 22 S. E. 869, where a charge that an employer is required, in providing appliances, methods of work, and means of safety for its employees in thawing dynamite, to use such reasonable care as

struction is not necessarily erroneous because the word "ordinary" or "reasonable" is not used for the purpose of defining the obligatory degree of care.¹⁷ As to the obligation to use more than ordinary care, which is predicated in the case of minor servants, see §§ 18 *et seq.*, *post*.

b. Rule applied to the advantage of the master.—In the cases hitherto cited, the principle under discussion has been applied for the purpose of holding the master to a stricter accountability. But it also inures to his benefit. Thus, the standard of ordinary care is held to be satisfied by the use of very primitive and inefficient implements where the risk of injury is but small.¹⁸ So, a less degree of care may be sufficient in the case of a merely temporary structure erected for a particular purpose, than in the case of one which is intended to be permanently used as a part of the plant.¹⁹ But the higher obligations attach if the temporary structure is allowed to remain so long that it becomes, for practical purposes, a permanent one.²⁰ Other cases bearing upon this aspect of the principle are referred to in § 29, *post*.

16a. Master's violation of or compliance with a rule made by himself; implication from.—The fact that the injury was due to the master's breach of a rule which he himself had promulgated for the protection of the servants is, at the very least, evidence from which negligence may be warrantably inferred.¹ But an instruction to the effect that

is "commensurate with the danger to be reasonably apprehended therefrom," was disapproved on the ground that it was calculated to create the impression that more than ordinary care was demanded of the master.

¹⁷In *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454, 27 L. ed. 602, 2 Sup. Ct. Rep. 932, the court approved a charge in which the jury were told that, in view of the consequences which result to employees from the carelessness of telegraphic operators, upon whose reports depend the movement of trains, the defendant is bound to exercise "proper and great care" in selecting them. The meaning of the charge was, as was pointed out, put beyond the reach of any possible misapprehension, not only by the words which led up to this statement, but by the subsequent declaration, that there could be no recovery unless it was affirmatively shown that the defendant knew, or could by "reasonable diligence" have known, that the negligent employee was incompetent. An instruction that

a company maintaining an electric wire carrying a dangerous current over a public street or alley is not an insurer of the safety of passers-by, but is bound to the highest degree of care, skill, and diligence, so as to make the same safe against accidents so far as such safety can, by the use of such care and diligence, be secured,—is not erroneous, although it is better to instruct that the company is bound to exercise that reasonable care and caution which would be exercised by a reasonably cautious and prudent person under the same circumstances. *Denver Consol. Electric Co. v. Simpson* (1895) 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499.

¹⁸*Steinhäuser v. Spraul* (1893) 114 Mo. 551, 21 S. W. 515, 859 (said of a ladder).

¹⁹See *Elmer v. Locke* (1883) 135 Mass. 575.

²⁰*Norfolk & W. R. Co. v. Gilman* (1891) 88 Va. 239, 13 S. E. 475.

¹*Baltimore & O. R. Co. v. Camp* (1895) 13 C. C. A. 233, 31 U. S. App.

a violation of rules by employees for whose acts the master is responsible is negligence *per se* is held to be erroneous, for the reason that rules of conduct prescribed by the master himself are not on the same footing as statutes and municipal ordinances which fix the legal standard of duty towards the persons for whose protection they are designed.² Presumably, however, such an instruction would be perfectly proper if the rule violated was one promulgated in accordance with some statutory provision, as in the English case cited in note 1; and, even apart from that element, there would seem to be room for considerable doubt whether it is not perfectly justifiable to lay it down, as a matter of law, that a master who fails to attain a standard of careful conduct which he himself has fixed is guilty of a clear breach of duty.

There can, of course, be no hesitation in rejecting the doctrine that the rules of the employer can, as against the servant, be referred to as

213, 65 Fed. 952; *Louisville & N. R. Co. v. Bryant* (1893) 15 Ky. L. Rep. 181, 22 S. W. 606. In *Senior v. Ward* (1859) 1 El. & El. 385, 28 L. J. Q. B. N. 8, 139, 5 Jur. N. S. 172, 7 Week. Rep. 261, recovery was denied on the ground that the maxim, *Volenti non fit injuria*, was applicable, but, except for this consideration, it was agreed that the master was liable for the reason that he was guilty of negligence in having failed to enforce a rule which, in accordance with the provision of the mines act, he had promulgated with regard to the testing of the hoisting apparatus before it was used for the conveyance of the miners. A nonsuit is improper where the answer in an action for injuries received by a car repairer admits that, while cars are being repaired upon other than repair tracks, "ordinary prudence, care, and the customs and regulations of the company" require that such work should not be done except while the car is being protected by watchmen or other suitable protection. *Luchke v. Chicago, M. & St. P. R. Co.* (1883) 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870. In *Boss v. Northern P. R. Co.* (1891) 2 N. D. 128, 49 N. W. 655, and *Pidcock v. Union P. R. Co.* (1888) 5 Utah, 612, 1 L. R. A. 131, 19 Pac. 191, the fact that a railway company had broken one of its own rules in allowing a structure to be so close to the track as the one which caused the injury was mentioned as a corroborative reason for upholding a verdict for the plaintiff. In *Gerrish v. New Haven Ice Co.* (1893) 63 Conn. 9, 27 Atl. 235, the court said that, even apart from the existence of the rule, it would have been justifiable to find the defendant to be negligent, but that the case against it was made much stronger by the fact that it had violated its own rule. In *Bailey v. Rome, W. & O. R. Co.* (1893) 139 N. Y. 302, 34 N. E. 918, the defendant was held liable on the ground that an inspection pursuant to one of its rules would have disclosed the defect in question; but presumably the result here was not affected by the existence of the rule. In *Thain v. Old Colony R. Co.* (1894) 161 Mass. 353, 37 N. E. 309, there is, perhaps, another implied recognition of the doctrine, though the actual point decided was merely that as the risk in question was assumed, the servant's right of action could be enlarged by showing that there was a rule directed to the prevention of the dangerous conditions from which the risk resulted. Since the law, irrespective of the rules of a railroad company, imposes upon it the duty of inspecting its cars properly, it is not error to allow a plaintiff to prove that the rules of the company required an inspection at terminal and intermediate points. *Kentucky C. R. Co. v. Carr* (1897) 19 Ky. L. Rep. 1172, 43 S. W. 193.

² *Smithson v. Chicago G. W. R. Co.* (1894) 71 Minn. 216, 73 N. W. 853 (disregard of rules as to the management of trains).—a case decided under the statute abolishing the defense of co-service in the case of railway servants. See chapter XXXIX., *post*.

evidence that a certain way of doing the work was careful. The law, and not the rule of the employer, defines negligence.³

16b. Right to rely upon the recommendations and advice of others.—

The general rule has been laid down, that a master is usually justified in relying on the advice and recommendations of persons of skill and experience.⁴ This rule has been applied in cases where the question to be settled was whether the master had attained the legal standard of safety with respect to the quality of an instrumentality,⁵ and in cases where the legal quality of the method adopted for carrying out the work in hand was in dispute,⁶—especially if he himself was not an expert or specialist in respect to the subject-matter of such advice or recommendations.⁷ On the other hand, it has been held that the master is not necessarily absolved from liability for this reason.⁸

17. Comparison between the degrees of care owed to a servant and to a stranger.—In so far as no special rule of law intervenes to create a duty to use a degree of care higher than that designated as "ordinary," it is manifest that, supposing the circumstances to be similar, a master's obligations to a stranger must be virtually identical with those which he owes to a servant. Whether a person enters upon the premises of another to perform a contract of service, or to transact some business, or by the direct request of the owner, the person extending the implied or express invitation owes to the person accepting it the duty of seeing that at least ordinary care and prudence are exercised to protect him against dangers which are neither actually nor constructively known to him.⁹ But the scope of this principle is necessarily much restricted in practice by the doctrine of assumption

³ *Pennsylvania Co. v. Stocke* (1882) 104 Ill. 201 (error to allow a witness to be asked a question based on the hypothesis that such evidence was competent for such a purpose).

⁴ *Service v. Shoneman* (1900) 196 Pa. 63, 46 Atl. 292, *supra*.

⁵ *McGill v. Bowman* (1890) 18 So. 337, 68 N. W. 36 (plans for the construction of a cistern, the walls of which collapsed, were adopted on the advice of an architect believed to be competent).

⁶ *Service v. Shoneman* (1900) 196 Pa. 63, 46 Atl. 292 (unsafe boiler); *Kelly v. Forty-second Street, M. & St. V. Tr. Co.* (1890) 58 Hun. 93, 11 N. Y. Supp. 344 (force pump selected by persons having experience in the use of such apparatus); *Keith v. Walker Iron & C. Co.* (1888) 81 Ga. 49, 7 S. E. 166 (negligence to take the opinion of an expert mason as to the safety of the roof of a structure which he has just completed).

⁷ *Diamond State Iron Co. v. Giles* (1887) 7 Houst. (Del.) 556, 11 Atl. 189; *Trimer v. St. Louis Brewing Co.* (1897) 69 Mo. App. 17 (recognizing the duty to guard the servant against pitfalls); *Musick v. Jacob Dold Packing Co.* (1894) 58 Mo. App. 322 (similar facts). See also *Larnum v. Crown Point Iron Co.* (1886) 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752, where the court distinguished the position of a servant from that of a mere licensee entering on premises to secure employ-

⁸ *Sales v. Packer* (1882) 99 Pa. 465 (laborer engaged in the demolition of a structure injured by its collapse, which was due to the removal of a

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of risks, the operation of which is far less extensive where the parties litigant are strangers than it is where they bear to one another the relation of master and servant.²

On the other hand, where a person is required by the policy of the law to exercise a higher degree of care than that described as "ordinary" for the protection of those who do business with him, it will often happen that a servant will be unable to recover under circumstances which, if the injured person had been a stranger, could have constituted a cause of action. Thus, the courts have uniformly declined to hold that the peculiar obligations imposed upon carriers of passengers are predicable in cases where a servant is traveling, in the course of his employment, upon a public conveyance belonging to his master.³

ment. In an early Maine case it was laid down that, as regards bridges, passageways, or ladders, "at least the same care and precaution [should] be used for the safety of the servant as for that of the stranger whose accidental presence business may require within the same limits." *Buzzell v. Laconia Mfg. Co.* (1861) 48 Me. 113, 77 Am. Dec. 212. It has also been remarked in a recent case that the relation of master and servant is not analogous to that of guardian and ward, and the obligation of the master in regard to appliances furnished for the use of the servant is not different from what it would be if such appliances were furnished for the use of one not a servant. *Garnett v. Phoenix Bridge Co.* (1899) 98 Fed. 192.

² The cases asserting the nonliability of a master to his servant for injuries caused by defective instrumentalities are treated as an exception to the general principle that "no man may, in conducting business, unnecessarily and wantonly disregard the rights of other people, whether employees or strangers," for these reasons: (1) That the servant is not secretly or involuntarily exposed to the peril; (2) that he is paid for the exact position and hazard which he assumes; and (3) that he may terminate his employment when, from unforeseen perils, he finds his reward inadequate or unsatisfactory. *Hayden v. Smithville Mfg. Co.* (1861) 29 Conn. 548. Compare the statement that "the servant undertakes his employment, relying upon the fact that the appliances are safe if carefully used, and he knows that their careful use depends upon himself and his fel-

low servants who may be assigned to operate and guard them." *Salters v. Delaware & H. Canal Co.* (1874) 3 Hun, 338. This seems to be the only ground upon which it is possible to accept the broad doctrine laid down in an Australian case, that circumstances which might entitle a stranger or visitor to recover damages do not apply in the case of a "workman," and the decision based upon that doctrine, that a shipowner is not liable for failing, as darkness comes on, to place a light near an open hatchway, so as to secure the safety of employees who have been working near it all day,—so long, at least, as the darkness has not become so profound that the employees cannot by using slightly increased vigilance avoid the orifice: *McLauchlin v. Service* (1871) 2 Viet. L. Rep. (1) 198.

³ *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, 471; *Smith v. St. Louis, K. C. & N. R. Co.* (1878) 69 Mo. 32, 33 Am. Rep. 484. While, in the case of passengers, railroad companies are bound to avail themselves of all new inventions and improvements known to them, which will contribute materially to the safety of their passengers, the utility of which has been tested, and the adoption of which is within their power so as to be reasonably practicable, they are not so bound as to employees. *Salters v. Delaware & H. Canal Co.* (1874) 5 Thomp. & C. 559 3 Hun, 338. In *Columbus & N. R. Co. v. Webb* (1861) 12 Ohio St. 475, the court rejected the special contention of counsel that, as both the railway company and the plaintiff knew it was the legal duty of the company as common carrier to furnish as perfect brakes

B. STANDARD OF DUE CARE: HOW FAR QUALIFIED BY THE MINORITY OF THE SERVANT.

18. **Negligence not inferable from the mere employment of a minor to do dangerous work.**— (Compare § 180, *post*.) A master is not culpable simply because he hires a minor servant for the performance of dangerous duties.¹ Whether a minor may, without negligence, be set to do dangerous work, "depends upon the particular circumstances of each case, upon the character and degree of the danger, and the capacity of the minor to comprehend and avoid it."² If the servant is of such tender years as to be unable, by reason of his immature judgment or bodily strength, to perform the duties imposed upon him,

upon the passenger cars as was practicable, it was a reasonable implication that, when the plaintiff entered the employment as brakeman, the company undertook the obligation of furnishing a brake as safe as it was bound to furnish for the safety of the passengers. The fallacy of this argument, it was pointed out, consisted in its ignoring the effect of the essential element of the servant's assumption of the ordinary risks of his employment. In *Gates v. Southern Minnesota R. Co.* (1881) 28 Minn. 110, 5 N. W. 579, a charge was held to be erroneous which allowed the jury to infer that the degree of care which a railway company must exercise in the maintenance of a safe road-bed for its employees is as high as that required of a carrier in regard to passengers. In *O'Connell v. Baltimore & O. R. Co.* (1863) 20 Md. 212, 83 Am. Dec. 549, it was declared that the doctrine laid down by the Supreme Court of the United States in *Stokes v. Saltonstall* (1839) 13 Pet. 191, 10 L. ed. 115, that a carrier warrants the safety of passengers as far as human care and foresight can go, was not applicable to a case where the plaintiff was a laborer who was carried to and from his work on a train, without any contract of carriage and without paying any fare. Similarly, the owner of a building owes only the care required from a master toward his servant, and not that due from a common carrier of passengers, in respect to employees in his business, in using a freight elevator in which such employees are permitted, but not required, to ride in going up to or down from, the stories of the build-

ing in which they respectively work. *McDonough v. Lauffer* (1893) 55 Minn. 501, 57 N. W. 152, followed in *McGregor v. Read, H. & Co.* (1899) 178 Ill. 164, 53 N. E. 323. Reversing (1898) 76 Ill. App. 610. The distinction between the duty owed by a railway company to a passenger and to an employee was lost sight of in *Vishville & C. R. Co. v. Elliott* (1861) 1 Coldw. 611, 78 Am. Dec. 506.

¹ *Youll v. Sioux City & P. R. Co.* (1885) 66 Iowa, 346, 23 N. W. 736; *Houston & G. N. R. Co. v. Miller* (1879) 51 Tex. 270. "There is no rule of law that a minor may not be employed about a dangerous machine; and the simple fact that a machine is dangerous does not make the employer liable for an injury received by a minor employed on such machine." *Buckley v. Gutta-Peicha & Rabler Mfg. Co.* (1889) 113 N. Y. 540, 21 N. E. 747. "If boys are not allowed to use machinery until they have become accustomed to its use, it would be difficult for them to learn any useful trade or occupation by which to earn a livelihood." *O'Keefe v. Thonn* (1889) 24 W. N. C. 379, 46 Atl. 737. An employer has a right to presume that a youth applying to him for employment is possessed of the average capacity of youths of his age and a competent knowledge of the employment he seeks, if it is such as is usually followed by such youths. *Adams v. Chum* (1893) 1 Marv. (Del.) 80, 36 Atl. 1101.

² *Anderson v. Morrison* (1875) 22 Minn. 274; *Hamilton v. Galveston, H. & S. A. R. Co.* (1881) 54 Tex. 556 (boy of fifteen employed as brakeman).

it may be that the master should be deemed negligent in placing him in a dangerous position.³ A similar inference may doubtless be drawn if the servant is wholly inexperienced in the work for which he is engaged.⁴ In the latter case, negligence is usually imputed on the specific ground of an omission to give instruction (chapter XVI. *post*); but in the former case it is easy to see that there may be some extreme circumstances in which, considering the age of the servant and the nature of the duties, it might not be consistent with ordinary prudence to set him to work, even though he may have received full instructions. The impropriety of imputing negligence to the master merely on the ground that the servant was a minor and the work dangerous becomes more and more unquestionable as the servant approaches his majority. He will not be allowed to retain a verdict based solely on that ground, where he was of such an age that he may well have looked like an adult, and no evidence has been produced to show that his minority was indicated by his stature and general appearance; or that the master had knowledge of his real age, or was in some way put upon inquiry as to that fact.⁵

19. Greater care must be exercised for the protection of young servants.—The materiality of the fact that a servant is not of full age consists in this,—that it is in many instances regarded as a ground for predetermining the existence of certain additional obligations on the master's part to see that the servant is adequately protected. "The almost universally accepted doctrine is that the care to be observed to avoid injuries to children is greater than that in respect to adults. That course of conduct which would be ordinary care when applied to persons of mature judgment and discretion might be gross, and even criminal, negligence toward children of tender years. The same discernment and foresight in discovering defects and dangers cannot be reasonably expected of them, that older and experienced

³ *Youll v. Sioux City & P. R. Co.*, the boy to undertake work of the character required. *Hagen v. Culchester* (1885) 66 Iowa, 346, 23 N. W. 736.

⁴ *Youll v. Sioux City & P. R. Co.*, *Mills* (1894) 69 Vt. 1, 37 Atl. 269. (1885) 66 Iowa, 346, 23 N. W. 736.

⁵ *Youll v. Sioux City & P. R. Co.* (1885) 66 Iowa, 346, 23 N. W. 736. Whether a master was negligent in directing an immature boy who had been employed to do such work around a factory as should be suited to his capacity, to perform a dangerous operation, in the course of which the boy was injured, depends upon the capacity of the employer. *Chicago & A. R. Co. v. Pettigrew* (1898) 82 Ill. App. 33.

persons habitually employ; and therefore the greater precaution should be taken where children are exposed to them.¹ Upon this ground he has been held liable for the following kinds of negligence: Not insisting on the use by a minor of certain safeguards provided for the servants;² requiring a minor to do work which is not within the compass of his age and experience;³ requiring a minor to encounter risks of an unusual kind, although such work is within the scope of his employment;⁴ augmenting the risks of a minor's service by giving him additional duties to perform;⁵ transferring a minor to new duties involving greater dangers than those involved in the work for which he was originally hired;⁶ setting a minor at a task which he has neither the strength nor the skill to perform;⁷ failing to prevent a minor from doing work in a dangerous way, when there is a temptation to a person of his years to do it so;⁸ allowing a minor to do things injurious to health.⁹

¹ *Cleveland Rolling Mill Co. v. Corriqua* (1889) 46 Ohio St. 283, 3 L. R. A. 385, 20 N. E. 466. That the duty of the master with reference to the exercise of care increases in proportion to a minor's want of capacity was declared in *Texas & P. R. Co. v. Carlton* (1883) 60 Tex. 397.

² *Vicksburg Foundry & Mach. Co. v. Yeaman* (1891) 3 Ind. App. 521, 30 N. E. 10. Whether an employer exercised the care which the circumstances required, in directing an apprentice sixteen years old to fasten a scaffolding, was held to be for the jury to determine, in *Henry v. Brady* (1879) 9 Daly, 142.

In the case of a girl of seventeen years engaged in filling soda-water bottles, which at one stage of the operation are liable to explode, a jury is justified in finding that it is not sufficient for the defendant to provide a mask, but that it is his duty also to point out to her the existence of the danger, and to insist on her wearing the mask. *Cracker v. Banks* (1888) 4 Times L. R. 324.

³ *Brazil Black Coal Co. v. Gaffney* (1889) 119 Ind. 455, 4 L. R. A. 859, 21 N. E. 1102 (boy of ten years in a coal mine directed to couple coal cars).

⁴ *Robertson v. Cornelson* (1888) 34 Fed. 716 (cleaning machinery in motion).

The question of the defendant's negligence is for the jury, where there is evidence that a boy was employed to drive a mule in a mine, and had imposed on him the additional task of opening a door to see whether the truck ahead was clear, and that a regular attendant should have been placed at the door, and that the absence of the superintendent was the cause of the accident. *Wearer v. Iselin* (1894) 161 Pa. 386, 29 Atl. 49.

⁵ *Stumper v. Fuchs & L. Mfg. Co.* (1898) 26 App. Div. 333, 49 N. Y.

Supp. 785. Affirmed (1900) 161 N. Y. 636, 57 N. E. 1125. Apparently the same principle is conceded in *Texas & P. R. Co. v. Carlton* (1883) 60 Tex. 397.

⁶ *Vicksburg Foundry & Mach. Co. v. Yeaman* (1891) 3 Ind. App. 521, 30 N. E. 10. Whether an employer exercised the care which the circumstances required, in directing an apprentice sixteen years old to fasten a scaffolding, was held to be for the jury to determine, in *Henry v. Brady* (1879) 9 Daly, 142.

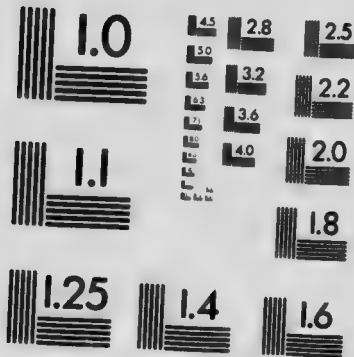
⁷ In *Marbury Lumber Co. v. Westbrook* (1898) 121 Ala. 179, 25 So. 914, the court approved a charge to the effect that particular work which is no more dangerous for a man than another employment may, nevertheless, be more dangerous to a boy because of his inexperience and the peculiar traits incident to adolescence, holding it not to be merely abstract, where a boy was injured because he rode up and down on a log carriage, instead of remaining on the floor of the sawmill.

⁸ In *Arban v. Johnson* (1885) 18 Neb. 180, 53 Am. Rep. 806, 24 N. W. 730, a master was held liable for allowing a girl of eleven to go across a prairie in cold weather, with clothing so inadequate that she was frozen. In *Larson v. Berquist* (1885) 34 Kan. 334, 55 Am. Rep. 249, 8 Pac. 407, a complaint was held good which alleged that during the employment of an inexperienced girl of tender years her menses began, that defendant advised her that menstruation was a dangerous disease, likely to



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From the doctrine that the master is subject to this larger measure of responsibility, some courts have deduced consequences which practically amount to a declaration that the same superior servant may be a vice principal as to a minor, and not a vice principal as to an adult.¹⁰ Another result of the doctrine is that the master will sometimes be held liable to children for the insecurity of portions of the

cause insanity and death, and that the best and only known remedy was hard and unrelenting labor, and that, by reason of this advice, she was induced to work far beyond her strength, and was permanently crippled and disabled.

"See the comments of Lords Cranworth and Chelmsford in *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, on the Scotch case of *O'Bryen v. Burn* (1854) 16 Sc. Sess. Cas. 2d series, 1025, as stated in § 247, *post*. In *Atlanta Cotton Factory Co. v. Spurr* (1882) 69 Ga. 137, 47 Am. Rep. 750, it was held that a girl fifteen years old could recover damages under the following showing of facts: She was a night hand in a cotton factory which used to shut down at 3 o'clock on every Sunday morning, and was allowed, with some other operatives, to occupy the basement till daylight. The night overseer of the room where she worked, seeing them there one Sunday night, told them to go to one of the upper rooms, which was better lighted and more comfortable, and removed them in spite of objections made by the watchman who had charge of the building when the work stopped. The plaintiff children then began to play hide and seek with some other children, and while so engaged went out into an adjacent passage where there was no light, and fell into an opening in which an elevator was about to be placed. The majority of the court held that the night overseer was, for the time being and as regards the acts which led up to the catastrophe, the representative of the company owning the factory. It was emphatically declared that when minor servants "are children, who can have no access to the great managers, who can receive no instructions from them, but who look alone, and must look alone, to him under whom they particularly work, and from whose lips alone the orders and behests of the corporation ever reach their ears," it is "simply monstrous to hold that for the wrongs and negligence of these lords of theirs they cannot re-

cover because their lesser lords violated orders which superior magnates had given them." The court then proceeded thus: "It makes no difference, therefore, in this case, whether Cobb, the man under whom they worked that night, violated his superior's orders or not. The children looked to him. Him they must obey or lose their places. Nor does it vary the question that, after working hours were over, another servant of the corporation, a watchman, had charge generally of the factory, and that he and Cobb had some altercation about the latter's putting the girls in that room. They were put in there by the person to whom they were accountable. Besides, the watchman yielded to Cobb and permitted them to be taken to the cloth room, and when the matter thus terminated between the superiors, is it right to lay blame upon the children? The reason and sense of the matter, it strikes us, is to lay the blame of their going to the room to Cobb, their special overseer, with the final acquiescence of the watchman, rather than to the children." The court also undertook to fortify its conclusion by propounding the very dubious theory that the whole reason on which rests the liability of a master for the negligence of a coemployee who rules for the time being is that he was negligent in employing an incompetent agent, and then drew the still more dubious conclusion that the night overseer and the watchman were both incompetent, the former because he persisted, against the protest of the latter, in disobeying the rule to keep the children in the basement, and the latter because he gave way to the former and allowed the rule to be violated. *Craighead, J.*, dissented on the ground that the evidence did not show that the overseer was in charge of the factory at the time, or had authority to give directions for the removal of the children. In this point of view the accident was due to the wrongful act of a mere fellow servant. But even assuming that the evidence was suffi-

premises outside of those which, as respects adults, he has impliedly agreed to keep in reasonably safe condition.¹¹

20. Limits of this obligation.— The rationale of the doctrine discussed in the preceding section is that the master is, as a prudent man, bound to regulate his conduct with due reference to the fact that minor servants are, on the average, less capable, not only of understanding the dangers of their employment, but also of avoiding the dangers which they do understand. In other words, it is the fact of immaturity, not of minority, that the master is bound to regard.¹ In this point of view, the rule that greater care must be exercised for the protection of minors is not an absolute one. Where, in the case of an injured minor, there is no immaturity of physical and mental faculties, he stands upon the same footing as an adult.² Nor does the mere fact that the servant is of immature years involve the conse-

cient to establish these facts, it is clear that the majority judgment goes much further than any court which has not adopted the "superior servant doctrine" (chapter XXVIII., *post*) would go in the case of an adult employee.

¹¹ In *Atlanta Cotton Factory Co. v. Speer* (1882) 69 Ga. 137, 47 Am. Rep. 750 (see above), the majority considered that the fact that the accident happened because the plaintiff, in playing the game, stepped outside the room to which she had been conducted, did not destroy her right of action. The position was taken that they would naturally while away the remaining hour or two before dawn, and that it was gross negligence in those who put them in the room not to warn them of the pitfall just outside the door, to leave such a hole with nothing around it to protect unwary feet. It was therefore held that the question of negligence, under all the facts and circumstances, was properly left to the jury, regard being had to contributory negligence on the part of the plaintiff, to her age and her entire ignorance of her danger, and the short time (only two weeks) which she had been connected with the factory. Crawford, J., dissented from the majority judgment in regard to this point also, on the ground that the facts brought it within the ordinary rule that a master is responsible for the condition only of those parts of his premises to which he directs, invites, or allows his employees to go.

¹ *Alabama Mineral R. Co. v. Marcus* (1896) 115 Ala. 389, 22 So. 135.

² *Alabama Mineral R. Co. v. Marcus*

(1896) 115 Ala. 389, 22 So. 135 (disapproving charge to contrary effect in the case of a servant of nineteen years). The proprietor of a laundry who places $\frac{1}{2}$ of an inch above the table on which clothes are spread preparatory to being passed through the ironing rollers, a brass rod to serve as a guard up to which the fingers of the operator may safely go, is not negligent in failing to anticipate that the operator, a girl of seventeen years of age, will attempt to pass her hand underneath the rod, and to provide for such a contingency by fastening the rod so that it cannot be raised. *O'Hare v. Keeler* (1897) 22 App. Div. 191, 48 N. Y. Supp. 376. If a child has discretion enough to know the dangers of his action and guard against it, the company is not bound to anticipate and provide against his peril in attempting to couple a train of cars. *Kentucky C. R. Co. v. Gastineau* (1885) 83 Ky. 119. The rule that machinery ordinarily used is suitable, in the legal sense, is not changed by the fact that the injured employee is a boy fifteen years of age. *Dingley v. Star Knitting Co.* (1900) 34 N. Y. S. R. 989, 12 N. Y. Supp. 31. Affirmed in (1892) 134 N. Y. 552, 32 N. E. 35; but this point was not referred to. See also *Michael v. Stanley* (1892) 75 Md. 464, 23 Atl. 1094, where a youth of eighteen years was denied recovery for an injury caused by a saw, and the cases in chapter XVII., *post*, in which a minor, no less than an adult, is held to assume the risks which he understands.

quence that the master is an insurer of such servant from injury by machinery in its nature dangerous.³ See, generally, § 24, *post*.

21. Employment of minor without his father's consent; effect of.—

In actions by an injured minor himself, or by his parent suing as his personal representative, under the damage acts, the general rule enunciated at the beginning of the last section is not changed by the mere fact that the minor was employed without his father's consent,¹ nor by the mere fact that he was, without that consent, transferred to new duties.² The absence of such consent is sometimes adverted to in cases of this type, but it will be found that the servant's right of recovery is predicated for reasons which are independent of this element.³

¹An instruction that permits the jury to find for plaintiff, a boy of fourteen years of age, if the machinery was dangerous and the plaintiff not guilty of contributory negligence, is erroneous, where there is no question as to the failure of the master to give the boy proper instructions. *Swift & Co. v. Holoubek* (1898) 55 Neb. 228, 75 N. W. 584.

²*Pennsylvania Co. v. Long* (1883) 94 Ind. 250; *Texas & N. O. R. Co. v. Crowder* (1884) 61 Tex. 262.

³*Texas & P. R. Co. v. Carlton* (1883) 60 Tex. 397. The court said: "Had the deceased not died, but brought this suit to recover damages for the injuries received in the manner shown in the record, he certainly could not have been heard to say that the employment of himself under the circumstances was such an act of negligence as would have entitled him to recover. He would have had to show such facts as would ordinarily entitle an employee of age to recover, unless it appeared that his inexperience and want of knowledge of the danger of his position and proper manner of avoiding it were such as to have made it the duty of the appellant to warn him upon these matters, and that it had failed in this duty. . . . It has been frequently held that where a master hired to another a slave to work in a given business or place, and the hirer subsequently, without the consent of the owner, placed the slave in a business or place more hazardous than that contemplated in the original contract of hiring, a recovery could be had for the value of the slave lost while engaged in and by reason of the more hazardous business or place; but those cases have no analogy

to the case before us. The slave had no power whatever to contract, nor in any way to create the relation of master and servant between himself and another person. The minor has such power; and while, as against his father, he cannot defeat his right to have his services by contracting them to another person, yet as between himself and such other person, the relation of master and servant may be created by his contract; and especially so when such contract is made for the purpose of obtaining employment necessary to his own support, as in this case it appears to have been."

⁴As, where it is laid down that a railroad company employing a minor, knowing him to be such, and that he was of such tender years as not to know the hazards of the service, and that his parents did not consent to it, will be liable for injuries received by him in such service; but if he was believed to be twenty-one years of age when employed the company is not liable by reason of his minority, even if the employment was without the consent of his parents. *Goff v. Norfolk & W. R. Co.* (1888) 36 Fed. 299. Here the defendant's knowledge of the servant's ignorance of the risks is itself a circumstance warranting the inference of negligence. In *Stimper v. L. Mfg. Co.* (1900) 161 N. E. 57 N. E. 1125. Affirming (1892) 20 App. Div. 333, 49 N. Y. Supp. 785, a master was held liable for an injury received by a minor while he was engaged in duties outside the scope of those authorized by his father. But here the act which caused the injury was a breach of a non-delegable duty. So, in *Wearer v. Iselin* (1894) 161 Pa. 386, 29 Atl.

It is otherwise where the action is brought by a parent for loss of services. The controlling principle then is that a person who hires an unemancipated minor and puts him at hazardous work is accountable to the nonassenting parent for all the consequences following directly from the employment, in so far as they entail a loss of the minor's services by the parent.⁴ That the employer did not know that the parent objected to his child's rendering the service is no defense, as it is his duty to ascertain whether the parent is willing before the child is hired.⁵ Nor is he entitled to rely upon an implied emancipation, predicated upon anterior occurrences, where he or his representative is actually aware of the parent's wishes that the child should not be employed,—especially where the child has previously been discharged on account of his minority.⁶ The consent of the parent is not available as a justification, except so far as it has regard to the particular work to which it applies.⁷ In such cases the wrong consists essentially in the employment of the minor servant without the permission or against the wishes of the parent. The parent is there-

49, the real gravamen of the complaint was that the minor was exposed to increased dangers by being required to perform certain additional duties,—a situation which raised a question for the jury.

⁴*Soldanels v. Missouri P. R. Co.* (1886) 23 Mo. App. 516, and the cases cited in the following notes. The testimony of the parent that she remonstrated with her son about his acting as brakeman is admissible as bearing upon the question of her consent. *Hamilton v. Galveston, H. & S. A. R. Co.* (1881) 54 Tex. 556. In *Toledo, St. L. & K. C. R. Co. v. Trimble* (1893) 8 Ind. App. 333, 35 N. E. 716, the distinction is taken that, where there has been active opposition to the parent's will, he is entitled to recover merely upon proof of that fact, for the reason that the injury must necessarily be the result of the opposition; while, if there has been merely a want of consent, the employment itself may not be wrongful, and it is therefore not a necessary inference from this fact that the injury was a proximate result of the employment. The want of consent might, it was said, give rise to the presumption that the employment was against the will of the parent, but this presumption was not conclusive in such a sense that it could be indulged for the purpose of upholding a judgment entered

on a special verdict not specifically finding that there had been active opposition to the parent's will. This distinction is not noticed in any other case, so far as the writer knows, and seems to be contrary to the analogies supplied by other branches of the law. The juridical consequences of a want of consent, wherever that fact is material, are, it is apprehended, precisely the same, whether there has been an active disregard of the wishes of the injured party, or merely a failure to obtain his consent.

⁵*Louisville & N. R. Co. v. Willis* (1885) 83 Ky. 57.

⁶*Soldanels v. Missouri P. R. Co.* (1886) 23 Mo. App. 516.

⁷A general permission of a father to his minor son to follow railroading for a living, and that he may become a fireman, does not deprive the father of the right of specifying how and where he shall work, and does not preclude a recovery by such father for injuries to the son while employed as a brakeman without the parent's consent. *Gulf, C. & S. F. R. Co. v. Redeker* (1889) 75 Tex. 310, 12 S. W. 855. A widow will not be held to have consented to the employment of her son upon dangerous work at a mill at which he was working, because of her knowledge that he was employed at the mill. *Marbury Lumber Co. v. Westbrook* (1898) 121 Ala. 179, 25 So. 914.

fore entitled to recover, irrespective of whether the master was negligent or not.⁸ And as the contract of employment is made without his consent, he is a stranger to it, and not bound by any of its terms. Not having agreed that his child shall assume the risks incident to the employment, he can recover, although the injury may have been caused by the negligence of the child's fellow servants.⁹ Nor is his action barred by the fact that the child was guilty of contributory negligence.¹⁰

⁸ *Marbury Lumber Co. v. Westbrook* & *P. R. Co. v. Brick* (1892) 83 Tex. 526, (1898) 121 Ala. 179, 25 So. 914; *Tol-ido, St. L. & K. C. R. Co. v. Trimble Willis* (1885) 83 Ky. 57. In a Missouri case it was merely said to be "very questionable" whether the want of due care and judgment on the part of an injured minor was a defense to an action by his parent for loss of service. *Soldanels v. Missouri P. R. Co.* (1886) 23 Mo. App. 516.

⁹ *Marbury Lumber Co. v. Westbrook* (1898) 121 Ala. 179, 25 So. 914; *Texas* (1886) 23 Mo. App. 516.

CHAPTER III.

WHAT KIND OF INSTRUMENTALITIES A MASTER IS BOUND TO FURNISH. GENERAL PRINCIPLES.

22. Total failure to furnish necessary instrumentalities or materials; negligence inferable from.
- 22a. Instrumentalities actually furnished must be reasonably safe.
23. Other forms in which the extent of the master's obligations is expressed.
24. Master not bound to insure his servant's safety.
25. Instructions must be in conformity with this principle.
26. Master's obligations limited by the uses for which the instrumentalities were designed.
27. Rationale of this limitation.
28. Diversion to new uses by the master himself, or with his consent.
29. Servants engaged in construction, alteration, or repair of instrumentalities; standard of safety lower as regards.

22. Total failure to furnish necessary instrumentalities or materials; negligence inferable from.— It is clear that the entire failure to furnish any instrumentalities or materials in a case where they are necessary for the servant's protection is not less a breach of the duty to furnish proper instrumentalities or materials than is the furnishing of instrumentalities or materials which fall below the legal standard of safety.¹ A servant who bases his right of action on the total lack of

¹*Southern Kansas R. Co. v. Moore* 216, 32 N. Y. Supp. 457. The mere fact that the evidence shows that certain defective clamps were furnished solely for the purpose of holding together slabs of stone on a truck, and not for the purpose of safe loading the servant, will not render erroneous an instruction to the effect that the master was bound to furnish proper clamps, and that the servant might recover if the master failed to exercise reasonable care to furnish reasonably suitable clamps, and the injury resulted from that failure. *Morris Bros. v. Lowers* (1900) 105 Tenn. 59, 58 S. W. 328. Numerous cases in which the omission to provide materials is assumed to be negligence will be found in the later chapter (XXXII.) which deals with the nonliability of the master for

requisite appliances must show that, under the circumstances, they were reasonably necessary for his protection from a danger which the master knew or ought to have known to be incident to the work,² and that they were either not obtainable at all, or were not readily accessible.³ When they are not available for use at the actual place of work, it is for the jury to say whether they are reasonably accessible in such a sense as to absolve the master from the charge of negligence.⁴ It is not sufficient discharge of the master's duty that sufficient good material should be mingled with bad material in a common mass.⁵

22a. Instrumentalities actually furnished must be reasonably safe.—

The general principle laid down in § 14, *ante*, involves the corollary that the master is in default as respects his servants, unless the appli-

the negligent manner in which the servants use the materials provided for the preparation of certain instrumentalities, as a part of the work they are doing.

² In *Bartolomeo v. McKnight* (1901) 178 Mass. 242, 59 N. E. 804, the jury was held to be warranted in finding for a plaintiff injured by the caving in of a trench, where the evidence was that the defendant had not furnished any materials for shoring it up, and that he was on the spot and had an opportunity to observe that, owing to the nature of the soil, the depth of the trench, and the manner in which it was dug, the sides were in a treacherous condition.

³ *Cogan v. Burnham* (1900) 175 Mass. 391, 59 N. E. 585. The absence of sufficient light in an elevator room will not entitle plaintiff to recover, where there was evidence that lanterns were provided for such workmen as chose to carry them. *Browne v. Siegel-Cooper & Co.* (1901) 191 Ill. 226, 60 N. E. 815. Affirming (1900) 90 Ill. App. 49. See also *Stewart v. Coltness L. Co.* (1877) 4 Sc. Sess. Cas. 4th series, 952 (allegation that mine owner had not provided wood for props, held not to have been proved); *Manning v. Manchester Mills* (1900) 70 N. H. 582, 49 Atl. 91 (plaintiff held not entitled to recover for injuries caused by the fact that the nails used by his fellow servants to fasten a ladder to a roof were too short, his own testimony being that there were plenty of nails furnished, and that he had no doubt there were other nails available); *Potter v. Chicago, R. I. & P. R. Co.* (1877) 46 Iowa,

399 (ordinary pole, such as is readily found in railway shops, held not to be an appliance which the company was negligent in not furnishing, where an employee was assisting to move a locomotive wheel).

⁴ As, where the coupling link of an engine tender was not on it, but left in side, to be picked up as occasion required (*Granville v. Minneapolis & St. L. R. Co.* [1882] 3 McCrary, 352, 40 Fed. 711 [held to be for the jury to say whether this arrangement was so unusual as to subject a brakeman to an extraordinary risk]); and where the materials for shoring up a trench which caved in were kept at a distance of about 1½ miles from the place of work (*Laporte v. Cook* [1901] 22 R. I. 554, 48 Atl. 798). In *Fitzsimmons v. Taunton* (1893) 160 Mass. 549, it was held that the jury properly find that the materials applied for shoring up a trench were practically inaccessible when kept at a place 2 miles away.

⁵ *Lafayette Bridge Co. v. Olson* (1901) 54 L. R. A. 33, 47 C. C. A. 367, 108 Fed. 335, disapproving of an unqualified instruction to the effect that, if the defendant company had furnished an abundance of suitable material and appliances from which the foreman and other workmen could select such as was needed for the several parts of the falsework, which gave way, then the defendant was not liable for any mistake in judgment by the foreman or other servants in the selection of suitable material out of the mass provided for use, although the plank in question was defective.

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ances furnished are such as would commend themselves to a reasonably prudent man.¹ He is bound to furnish such appliances as are reasonably safe and suitable, — such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances.² In order to discharge this obligation, he must see that the instrumentalities which he furnishes are in "proper condition,"³ that is to say, in "a condition which shall not endanger the safety of the employed,"⁴ or in such a condition "that an employee can perform all the duties required of him with reasonable safety;"⁵ or in such a condition that it shall be "reasonably prob-

¹ *Geno v. Fall Mountain Paper Co.* Iowa, 134. A master must furnish (1895) 68 Vt. 568, 35 Atl. 475. In *McCombs v. Pittsburgh & W. R. Co.* (1889) 130 Pa. 182, 18 Atl. 613, the defendant requested an instruction "that an employer does his duty when he provides for his employees in such manner as he fairly and reasonably deems prudent and safe." The trial judge substituted the words, "is fairly and reasonably prudent and safe," for the words "he fairly and reasonably deems safe," remarking that it was not what he decided might be prudent, but what was, in point of fact, reasonable, prudent, and safe, that he was required to furnish, and with that modification affirmed the point. The supreme court said: "In that he was clearly right. If the doctrine asserted in the point were recognized as correct, we would have as many standards of duty as there are degrees of carelessness among employers, and every employer would have to be adjudged guilty of negligence or not, according to his own standard of duty to his employees in each particular case."

² *International & G. N. R. Co. v. Bell* (1889) 75 Tex. 59, 12 S. W. 321.
³ *Smith v. Baker* [1891] A. C. 325, 362, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392; *Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918. The master "should adopt such suitable implements and means to carry on the business as are proper for that purpose." *Union P. R. Co. v. Daniels* (1894) 152 U. S. 685, *sub nom. Union P. R. Co. v. Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 756. Similar phraseology is found in *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497. The master must furnish "appliances reasonably well calculated to answer the end proposed." *Cooper v. Central R. Co.* (1876) 44

Buzzell v. Locomotive Mfg. Co. (1861) 48 Mo. 113, 71 Am. Dec. 212.

⁴ *St. Louis, Ft. S. & W. R. Co. v. Irwin* (1887) 37 Kan. 701, 16 Pac. 146.

The master must provide "reasonably safe conditions for work, according to the nature of the business, and to the customary provisions for the safety of life and limb." *The Frank & Willie* (1891) 45 Fed. 494. "The master must take reasonable care to have the tools and appliances with which, and the places on or about which, the servant is to be employed, reasonably safe for the work the latter is employed to do." *Essex County Electric Co. v. Kelly* (1894) 57 N. J. L. 100, 29 Atl. 427. In *Louisville & N. R. Co. v. Kelly* (1894) 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407, the court refused to instruct to the effect that, if the cars in the coupling of which the plaintiff

was hurt were received by the defendant from other railroads, and were "ordinarily and reasonably safe for the purpose for which they were used," the defendant as a common carrier was bound to receive and transport them over its line, and, if the plaintiff was injured solely on account of the dead-woods on the cars, he could not recover. This, it was objected, would have ex-acted of the defendant only ordinary care, while the law required that proper care should be exercised. The court of appeals, however, said that by the instruction the cars were to be reasonably as well as ordinarily safe, and that clearly implied good repair or proper condition. Anything less than reasonable was not good or proper. The refusal to give this instruction, or an

able that injury will not occur in the exercise of the employment."⁶

Such being the general character of the master's obligations, the doctrine is now regarded as axiomatic that the employer is bound to furnish adequate materials and means and resources suitable to accomplish the work; that is to say, all that is necessary to carry on the business, including premises reasonably safe for that purpose.⁷

equivalent, was, therefore, error. In *Mackey v. Baltimore & P. R. Co.* (1890) 8 Mackey, 282, the court sustained instructions to the effect (1) that a railroad company should, "as far as possible, provide for the protection of employees sufficient machinery in good order and condition," the words in italics being held not to extend unduly the master's obligation; (2) that the servant "has a right to expect that the master will, as far as possible, provide sufficient machinery in good order and condition," the words, "as far as possible," being approved for the same reason; (3) that a railroad company is liable for injuries to an employee caused by a brake which was "defective, out of order, not in reasonable repair, or not reasonable for the occasion,"—as, in the case of a severe storm. The word "occasion" was declared to have been correctly used, whether it signified "necessity, or need," or "a particular time."

⁶ *Wander v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143.

⁷ *Allen v. New Gas Co.* (1876) L. R. 1 Exch. Div. 251, 45 L. J. Exch. N. S. 668, 34 L. T. N. S. 541. The following epithets and phrases have been used by the courts to designate the obligatory quality of the instrumentalities which the master is to furnish:

Proper. *Smith v. Baker* [1891] A. C. 325, 362, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392; *Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918; *Union P. R. Co. v. O'Brien* (1892) 1 C. C. A. 354, 4 U. S. App. 221, 49 Fed. 538; *Baltimore & O. R. Co. v. McKenzie* (1885) 81 Va. 71. Suitable. *Buzzell v. Leconia Mfg. Co.* (1861) 48 Me. 113, 77 Am. Dec. 212; *Sullivan v. India Mfr. Co.* (1873) 113 Mass. 396, 398; *Rice v. King Philip Mills* (1887) 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101; *Brick v. Rochester, N. Y. & P. R. Co.* (1885) 98 N. Y. 211; *Cooper v. Central R. Co.* (1876) 44 Iowa, 134 (instruction approved); *Philadelphia, W. & B.*

R. Co. v. Keenan (1883) 103 Pa. 121; *Whitlaw v. Memphis & C. R. Co.* (1886) 16 La. 391, 18 W. 37. Safe. *Harritt v. Flint & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 659; *Smith v. Peninsular Car Works* (1886) 60 Mo. 501, 27 N. W. 662; *Wood v. Home* (1896) 83 Md. 257, 34 Atl. 872; *Wells v. Raleigh & C. F. R. Co.* (1900) 127 N. C. 203, 37 S. E. 204; *Nathan v. White River Lumber Co.* (1890) 76 Wis. 129, 43 N. W. 1135. Fit and safe. *Patterson v. Northern C. R. Co.* (1880) 83 N. Y. 7. Suitable and safe. *Brunner v. Southern P. Co.* (1891) 90 Cal. 496, 27 Pac. 371; *Crocker v. Pusey & J. Co.* (1900) 3 Penn. (Del.) pt. 1, p. 1, 50 Atl. 61; *Camp Point Mfg. Co. v. Ballou* (1874) 71 Ill. 417; *Ardesco Oil Co. v. Gilson* (1869) 63 Pa. 140; *Norfolk & W. R. Co. v. Nuckols* (1895) 91 Va. 193, 21 S. E. 342; *Carpenter v. McCann Nat. R. Co.* (1889) 39 Fed. 315. Suitable and sufficient. A verdict for the plaintiff based on a special finding that the appliance was not "suitable and sufficient" for the purposes for which it was used will not be set aside. *Quaid v. Cornwall* (1878) 13 Bush, 601. Sufficient and safe. *Erskine v. Chin. Allen Beet-Sugar Co.* (1895) 71 Fed. 2. Safe and proper. *Union P. R. Co. v. Brodrick* (1890) 30 Neb. 735, 46 N. W. 1121. In safe condition. *Carcoran v. Hollbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369. Sound and safe. *Chesson v. John L. Roper Lumber Co.* (1896) 118 N. C. 59, 23 S. E. 925; *Wander v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143. Fit and proper appliances. *Wrems v. Mathieson* (1861) 4 Macq. H. L. Cas. 215; *Erskpatrick v. New York C. & H. R. Co.* (1879) 79 N. Y. 240. Safe and secure. *Ryan v. Fowler* (1862) 24 N. Y. 411, 82 Am. Dec. 315. Safe, sound, and suitable. *Ayers v. Richmond & D. R. Co.* (1888) 84 Va. 679, 5 S. E. 582. Reasonably safe. *Little Rock & Ft. S. R. Co. v. Voss* (1892) Ark. 18 S. W. 172; *Pioneer Fireproof Constr. Co. v. Howell* (1901) 189 Ill. 123, 59 N. E. 535, Affirming (1899) 90 Ill. App. 123;

The suitability of an appliance for the uses which it is to subserve being the criterion by which the employer's performance of his duty is measured, it follows that, if that standard is attained, all inquiry as to the dimensions or other characteristics of the instrumentality which caused the injury becomes immaterial and supererogatory.*

Where an employer is required, either by statute or by the terms of an agreement made with a municipality, to arrange his premises in a certain manner for the benefit or protection of the public, he must comply with this requirement in such a manner that his employees will not be unnecessarily imperiled.⁹ A similar responsibility

Chicago & G. W. R. Co. v. Armstrong (1895) 62 Ill. App. 228; *Rogers v. Lloyd* (1890) 127 Ind. 50, 26 N. E. 210; *Chicago & E. R. Co. v. Lee* (1897) 17 Ind. App. 215, 46 N. E. 543; *Pennsylvania Co. v. Witte* (1896) 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377; *Clark County Cement Co. v. Wright* (1896) 16 Ind. App. 630, 45 N. E. 817; *Hannibal & St. J. R. Co. v. Kameley* (1888) 39 Kan. 1, 17 Pac. 324; *Rush v. Missouri P. R. Co.* (1887) 30 Kan. 129, 12 Pac. 582; *Missouri, K. & T. R. Co. v. Young* (1896) 4 Kan. App. 219, 45 Pac. 963; *Pullan v. Detroit, G. H. & M. R. Co.* (1899) 122 Mich. 232, 81 N. W. 103; *Anderson v. Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585; *Gardner v. St. Louis & N. F. R. Co.* (1896) 135 Mo. 90, 36 S. W. 214; *Bender v. St. Louis & N. F. R. Co.* (1897) 137 Mo. 240, 37 S. W. 132; *Phoka v. Knapp-Stout Lumber Co.* (1897) 72 Mo. App. 309; *Mulligan v. Montana Union R. Co.* (1897) 19 Mont. 135, 47 Pac. 795; *Chicago, B. & Q. R. Co. v. Opster* (1899) 58 Neb. 1, 78 N. W. 359; *Ellis v. New York, L. E. & W. R. Co.* (1884) 95 N. Y. 546; *Dingley v. New Knitting Co.* (1900) 34 N. Y. S. 59, 12 N. Y. Supp. 31; *Chesson v. L. Roper Lumber Co.* (1896) 118 C. 59, 23 S. E. 925; *Faber v. Carlisle Mfg. Co.* (1889) 126 Pa. 387, 17 Atl. 621; *Titus v. Bradford, B. & K. R. Co.* (1890) 136 Pa. 618, 20 Atl. 517; *Augenstein v. Jones* (1891) 139 Pa. 183, 21 Atl. 24; *Knorrville Iron Co. v. Pace* (1898) 101 Tenn. 476, 48 S. W. 232; *Eddy v. Adams* (1892; Tex.) 18 S. W. 490; *Chapman v. Southern P. Co.* (1895) 12 Utah, 30, 41 Pac. 551. In *Chicago & G. W. R. Co. v. Armstrong* (1895) 62 Ill. App. 228, the court approved of the submission to the jury of the two questions separately: (1) Was the appliance reasonably safe for the purpose intended? (2) Had the master exercised reasonable diligence to procure a reasonably safe appliance? Reasonably suitable. *O'Hare v. Kecker* (1897) 22 App. Div. 191, 48 N. Y. Supp. 376. Reasonably safe and fit. *Arizona Lumber & Timber Co. v. Mooney* (1895; Ariz.) 42 Pac. 952. Reasonably safe and adequate. *Palmer v. Denver & R. G. R. Co.* (1882) 3 Me. Cray, 635, 12 Fed. 392; *Cameron v. Great Northern R. Co.* (1898) 8 N. D. 124, 77 N. W. 1016. Reasonably safe and proper. *Lytle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571. Reasonably safe and secure. *Schleck v. Langdon* (1889) 55 Hun. 19, 8 N. Y. Supp. 573. Reasonably safe and suitable. *Washington & G. R. Co. v. McDade* (1890) 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; *Green v. Sansom* (1899) 41 Fla. 94, 25 So. 332; *Kaye v. Rob Roy Hosiery Co.* (1889) 51 Hun. 519, 4 N. Y. Supp. 571; *Spencer v. Worthington* (1899) 44 App. Div. 496, 60 N. Y. Supp. 873; *Galveston, H. & S. A. R. Co. v. Garrett* (1889) 73 Tex. 262, 13 S. W. 62; *Southern R. Co. v. Maury* (1900) 98 Va. 692, 37 S. E. 285. Reasonably safe, sound, and suitable. *Bertha Zinc Co. v. Martin* (1895) 93 Va. 791, 22 S. E. 869. Adequately safe. *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612; *Chesapeake & O. R. Co. v. Lash* (1896, Va.) 24 S. E. 385.

As to the propriety of these expressions in laying down the law for a jury, see § 1183, *post*.

* *Smith v. New York C. & H. R. R. Co.* (1890) 118 N. Y. 645, 23 N. E. 900 (railroad company is not bound to furnish new brake shoes, or those which have been worn away only half an inch or an inch, but brake shoes which are effectual for the purpose for which they are used).

⁹ Thus, a railroad company, although required by law to erect and maintain

ity accrues where the employer undertakes, *proprio motu*, to provide for the public any accommodations which may affect the safety of the employees.¹⁰

The probability or improbability of the occurrence which caused the injury is sometimes an essential factor in determining the question whether the instrumentalities or arrangements of the defendant satisfied the legal standard of safety. See chapters x., xi., *post*.

23. Other forms in which the extent of the master's obligations is expressed.— It is frequently said that negligence is imputable to a master whenever an instrumentality is of such a character, or his business is carried on in such a manner, as to subject his servants to dangers which are described as being unnecessary,¹ or needless,² or unreasonable,³ or unnecessary and unreasonable,⁴ or unreasonable and

a cattle guard at a certain point, must make it safe for employees to cross if it so locates its switchyards that they are constantly required to cross it. *Ford v. Chicago, R. I. & P. R. Co.* (1894) 91 Iowa, 179, 24 L. R. A. 657, 59 N. W. 5. So, a railroad company which obtains its right to cross streets in a city upon condition that it will plank between its rails is under obligation to do the work, and maintain it, when done, in such a way that it will be reasonably safe to its employees who may be required to pass over it in the discharge of their duties, although it owes no duty to them to put down or maintain the planks in the first instance. *Valley R. Co. v. Keegan* (1898) 31 C. C. A. 255, 58 U. S. App. 377, 87 Fed. 849.

"Thus, a railroad company is negligent towards a brakeman engaged in coupling cars, in leaving, in a walk between the tracks constructed for people to walk upon, a rotten plank which springs up and down when stepped upon, and a hole in which his foot is liable to be caught." *Bird v. Long Island R. Co.* (1896) 11 App. Div. 134, 42 N. Y. Supp. 888.

¹ *Smith v. Baker* [1891] A. C. 325, 262, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 32; *Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918; *Union P. R. Co. v. O'Brien* (1892) 1 C. C. A. 354, 4 U. S. App. 221, 49 Fed. 538; *Reed v. Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186; *Chicago & E. I. R. Co. v. Driscoll* (1897) 70 Ill. App. 91; *Kearns v. Chicago, M. & St. P. R. Co.* (1885) 66 Iowa, 599, 24 N. W. 231;

Rush v. Missouri P. R. Co. (1887) 36 Kan. 129, 12 Pac. 582; *Ashland Coal & I. R. Co. v. Wallace* (1897) 161 Ky. 626, 42 S. W. 744, 43 S. W. 207; *Baugh v. Laramie Mfg. Co.* (1861) 48 Me. 113, 117, 77 Am. Dec. 212; *Harrison v. Central R. Co.* (1865) 31 N. J. L. 293; *Pandover v. Erie R. Co.* (1870) 34 N. J. L. 151; *Abel v. Delaware & H. Canal Co.* (1891) 128 N. Y. 664, 28 N. Y. 663; *Warn v. New York C. & H. R. R. Co.* (1894) 80 Hun, 71, 29 N. Y. Supp. 897; *Tissue v. Baltimore & O. R. Co.* (1886) 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 667; *Brannan v. Lehigh Valley R. Co.* (1886) 113 Pa. 491, 57 Am. Rep. 479, 6 Atl. 226; *Bonner v. La Nue* (1891) 80 Tex. 117, 15 S. W. 803. A railroad company is liable for injuries to a railroad brakeman ordered by the conductor to carry goods from a freight car across a siding to the depot, where the conductor also directs that the train be cut in two, and a portion of it backed down against cars standing on such siding, after the brakeman has started to carry the goods across it, where such backing is unnecessary and saves no time. *Richmond & D. R. Co. v. Beaton* (1893) 89 Va. 749, 17 S. E. 132.

² *Weiss v. Bethlehem Iron Co.* (1898) 31 C. C. A. 363, 59 U. S. App. 627, 88 Fed. 23; *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497.

³ *Vance v. Smith* (1856) 28 Vt. 59, 65 Am. Dec. 222; *Puan v. Fanch* (1862) 24 N. Y. 410, 82 Am. Dec. 315. That defects rendering an appliance more "hazardous than reasonable" impute negligence, see *Taylor, B. & H. R. Co. v. Taylor* (1890) 79 Tex. 104, 14 S. W. 918.

⁴ *Bennett v. Knudicate Ins. Co.* (1888) 39 Minn. 254, 39 N. W. 488.

extraordinary,⁹ or extraordinary,¹⁰ or greater than is reasonable and proper.¹¹ It is manifest that the question, What shall be regarded as a necessity sufficient to justify the master in using any particular instrumentality? is one of fact, and must be decided with reference to the evidence presented in each particular case.¹² But a general principle which is often helpful in determining whether or not a defendant is culpable is that a convenience may be so great as to be regarded as a practical necessity.¹³ The fact that a slight inconvenience or expense may have been saved by the adoption of a certain plan can have no weight in a matter affecting the safety of workmen.¹⁴ The master, therefore, is bound to remedy dangerous conditions whenever that can be done at a comparatively small cost.¹⁵ How far the master is excused by evidence that the removal of the abnormal risk could not have been effected without a relatively large expenditure of money is a question which can scarcely be regarded as definitely settled by

Marble v. Widdicomb Furniture Co. (1884) 67 Mich. 167, 34 N. W. 541; *Houston & T. R. Co. v. Oram* (1878) 40 Tex. 341; *Southeast Virginia Improv. Co. v. Andrew* (1889) 86 Va. 270, 9 S. E. 1015.

Taylor, B. & H. R. Co. v. Taylor (1890) 70 Tex. 101, 14 S. W. 918.

In *Myers v. Chicago, St. P. M. & O. R. Co.* (1899) 37 C. C. A. 137, 95 Fed. 106, the court seems to be of opinion that a railway company is excused from maintaining low overhead bridges where the grade is such that the track cannot be lowered, and the municipal authorities object to the bridges being raised. But here the fact that the servants had been duly notified was sufficient to negative liability. It has been held that the negligence of a railway company in placing a "mail crane" at a certain distance from the track can be a question for the jury, even if it is set up within the distance prescribed by the United States government. *Louisville & N. Co. v. Mail Union* (1899) 21 Ky. L. Rep. 489, 51 S. W. 796.

Dorsey v. Phillips & C. Constr. Co. (1877) 42 Wis. 583 (p. 597), where it was emphatically declared that "a convenience merely to lessen a little the labor of driving cattle into cars can hardly rank as a necessity, or excuse such proximity of cattle chutes to the track as to jeopardize life and limb of persons operating trains." To same effect as to a similar structure, see *Allen v. Burlington, C. R. & N. R. Co.* (1882) 91 Iowa, 623, 11 N. W. 614. In *Kan-*

sas City, M. & H. R. Co. v. Burton (1892) 97 Ala. 249, 12 So. 88, it was held that leaving a car at a place where it is dangerously close to cars passing on an adjoining track is negligence for which there is no "justifying necessity."

Trainor v. Philadelphia & R. R. Co. (1890) 137 Pa. 148, 20 Atl. 632.

Kline v. Abrahams (1900) 48 App. Div. 522, 63 N. Y. Supp. 857; *Myers v. Chicago, St. P. M. & O. R. Co.* (1899) 37 C. C. A. 137, 95 Fed. 106 (overhead bridge); *Louisville & N. R. Co. v. Hall* (1890) 91 Ala. 112, 8 So. 371 (overhead bridge); punitive damages held to be permissible in this class of cases, where the expense of erecting a higher bridge was insignificant; *Cincinnati R. Co. v. Sampson* (1895) 97 Ky. 65, 30 S. W. 12 (overhead bridge); *Eastman v. Lake Shore & M. S. R. Co.* (1894) 101 Mich. 597, 60 N. W. 309 (for facts see § 1076, note 2, *post*). Evidence that the dangerous conditions might have been remedied at a small cost, without impairing the efficiency of the instrumentality, is always admissible on the question of the master's negligence. *Morris v. Stanfield* (1898) 81 Ill. App. 264. Such evidence is not rendered incompetent as a result of the principle (see chapter v., *post*) that as against the servant the master has the right to construct and place the instrumentality as, in his judgment, would best accommodate his interest. *Reine v. United States Leather Co.* (1900) 107 Wis. 305, 83 N. W. 473.

the cases. No court seems to have gone to the extreme length of holding that the necessity for such expenditure may of itself be regarded as a circumstance which absolves the master from the duty of making a change, and against this view there is at least one decision, which is of the greater weight as it was rendered by a court which is usually by no means favorable to servants.¹² In Alabama the prevailing doctrine seems to be that if it appears, not only that the suggested alterations would have been very costly, but also that they would have caused much inconvenience and financial loss to several members of the public, the master cannot be held negligent in maintaining the conditions complained of.¹³

The materiality of the fact that a change can or cannot be effected without injuring the efficiency of the instrumentality is discussed in § 36, *post*.

It is not disputed that risks caused by defects which render instrumentalities less safe than they are when in their normal condition are unnecessary. A large number of cases in which the master's liability was affirmed under such circumstances are collected in chapter VIII., *post*.

How far injuries caused by instrumentalities in their normal condition are to be deemed unnecessary in such a sense as to import culpability is a much more complicated question, and may be said to depend upon the construction put by the court upon the principles discussed in the following chapters.

24. Master not bound to insure his servant's safety.—That the words used in the preceding section to denote the legal standard of safety which the instrumentalities furnished by the master must satisfy also indicate the level above which he is not bound to rise is well settled. "All that can be required of the master . . . is that he shall use due and reasonable diligence in providing safe and sound machinery, and in the selection of fellow servants of competent skill and prudence, so as to make it reasonably probable that injury will not occur in the exercise of the employment."¹

¹² An employer is negligent in continuing to operate a blast furnace in such a condition that there is a recurrent danger of a rush of flame from the door, even though there is no way of remedying the defect except by extinguishing the fire, and that would involve considerable expense. *Henderson v. Carron Co.* (1889) 16 So. Sess. Cas. 4th series, 633.

¹³ In a case where a train hand was injured by a dangerously low overhead bridge, it was held that the jury should

be directed to consider whether any of the following three excuses for its not being raised are reasonably available to the railway company: That a higher level would cause too great inconvenience to vehicles crossing it; or that the alteration would be seriously detrimental to adjoining landowners; or that the cost of making the change would be so great that it ought not to be imposed on the company. *Louisville & N. R. Co. v. Hall* (1890) 91 Ala. 112, 8 So. 371.

¹ *Wonder v. Baltimore & O. R. Co.*

This proposition is also susceptible of expression in the negative form, that, as regards the condition of his instrumentalities, viewed with relation to the safety of his servants, the master is not an insurer, or guarantor, or warrantor, of the safety of his servants.²

(1870) 32 Md. 411, 3 Am. Rep. 143. The duty of the employer to provide safe machinery, tools, and appliances is satisfied by the exercise of reasonable care and prudence in the manufacture, selection, and repair of such appliances. *Probst v. Dehnamer* (1885) 100 N. Y. 266, 3 N. E. 184. A master is required only "to use ordinary and reasonable care and foresight in procuring such appliances and keeping them in repair." *Krampe v. St. Louis Brewing Assn.* (1894) 59 Mo. App. 277. See also, as examples of similar restrictive expressions, *Harley v. Buffalo Car Mfg. Co.* (1894) 142 N. Y. 31, 36 N. E. 813; *Wray v. Standard Oil Co.* (1900) N. J. L. 47 Atl. 803; *Bertha Zinc Co. v. Martin* (1895) 93 Va. 791, 22 S. E. 869; *Texas & P. R. Co. v. Huffman* (1892) 83 Tex. 286, 18 S. W. 741; *Chicago & E. R. Co. v. Lee* (1897) 17 Ind. App. 215, 46 N. E. 543; *Missouri, K. & T. R. Co. v. Young* (1896) 4 Kan. App. 219, 45 Pac. 967; *Arizona Lumber & Timber Co. v. Mooney* (1895) Ariz. 42 Pac. 952. It is error to instruct a jury that a master is negligent in using defective machinery. *Louisville & N. R. Co. v. Orr* (1882) 84 Ind. 50. See also § 1051, *post*.

²According to Blackburn, J., in *McLure v. Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, the ground of the decision in the case of *Priestley v. Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, which laid the foundation of the modern law of employers' liability, was that there was no warranty on the part of the master that the carriage should be free from defects, or that no injury should happen to the servant. "There is no warranty that machinery shall be so complete that no injury shall be incurred by the servant." *Weems v. Mathieson* (1861) 4 Macq. H. L. Cas. 215. A master does not warrant the soundness of the materials furnished by him. *Ormond v. Holland* (1858) El. Bl. & El. 102. As there is an implied agreement on the part of the servant that he will faithfully serve and be careful of the interest of his employer during the term of his service, a like implied agreement arises on the part of the master that he will be reasonably

provident and regardful for the safety and well being of the servant. While, therefore, it is the duty of each, the employer and the employee, to be provident and regardful of the interest of the other, and careful to respectively discharge his duty to the extent reasonably implied by the relation of employer and employee, it must be admitted that there is no warranty implied that the faithfulness of the servant shall always secure the best interests of the employer, nor that the implied reasonable regard of the employer for the safety and well being of the employee shall always secure his safety and well being. *Columbus & X. R. Co. v. Webb* (1861) 12 Ohio St. 475. "Safety in the use of machinery is only comparatively so, both to those using it and to those at work in its immediate vicinity. All machinery is dangerous when in use, to a greater or less extent; and when it is said that the master may become liable for negligence in not providing suitable and safe machinery, it is not meant that the master warrants the strength or safety of his machinery or appliances, but that he is personally negligent in not taking proper precautions to see that they are reasonably strong and safe." *Marsshall v. Widdicomb Furniture Co.* (1887) 67 Mich. 167, 34 N. W. 541.

To cite all the other cases in which the principle stated in the text is recognized would be superfluous. The following list will suffice: *Tarrant v. Webb* (1856) 18 C. B. 797, 25 L. J. C. P. N. S. 261; *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, per Lord Colonsay (*arg.*); *Snedden v. Addie* (1849) 11 Dunlop, 1159; *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739; *Patton v. Texas & P. R. Co.* (1901) 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, Affirming (1899) 95 Fed. 244, 37 C. C. A. 56; *Reilly v. Campbell* (1894) 8 C. C. A. 438, 20 U. S. App. 334, 59 Fed. 990; *Little Rock & Ft. S. R. Co. v. Duffey* (1880) 35 Ark. 602; *Little Rock & Ft. S. R. Co. v. Voss* (1892) Ark. 18 S. W. 172; *Honner v. Illinois C. R. Co.* (1854) 15 Ill. 550; *Columbus, C. & I. C. R. Co. v. Trausch* (1873) 68 Ill. 545, 18 Am. Rep. 578; *Edward*

Other virtually equivalent forms in which this rule is expressed are these: The master is not bound to see that his instrumentalities are "absolutely safe,"³ or "absolutely safe and suitable,"⁴ or "perfectly safe."⁵ Nor is he bound to see that "in every event" his instrumentalities are in safe condition,⁶ nor to see that they are as safe "as human skill and foresight can make them."⁷ So far as there is any guaranty on his part, it is merely that due care shall be exercised in furnishing and maintaining the instrumentalities.⁸

This limitation upon the liability has been put upon the ground of public policy, the opinion being expressed that a contrary rule would eventually be disastrous to the servants themselves.⁹ But it is scarcely necessary to sustain the rule by invoking *in terrorem* arguments based upon speculations in the field of political economy. It is sufficiently supported by the consideration that ordinary care is expressive of the standard of duty which is owed by all the members of the community to each other, and that the law exacts a higher standard only in a few cases, and for reasons which are wholly inapplicable to the relations between a master and his servant.

Hines Lumber Co. v. Ligu (1898) 172 Ill. 315, 50 N. E. 225; *Affirming* (1896) 68 Ill. App. 523; *East St. Louis Pkg. & Provision Co. v. McElroy* (1889) 29 Ill. App. 504; *McGregor v. Reid, M. & Co.* (1898) 76 Ill. App. 610; *Indianapolis & C. R. Co. v. Love* (1858) 10 Ind. 554; *Jenney Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 566, 18 N. E. 30; *Chicago & E. R. Co. v. Lee* (1897) 17 Ind. App. 215, 46 N. E. 543; *Missouri, K. & T. R. Co. v. Young* (1896) 4 Kan. App. 219, 45 Pac. 967; *Atchison, T. & S. F. R. Co. v. Winston* (1896) 56 Kan. 456, 43 Pac. 777; *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 36 Am. Rep. 454; *O'Donnell v. Baum* (1889) 38 Mo. App. 245; *Krampe v. St. Louis Brewing Assn.* (1894) 59 Mo. App. 277; *Esser County Electric Co. v. Kelly* (1894) 57 N. J. L. 100, 29 Atl. 427; *Baulce v. New York & H. R. Co.* (1874) 59 N. Y. 356, 17 Am. Rep. 325; *Painton v. Northern C. R. Co.* (1880) 83 N. Y. 7; *Harley v. Buffalo Car Mfg. Co.* (1894) 142 N. Y. 31, 36 N. E. 813; *Phasants v. Raleigh & A. Air-Line R. Co.* (1886) 95 N. C. 195; *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312; *Ardesco Oil Co. v. Gibson* (1869) 63 Pa. 146; *Philadelphia, W. & B. R. Co. v. Keenan* (1883) 103 Pa. 124; *Faber v. Carlisle Mfg. Co.* (1889) 126 Pa. 387, 17 Atl. 621; *Augerstein v. Jones* (1891) 139 Pa. 183, 21 Atl. 24; *San Antonio & A.*

P. R. Co. v. Taylor (1896; Tex. Civ. App.) 35 S. W. 855; *Oliver v. Ohio River R. Co.* (1896) 42 W. Va. 703, 26 S. E. 444.

Texas & P. R. Co. v. Rhodes (1895) 18 C. C. A. 9, 30 U. S. App. 561, 71 Fed. 145; *Erskine v. Chino Valley Beet Sugar Co.* (1895) 71 Fed. 270; *Harley v. Buffalo Car Mfg. Co.* (1894) 142 N. Y. 31, 36 N. E. 813; *Camp Point Mfg. Co. v. Ballou* (1874) 71 Ill. 417; *Chicago, B. & Q. R. Co. v. Smith* (1885) 18 Ill. App. 119; *Chicago & E. R. Co. v. Lee* (1897) 17 Ind. App. 215, 46 N. E. 543; *Gardner v. St. Louis & S. F. R. Co.* (1896) 135 Mo. 90, 36 S. W. 214; *Burlington & C. R. Co. v. Liche* (1892) 17 Colo. 280, 29 Pac. 175.

Nutt v. Southern P. R. Co. (1894) 25 Or. 291, 35 Pac. 653.

Findlay Brewing Co. v. Bauer (1893) 50 Ohio St. 565, 35 N. E. 55.

Southern P. R. Co. v. Upward (1891) 79 Tex. 675, 15 S. W. 697.

East Tennessee, V. & G. R. Co. v. Aiken (1890) 89 Tenn. 245, 14 S. W. 1082.

Little Rock & Ft. S. R. Co. v. Enbanks (1886) 48 Ark. 460, 3 S. W. 808.

³⁰To hold that the master warrants the safety and proper condition of the machine is equally unjust to the master, for no degree of care can insure perfect safety; and it is equally inconvenient to the public, for who would employ such machines if he were an in-

In the cases cited in this section, the principle that a master is not an insurer of his servants' safety is treated as a deduction from the conception that he is bound to exercise neither more nor less than ordinary care. But it is also frequently viewed as a corollary of the doctrine discussed in a later chapter, that the unsafe condition of an instrumentality does not import negligence, unless the master knew or ought to have known of that condition.¹⁰ See chapter x., *post*. In some cases, both conceptions are traceable in the language of the court.¹¹

The master is not bound to guarantee his servants against even extraordinary risks,¹² as, in cases where the servant is ordered to do something outside the scope of his regular employment.¹³

25. Instructions must be in conformity with this principle.—A jury is correctly instructed that a master does not insure his servants against injury.¹ On the other hand, a verdict against the master will not be allowed to stand, where the trial judge has expressly laid it down that an instrumentality must be kept in such repair as to in-

surer?" *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, per Byles, J. "If capitalists were held to be insurers of the lives of those who enter their service in the various industries, whether in operating railroads in constructing buildings, in various sorts of mining operations, and in all the multifarious ways by which money is made, these industries would languish, and many more laborers would be out of employment, and the laboring poor would suffer infinitely more than now." *Berns v. Gaston Gas Coal Co.* (1885) 27 W. Va. 285, 55 Am. Rep. 304.

¹⁰ For example, it has been held that, as the master does not guarantee that the appliances shall be free from defects, a complaint alleging an injury from a defective tool is demurrable, unless it is also averred that the defendant knew or ought to have known that it was unsafe.

¹¹ See, for example, *Jones v. New York C. & H. R. R. Co.* (1880) 22 Hun. 284, where the court lays it down that the master does not guarantee that the machinery furnished is perfect, as the law only requires him to use due care and diligence in the selection and use of the machinery, and also remarks that to hold him liable for defects not ascertainable by known tests and by the exercise of due care would render him liable for every accident occurring,

without the fault of the servant, by the breaking of machinery. Compare also the remark that the master does not insure against latent and undiscoverable defects, *The Lizzie Frank* (1887) 31 Fed. 477.

¹² *Southwest Virginia Improv. Co. v. Andrew* (1889) 86 Va. 270, 9 S. E. 1015 (arg.); *Wander v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143. There is "no general duty thrown by law upon the master" to take due and ordinary care that the servant shall be exposed to no extraordinary risk in the course of his service. *Dymen v. Leach* (1857) 26 L. J. Exch. N. S. 221, per Pollock, C. B. 222.

¹³ *Mary Lee Coal & R. Co. v. Chambliss* (1892) 97 Ala. 171, 11 So. 897.

¹⁴ *Western Serris Co. v. Johnson* (1898) 86 Ill. App. 89. It is error to refuse the defendant's request for an instruction that an employer does not insure the absolute safety and suitability of the appliances furnished, but merely undertakes that they are "reasonably" safe and suitable. *Harsha v. Bahier* (1894) 54 Ill. App. 586. An instruction that the employer contracts that his employees are men of ordinary care and prudence is not prejudicial, where such charge also makes the employer's liability dependent on its knowledge of the fellow servant's incompetency. *Hicks v. Southern R. Co.* (1901) S. C. 38 S. E. 725. Contrast cases cited in note 4, *infra*.

sure the safety of persons using it,² nor where, although he has not used the word "insure" in stating the nature and extent of the master's obligation, he has used language which may have been construed by the jury in such a sense that they supposed him to be absolutely bound to safeguard his servants.³ Hence it is error to use the epithets "safe," "secure," "safe and sound," or the like, for the purpose of describing the instrumentalities which the master is bound to furnish, unless it is also made quite clear to the jury that he is only required to use ordinary care in furnishing instrumentalities answering this description.⁴

² *Colorado C. R. Co. v. Ogden* (1877) 3 Colo. 499.

³ The following instructions are erroneous: That a railway company is bound to exercise "ordinary care" in seeing that the coupling appliances upon its cars are in such repair that coupling may be made "without any danger" to the brakeman or switchman making the coupling from being squeezed or compressed. *Van Winkle v. Chicago, M. & St. P. R. Co.* (1895) 93 Iowa, 509, 61 N. W. 929. That it is negligence *per se* for a railroad company to receive foreign cars the drawbars of which are lower than those of its own cars, and to furnish such cars to its employees to handle in connection with its own cars if they believe that such inequality of height renders the handling of such cars dangerous to the defendant's own employees. *Wabash R. Co. v. Farrell* (1898) 79 Ill. App. 508. That a master is bound "to do everything that can reasonably be done for the safety of his employees." *Texas & N. O. R. Co. v. Bingle* (1895) 9 Tex. Civ. App. 322, 29 S. W. 674. That an employer is bound to exercise such care as will "reduce questions of liability of accident to the minimum." *Jungpitsch v. Michigan Malleable Iron Co.* (1895) 105 Mich. 270, 63 N. W. 296. That the master is required to furnish such appliances "as combine the greatest safety with practical use." *Sappenfield v. Main Street & Agri. Park R. Co.* (1891) 91 Cal. 48, 27 Pac. 590.

⁴ The word used in the following cases of instructions declared to be erroneous was "safe:" *Quindiran v. Buffalo, R. & P. R. Co.* (1900) 52 App. Div. 1, 64 N. Y. Supp. 795; *Hughley v. Wabasha* (1897) 69 Minn. 245, 72 N. W. 78; *Galveston, C. & S. F. R. Co. v. Wells* (1891) 81 Tex. 685, 17 S. W. 511; *International & G. N. R. Co. v.*

Williams (1891) 82 Tex. 342, 18 S. W. 700; *Eddy v. Adams* (1892; Tex.) 18 S. W. 490; *Gulf, C. & S. F. R. Co. v. Johnson* (1892) 1 Tex. Civ. App. 103, 20 S. W. 1123; *Galveston, H. & S. A. R. Co. v. Davis* (1893) 4 Tex. Civ. App. 468, 23 S. W. 301; *Galveston, H. & S. A. R. Co. v. Gormley* (1894; Tex. Civ. App.) 27 S. W. 1051. It is also objectionable to use without qualification any of the following adjectives or phrases: "Good and safe," *Texas & P. R. Co. v. Huffman* (1892) 83 Tex. 286, 18 S. W. 741; "safe and secure," *Probst v. Delamater* (1885) 100 N. Y. 266, 3 N. E. 184; "safe and sound," *Southern R. Co. v. Mauzy* (1900) 98 Va. 692, 37 S. E. 285; "safe and proper," *Texas Mexican R. Co. v. King* (1896) 14 Tex. Civ. App. 290, 37 S. W. 34; "safe and suitable," *Nutt v. Southern P. Co.* (1894) 25 Or. 291, 35 Pac. 653; *Gulf, C. & S. F. R. Co. v. McNeill* (1894; Tex. Civ. App.) 25 S. W. 647; "sufficient, safe, adequate, and suitable," *Allen v. Union P. R. Co.* (1891) 7 Utah, 239, 26 Pac. 297; "safe, sound, and suitable," *Bertha Zinc Co. v. Martin* (1895) 93 Va. 791, 22 S. E. 869; "properly constructed," *Kranz v. White* (1881) 8 Ill. App. 583; "in safe condition," *Peoria, D. & E. R. Co. v. Johns* (1891) 43 Ill. App. 83; *Jones v. New York C. & H. R. R. Co.* (1880) 22 Hun, 284; "in safe and sound condition," *Wabash, St. L. & P. R. Co. v. Fenton* (1883) 12 Ill. App. 417. The duty imposed by such instructions upon the master for the safety of his servant is a higher degree of duty than is imposed upon the servant for his own protection, and is therefore contrary to reason, as well as to law, for no master can be required to do more for his servant's safety than the servant is required to do for his own safety. *Bertha Zinc Co. v. Martin* (1895) 93 Va. 791, 22 S. E. 869. An instruction declaring

Since such words as these are frequently used *arguendo*, without any qualifying adverb to designate the character and extent of the master's obligation (see § 1045, *post*), this doctrine virtually amounts to a declaration that language which is sufficiently precise for the purposes of general statement in the opinions of courts of review is misleading when the law is being laid down for a jury.⁵ That the correctness of the language used to describe the extent of a master's duty is tested by a different standard of precision, according as it occurs in a judgment or in an instruction to a jury, is shown in a still more remarkable manner by the fact that it has been frequently held that even the addition of some qualifying adverb, like "ordinarily" or "reasonably," to such an epithet as "safe," "competent," etc., will not save an instruction from condemnation, unless it is also explicitly declared that the master is required to exercise only reasonable care in the production of the conditions described by those epithets. The rationale of these decisions is that, in order to make good a charge of negligence, the servant must at all events prove that the master ought, as a prudent man, to have known of the existence of the conditions imputed as negligence, and that this essential element of liability is ignored by an instruction which merely adverts to the quality of the

the employer to be liable if the machinery is of "doubtful safety" is erroneous, as that is equivalent to requiring that it shall be perfectly safe. *Illinois River Paper Co. v. Albert* (1893) 49 Ill. App. 363. It is error to charge that a railway company is bound to see that the road is in good order and safe, and the engines are perfect, and properly constructed according to the present state of the art (*Nashville & D. R. Co. v. Jones* [1871] 9 Heisk. 27), or that "plaintiff did not undertake to incur risks arising from defective machinery or other instruments with which he is to work; his contract implied that in regard to these matters the defendant would make adequate provision, and that no unnecessary danger should ensue to him" (*Konold v. Rio Grande W. R. Co.* [1900] 21 U. S. 379, 60 Pac. 1021). It is error to refuse a charge to the effect that a master is not liable for injuries to an employee from a defective platform which was constructed with reasonable care and caution. *Missouri, K. & T. R. Co. v. Baker* (1896; Tex. Civ. App.) 37 S. W. 94. Similarly, it is improper to charge the jury, without qualification, that the master is bound to employ "fit, suitable, com-

petent, and experienced" men (*Cerrillos Coal R. Co. v. Deserant* [1897] 9 N. M. 49, 49 Pac. 807); or "men of ordinary skill and care" (*Nashville & D. R. Co. v. Jones* [1871] 9 Heisk. 27); or "competent, skilful, and prudent" men (*Kranz v. White* [1881] 8 Ill. App. 583; *San Antonio & A. P. R. Co. v. Taylor* [1896; Tex. Civ. App.] 35 S. W. 855).

⁵ In *Probst v. Delamater* (1885) 100 N. Y. 266, 3 N. E. 184, in expressing its disapproval of an instruction requiring the master to furnish a "safe" appliance, the court remarked that the duty had been stated in similar terms in several decisions by the court of appeals, but pointed out that these statements had occurred in defining the doctrine of non-delegable duties, and there was no necessity to notice the limitations of the rule. It was held that, as the trial judge was not requested to quote the instruction objected to, and insert words expressive of these limitations, and there was no evidence that the defendant exercised any care in selecting the appliance, the court of appeals could not treat the charge as error requiring the reversal of a judgment for the plaintiff.

appliances which the master is bound to furnish.⁶ Other courts, however, seem to consider that no prejudicial error is committed if it is made clear to the jury that a master is merely required to provide appliances that are reasonably safe.⁷ Even an instruction which ex-

⁶The following instructions have been disapproved: That if a railroad failed to provide a reasonably safe track and equipment, and to keep the same in repair, it would be liable for the death of an employee due to a defect in the track. *Anderson v. Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585. (The court pointed out that the duty as to track that was originally safely constructed is the exercise of ordinary care in inspecting it to see that it remains in reasonably safe condition.) That "it was the duty" of a railway company to provide the injured servant "with a reasonably safe and clear roadbed." *Chicago, B. & Q. R. Co. v. Ogster* (1899) 58 Neb. 1, 78 N. W. 359. (The court pointed out that under this instruction the defendant, even if it had not been guilty of negligence, would have been liable if the accident had occurred by reason of the roadbed having recently become unsafe.) That it is the duty of a railway company to keep its roadbed in a "reasonably safe condition." *Texas & P. R. Co. v. McCoy* (1896) 90 Tex. 261, 38 S. W. 36 (conclusion put on the ground that a master might use ordinary care to make its track reasonably safe; and yet there might be undiscovered defects which would render it unsafe). That it is the defendant's duty to furnish a reasonably safe place of work. *Hughley v. Wabasha* (1897) 69 Minn. 245, 72 N. W. 78. That a railroad company is bound to furnish safe machinery and appliances. *Gulf, C. & S. F. R. Co. v. Ball* (1898) Tex. Civ. App.) 43 S. W. 605. The principle thus relied on in these decisions—that a jury should not be left to suppose that a master is required, at his peril, to secure even a condition of reasonable safety—seems to indicate that the Texas court of appeals has gone too far, in a recent case, in condemning a charge which conveys the impression that the master is rendered liable merely by proof that an appliance was not reasonably safe to his knowledge. *The Oriental v. Barclay* (1897) 16 Tex. Civ. App. 193, 41 S. W. 117.

In several decisions by the Illinois court of appeals it has been held a misdirection to tell the jury, without quali-

fication, that the master is bound to provide agencies that are "reasonably safe" or "reasonably suitable." *Bellville Pump & Skin Works v. Bender* (1896) 69 Ill. App. 189; *Gormully & J. Mfg. Co. v. Olson* (1897) 72 Ill. App. 32; *Peoria, D. & E. R. Co. v. Hardwick* (1892) 48 Ill. App. 562; *Chicago, B. & Q. R. Co. v. Merckes* (1889) 36 Ill. App. 195; *North Chicago Rolling Mills Co. v. Monka* (1879) 4 Ill. App. 664; *Chicago & E. I. R. Co. v. Garner* (1898) 78 Ill. App. 281. The conception underlying the decisions of the other courts is not explicitly referred to in these decisions, as they are put simply on the ground that the master's contract is merely that he will use due care in furnishing reasonably safe appliances. The case on which most of them are based is *Camp Point Mfg. Co. v. Ballou* (1874) 71 Ill. 417, p. 421. But there the specific ruling was simply that it was error to refuse an instruction to the effect that the master "is not bound to furnish the very best or most improved kind of machinery," and although the court laid it down, *arguendo*, that the master is charged only with the "obligation to use reasonable care and diligence in providing suitable and safe machinery," it seems scarcely possible to ascribe to this statement the significance attached to it by the court of appeals, when we find it followed by the remark that "it was sufficient if the machinery was reasonably safe." The same criticism is applicable to the citation (in *Gormully & J. Mfg. Co. v. Olson* [1897] 72 Ill. App. 32, *supra*) of *Weber Wagon Co. v. Kehl* (1892) 139 Ill. 644, 29 N. E. 714, as a precedent for the same theory. It does not lay the emphasis asserted upon the necessity of combining in the instruction terms expressive, not only of reasonable safety, but of reasonable care. These authorities, therefore, cannot fairly be said to afford any direct support for the decisions in question; but this is immaterial, as the principle they embody involves, as a corollary, the doctrine relied upon in the rulings of the other courts, as stated above.

⁷An instruction that "it was the duty of the defendant to furnish a reason-

explicitly recognizes the duty of the master to use ordinary or reasonable care on the premises is deemed to be correct only when the phraseology used in regard to that duty is such that the jury must have understood that the nonattainment of the obligatory standard of safety which the appliances are to satisfy is not culpable, unless that nonattainment is the result of a failure to exercise ordinary or reasonable care.⁸

ably safe place for this man to work" is not misleading, since the jury must have understood that "a reasonably safe place" meant such a place as would be reasonably safe with reference to the circumstances and conditions attending the conduct of the business in question. *Augusta v. Owens* (1900) 111 Ga. 464, 36 S. E. 830. The mere fact that the trial court instructed the jury that the master was bound to use such care as would maintain his appliances "in safe condition," omitting the word "reasonably" or some other qualifying expression, is not ground for reversal, where the charge was given as a whole, and the correct rule was laid down in the same subdivision of the charge. *Atchison, T. & S. F. R. Co. v. McKee* (1887) 37 Kan. 592, 15 Pac. 484.

⁸In *Cleveland, C. C. & St. L. R. Co. v. McClintock* (1899) 32 C. C. A. 466, 63 U. S. App. 550, 91 Fed. 223, there was held to be error, where the trial judge, after telling the jury that the railway company in employing the plaintiff "undertook to use ordinary diligence in providing safe machinery and instrumentalities to be handled by its employees," added, "and the most efficient mode of discharging that duty in respect to cars used was to maintain a careful system of inspection," etc. In *F. C. Austin Mfg. Co. v. Johnson* (1898) 32 C. C. A. 309, 60 U. S. App. 661, 89 Fed. 677, the following instruction was held to be misleading: "While the defendant company and its agent, Killifer, under the law were required to furnish the plaintiff a safe scaffold to work upon, they were not insurers of the absolute safety of the structure, but they were bound to exercise every reasonable care in selecting the material and in putting it up in a proper manner to avoid accident and injury to the plaintiff." The jury, it was said, would naturally construe this instruction to mean that, while the company was not an insurer of the absolute safety of the structure, it was bound to furnish a safe scaffold, and to exercise

every reasonable care in selecting the materials and in putting it up in a proper manner, so as to avoid accidents. This is certainly a very strong case, to say the least. A charge imposing upon the master the duty "to do everything that can reasonably be done for the safety of its employees" may possibly be upheld as merely an instruction that it was his duty to use ordinary care in reference to the matters referred to, but is error calling for reversal, if the jury are also informed that it was the duty of the master "to furnish safe machinery for the use of its employees." *Gulf, C. & S. F. R. Co. v. Wells* (1891) 81 Tex. 685, 17 S. W. 511. The court said: "The words 'safe machinery,' in the connection used, would mean machinery so perfect that it could be used without danger resulting from any defect in it. . . . If it be contended that the word 'reasonably' should be held to qualify the words under consideration, we are of opinion that such was not the intention, and that the jury could not so have understood the charge. This is illustrated by the following part of the charge intended to apply the law to the facts of the case. That part of the charge in effect informed the jury that they would find for the plaintiff if 'said hand car had a defective wheel; and, further, that said defective wheel was the cause of the injury to plaintiff,' unless his own negligence contributed to the injury. The hand car may have been defective and the injury may have resulted from it, without contributory negligence on the part of the plaintiff, and the defendant still not be liable if it had used that degree of care in reference to the hand car which the law required of it."

The fact that the court charges in general terms that the degree of care required in regard to the means for carrying off surplus water on a railway is "due and ordinary care," "reasonable care," and "ordinary prudence," is not sufficient to cure the error of other portions of the charge to the effect that

26. Master's obligations limited by the uses for which the instrumentalities were designed.— A general principle which is frequently conclusive against the servant's right to maintain an action is that the master's duty in respect to his instrumentalities is restricted to seeing that they are reasonably safe for the performance of the functions for which they are designed.

In most of the cases in which this principle has been applied, the justice of admitting such a qualification of his liability is too obvious to be open to question. Thus, it would clearly be unfair to require him to answer for an injury, where the emergency which tested the quality or capacity of the instrumentality arose out of an occurrence

railway companies are bound to take notice of the topography of the country and of the climate in which their roads are built, and of the storms and floods that annually occur in those localities, and make all necessary guards against danger caused by ordinary and severe storms of the locality and to guard against washouts, landslides and obstructions, and to keep their roads in suitable and safe repair. The jury might understand that no amount of care and prudence to effect these ends would relieve the defendant from liability if the ends aimed at were not accomplished. *Gates v. Southern Minnesota R. Co.* (1881) 28 Minn. 110, 9 N. W. 579. A jury is correctly instructed that it is the duty of a master to use ordinary and reasonable care to furnish his servant with a safe place to perform his labor, and any failure to observe such duty is negligence. *Western Screw Co. v. Johnson* (1898) 86 Ill. App. 89. Compare the Illinois cases cited *supra*. An instruction in an action for personal injuries to an employee by the fall of a board which covered the coping of a building in process of construction, that it was the duty of defendant to use reasonable care to keep the boards on the sill "securely fastened," is not objectionable as requiring that the covering should be "absolutely safe." *Whitney & S. Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242, Affirming (1896) 68 Ill. App. 487. In *Lewis v. Emery* (1896) 108 Mich. 641, 66 N. W. 569, the trial judge in one of the instructions charged as follows: "The law imposes upon every man that runs a sawmill the duty to employ and use reasonably safe appliances, and to employ reasonably skilful and competent employees," and in other parts of the same instruction used language which

might be interpreted by the jury as laying down the rule that if the defendant employed an incompetent servant he would be liable to other employees, even if he used due care in employing the defaulting servant. But in another part of the charge he also instructed the jury that in order to justify a verdict for the plaintiff it must be found, not only that the defaulting servant was incompetent, but that the defendant's foreman had notice of such incompetency. The court thought it improbable that the jury could have been misled, but, as the case was being sent down on other grounds for a new trial suggested that the wording of the charge should be altered so as to remove all obscurity. Where negligence was alleged in providing a defective cross-arm on its telegraph pole, and the jury were instructed that negligence consisted in failing to do what a reasonable and prudent person would have done under the same circumstances, and it was the master's duty to discover a defect that a reasonable and prudent person could have discovered, and if a defect existed, obvious to an observer, it was the master's duty to have made the necessary inspection, it was not error to further instruct that the master was to furnish a reasonably safe cross arm, since such further instruction was not equivalent to saying that the master insured the safety of the appliance, but was, in substance, a ruling that a master must use reasonable care to furnish safe appliances. *McDonald v. Postal Tel. Co.* (1900) 22 R. I. 131, 46 Atl. 407. An instruction that a railway company owes to its employees the duty of using "reasonable care in keeping the cars in its possession and use in a safe condition, both as to the construction and the loading," is not

which implied no culpability on his part.¹ The same may be said of those decisions the essential presented feature of which is that the plaintiff or a coemployee caused the injury by putting some part of the plant to an absolutely improper use. "Although it is a master's duty to use due care to furnish his servants tools and appliances suitable for the purpose for which they are provided, he owes them no such duty when they put his tools to uses for which they were not intended."² It is "not negligence to omit a precaution applicable only to a situation which did not in fact exist."³ It is universally agreed, therefore, that an employer is not liable where the servant's injury was not caused by any defect in the appliance which affected its safety when it was used in the ordinary manner and for the purposes for which it was intended.⁴

open to the objection that it requires the employer absolutely to keep its cars in a safe condition. *Houston & T. C. R. Co. v. Kelley* (1896) 13 Tex. Civ. App. 1, 34 S. W. 809, 46 S. W. 863. An instruction directing the jury to find for the plaintiff if his injury was "caused by the defective condition of defendant's roadbed," and such condition was known or ought to have been known to the defendant, is not open to the objection that it makes the company an absolute insurer against all possible defects in the roadbed, where the jury are also told in another part of the same instruction that the defendant assumed towards the plaintiff a duty to keep the roadbed "in a reasonably safe condition." *Little Rock & Ft. S. R. Co. v. Voss* (1892; Ark.) 18 S. W. 172.

¹The failure of a railroad company to block a guard rail in its yard is not ground for recovery by a switchman thrown from a car, whose arm was caught and crushed between the guard rail and the main rail; blocking being intended only to prevent feet from being caught. *Rutledge v. Missouri P. R. Co.* (1892) 110 Mo. 312, 19 S. W. 38. Ties are sufficiently strong if they will support a train as long as it is on the rails. The fact that a train moving at the rate of about 25 miles an hour, runs off the track after derailment, because the ties give way, is not evidence of negligence on the part of the company. *Ward v. Bonner* (1891) 80 Tex. 168, 15 S. W. 805.

²*Morrison v. Burgess Sulphite Fibre Co.* (1900) 70 N. H. 406, 47 Atl. 412. In *Durgin v. Munson* (1864) 9 Allen, 396, 85 Am. Dec. 770, the defect in an engine, which was alleged as the cause

of the plaintiff's injury, was the insufficiency of the brake to prevent the engine from running off while it was turned on the turntable. It was held that the trial court should have permitted the defendant to show that, before the accident, instructions had been given to the engineers to have the wheels of the engines "chocked" while turning on the turntable, and that the accident occurred by failure of some servant of the company to obey instructions. Said Hoar, J.: "The defects of the engine in the abstract were not the gist of the plaintiff's complaint; but its defects at the time and for the service in which the defendant allowed it to be used when it ran on to the plaintiff. If it were fit and sufficient for use in the manner in which the defendant then allowed it to be used, its insufficiency for other service, at other times, would not concern the plaintiff. Now, it is plain that a machine may be safe and fit for one use when it is not for another. To put an extreme case, by way of illustration: Suppose the defendant had a worn-out engine, unfit for any service, and he had given orders that it should not be run at all, yet some workman had, without his knowledge, undertaken to run it: could the master be held responsible to the fellow servant? Suppose a car that was not fit to run with steam power was kept for use only when drawn by horses, or an engine which had not the proper appliances for a locomotive was employed solely as a stationary engine; would an unauthorized change of the use make the master liable?"

³*Kern v. De Castro & D. Sugar Ref. Co.* (1890) 125 N. Y. 50, 25 N. E. 1071.

⁴*York v. Kansas City, C. & S. R. Co.*

The propriety of the limitation, viewed as a rule of law, excluding the intervention of a jury altogether, does not seem to be equally beyond dispute in a third class of cases, *viz.*, those in which the circumstances which eventuated in disaster were brought about by an act of

(1893) 117 Mo. 405, 22 S. W. 1081. Machinery is not negligently constructed when, if properly used in the ordinary manner, it is safe under all conditions which will probably arise in any instance, although it may have a defect which does not interfere with its safe and proper use for the purpose for which it was constructed. *Richmond & D. R. Co. v. Dickey* (1892) 90 Ga. 491, 16 S. E. 212.

The cases illustrating this rule under its different aspects are very numerous, and for the purpose of convenient reference are classified in the subjoined note under separate headings expressive of the special nature of the misuse involved.

(1) *Rating on vehicles only intended for freight.*—It is not negligent to omit to put safety appliances upon an elevator which never carries passengers, from which and its well the servants are excluded. *Kern v. De Castro & D. Sugar Ref. Co.* (1890) 125 N. Y. 50, 25 N. E. 1071; *Ross v. Cross* (1890) 17 Ont. App. Rep. 31 (nonsuit approved). A master is not liable for injuries received by an employee in riding upon a freight elevator which is safe and suitable for the purpose for which it is constructed and of the kind commonly used for the carriage of freight. *Riordan v. Ocean S. S. Co.* (1890) 32 N. Y. S. R. 328, 11 N. Y. Supp. 57. Affirmed (1891) 124 N. Y. 655, 26 N. E. 1027. To same effect see *Fitch v. Allen* (1868) 98 Mass. 572; *Hochmann v. Ross Engraving Co.* (1893) 4 Misc. 160, 23 N. Y. Supp. 787. That a "push car" designed for use by section hands in moving heavy materials short distances, and intended to be pushed, not ridden, is not furnished with brakes, is not negligence rendering the railroad company liable for the death of a section hand killed by jumping off after riding the car down a steep grade. *York v. Kansas City, C. & S. R. Co.* (1893) 117 Mo. 405, 22 S. W. 1081. Compare also the decision that there is no duty on the part of a contractor engaged in the excavation of a tunnel to see that the "dump" cars, provided solely for the conveyance of materials, are in such a condition that a civil engineer in the service of the contractor's employer can

ride upon them safely. *Morris v. Brown* (1888) 111 N. Y. 318, 18 N. E. 772.

(2) *Appliances improperly used for the support of a servant's person.*—The canvas cover at the top of a sloping elevator shaft in a mill is not intended to support the weight of a servant, and he steps upon it at his peril. *Morrison v. Burgeon Sulphate Fibre Co.* (1900) 70 N. H. 406, 47 Atl. 412. Compare *Schmidt v. Leistikow* (1889) 6 Dal. 386, 43 N. W. 820 (servant stood on spouting running between the different stories of a flouring mill, for the purpose of passing mill stuffs, and it gave way under him). A master is not bound to furnish a mullion of a window, in a flat roof, strong enough to bear the weight or any part of the weight of a servant directed to go upon the roof and replace a pane of glass in the window. *Saunders v. Eastern H.draulic Pressed Brick Co.* (1899) 63 N. J. L. 554, 44 Atl. 630. One employed in shifting and handling cars in a railroad yard, and run over after falling from the pilot of an engine on which he attempted to ride, cannot complain that the slats of the pilot were insufficient to afford a reasonably safe footing, since, if the defect be regarded as not obvious, it is still evident that pilots are not constructed for riding purposes. *Young v. Boston & M. R. Co.* (1898) 69 N. H. 356, 41 Atl. 268. A railroad is not chargeable with negligence because a number plate on an engine, designed merely to identify the engine, was not so securely fastened as to serve as a support for an employee as he passed over the pilot. *McCauley v. Southern R. Co.* (1897) 10 App. D. C. 560. A railroad company under no duty to a brakeman to have the end gate of a gondola car properly constructed for the purpose for which it was intended, securely fastened so as to allow him to use it as a hand hold in attempting to alight from the car in motion. *Graham v. Chicago, St. P. M. & O. R. Co.* (1894) 62 Fed. 896. An employee hauling buckets of tar up on a roof lost his balance, and, in falling, grasped a triangular wooden "horse" used as an appliance in hauling up the buckets. The "horse" was insufficient

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the injured person which was perfectly proper in itself, and not improbable, or even very probable under the circumstances. It is difficult to admit that the elements thus involved present a situation which, in every instance, will justify a court in declaring that the

to withstand the strain, and fell with him. Held, that a peremptory instruction for defendant was proper, since the fact that the "horse" fell when jerked by plaintiff did not show that it was insufficient for the use for which it was intended. *Hill v. Refugio Oil Mill Co.* (1899) 77 Miss. 387, 27 So. 382. An employee cannot recover for an injury caused by the breaking of a switch board upon which he was standing, due to the stepping thereon of a fellow servant in an attempt to cross from one part of the building to another, where such board was intended for the purposes of a switch board only, and not as a part of a passageway. *Facts v. Simmons* (1895) 60 N. Y. S. R. 34, 34 N. Y. Supp. 972. A workman cannot recover against his employer for injuries caused by falling from a scaffold on the giving way of a stay lath to which he was holding while leaning over to catch his tools thrown to him from below, where such stay lath was intended solely to keep the posts of the scaffold upright. *Cochran v. National Transit Co.* (1894) 77 Hun. 74, 28 N. Y. Supp. 291. A railroad company discharges its duty to an employee in furnishing a brake staff on a car sufficient for the use for which it is intended, although it gives way when he attempts to use it as a hand-hold in climbing on the car while moving. *Elgin, J. & E. R. Co. v. Docherty* (1895) 66 Ill. App. 17. See also, to same effect, *Jaume v. Schwaning Coal Co.* (1896) 108 Mich. 242, 65 N. W. 971 (miner when about to ascend a shaft in a cage took hold of a loose nut, not intended as a hand hold, and not affecting the safe operation of the machine, and had his hand crushed when the cage started); *New York & N. J. Teleph. Co. v. Speicher* (1896) 59 N. J. L. 23, 39 Atl. 661 (lineman used a cross-bar carrying wires as a support in climbing a pole).

(3) *Doing work in a manner different from that contemplated by the employer.*—If a safe way is provided for doing certain work, the servant adopts a different way at his own risk. Hence, the owner of a sawmill in which is a saw, the upper portion of which is covered by a sleeve which is raised by a

jack screw and levers so as to make an opening through which a man's arm can be thrust, intended for the use of levers in regulating the tension, is not, as matter of law, required to foresee that an employee might thrust his arm through such opening and the sleeve fall because of a defective nut, where other openings, known to the employer, have been provided through which one's arm could be put with safety. *Rosdorp v. George Paulnitz Lumber Co.* (1897) 95 Wis. 622, 70 N. W. 677. A railroad company is not liable for an injury occasioned by running a train with excessive speed over a short connecting track which is seldom used, and then for a particular purpose. It is not required to keep such a track in the same state of repair as that part of the road which is constantly serving the purposes of transportation. *Stetler v. Chicago & N. W. R. Co.* (1879) 46 Wis. 497, 1 N. W. 112; *Vosholsen v. Hillside Coal & I. Co.* (1897) 24 App. Div. 168, 47 N. Y. Supp. 386 (servant injured while riding on a loaded car, an act declared unlawful by a Pennsylvania statute). An employer is not liable where a wedge was sufficiently strong to hold a heavy casting while quiescent, but broke when a servant, in trying to lift the casting without help, allowed it to roll against the wedge, and so caused it to fall on him. *McGoldrick v. Metcalf* (1891) 37 N. Y. S. R. 611, 14 N. Y. Supp. 269. An employee cannot recover for injuries received from operating a saw, with the guard thereof placed by himself in a position different from that intended. The fact that it might have been useless, or even dangerous in other ways, if placed where it was intended to be placed, is immaterial. *Chung v. Cornell Mills* (1893) 160 Mass. 218, 35 N. E. 772. A master is not liable for injuries caused by the breaking of an appliance under an excessive strain put upon it by the injured person's fellow servants. *Throckmorton v. Missouri, K. & T. R. Co.* (1896) 14 Tex. Civ. App. 222, 39 S. W. 174.

(4) *Doing work with an appliance not designed for such a function.* No liability, as for defective machinery, is established where carpenters use a team

master was not bound to make such arrangements as would have obviated the accident. Such a declaration may be permissible where the servant's act, if not positively negligent, was one which he could not have been reasonably expected to commit, inasmuch as there was an alternative and safe course open to him.⁵

But it is impossible not to feel some doubt as to the correctness of the decisions which virtually amount to an affirmation of the doctrine

to raise a bent for the support of a tank, instead of waiting for the engine which had usually furnished the power, and, owing to the team's not being strong enough, the bent falls back upon one of the men. *McPherson v. Pacific Bridge Co.* (1891) 20 Or. 486, 26 Pac. 560. A foreman of a construction train, who uses a stanchion for the purpose of keeping in position upon a sharp curve the cable by which a plough is dragged over flat cars loaded with gravel, cannot recover for injuries caused by the giving way of the stanchion by reason of the rotten condition of a sill, where it appears that the company has furnished shives or ground wheels, especially adapted to keep the cable in place under such circumstances, and to support the strain. *Illinois C. R. Co. v. Daniels* (1895) 73 Miss. 258, 19 So. 830. An employer who supplies safe and proper tools is not liable to an employee injured by using, under the direction of the foreman over him, a tool not furnished for or safely adapted to the work. *Maher v. Thropp* (1896) 59 N. J. L. 186, 35 Atl. 1057. Negligence cannot be imputed to a master where the evidence is merely that a ladder gave way when spliced to another by the employees for the purpose of forming a temporary appliance, and, for aught that appears, it would have been of sufficient strength to be used by itself. *McKay v. Hand* (1897) 168 Mass. 270, 47 N. E. 104. The fact that an engine stands on a trestle when the train halts at a certain station does not raise a duty to lay a platform upon it to enable the engineer to examine his engine more safely, -not, at all events, in the absence of evidence showing that such examination was required by the regulations of the company. *Chicago, B. & Q. R. Co. v. Abend* (1880) 7 Ill. App. 130. A servant who uses a short stick to clean sawdust out of the hopper underneath a circular saw assumes the risk of doing so. *Henry Wrape Co. v. Huddleston* (1899) 66 Ark. 237, 50 S.

W. 452. In *Cahill v. Hilton* (1887) 106 N. Y. 512, 13 N. E. 339, where the plaintiff was injured while standing on a ladder attempting to repair machinery, one of the grounds on which the right to recover was denied was that there was no proof that the ladder had been designed for the use to which the plaintiff put it.

(5) *Using a part of the master's premises for a purpose for which it was not intended.*—An employee of a coal-mining company who, becoming affected by bad air, abandoned work and walked down an entryway to the first finished cross cut, to obtain a supply of fresh air, cannot recover from his employer for injuries sustained in using the cross cut as a passageway, knowing it was not designed for that purpose, but was constructed for the circulation of air in the mine. *Leak v. Kansas & T. Coal Co.* (1899) 80 Mo. App. 374, 2 Mo. App. Rep. 589. As the gaps left between cars from time to time in the process of shifting cars in a yard are not designed for the purpose of furnishing employees with a passage, one of those employees assumes a risk of such an opening being suddenly closed up without any notice to him. *Plunkett v. Central of Ga. R. Co.* (1898) 105 Ga. 203, 30 S. E. 728 (First App. [1897] 102 Ga. 577, 27 S. E. 682). Compare § 30a, note, 4, *post*.

A street railway company is not guilty of negligence toward a workman employed upon a temporary track, in locating such track so close to the girders between the pillars of an elevated railroad structure that one cannot stand between a car passing on the track and such girder, where there is nothing to prevent the workman from stepping to the other side of the track upon the approach of the car. *Sullivan v. Third Ave. R. Co.* (1897) 19 App. Div. 195, 45 N. Y. Supp. 1083. The court said: "It was not a part of the scheme of construction that a man should stand for the purposes of work, between the girder and the car."

that a master's duty is fulfilled if his instrumentalities are reasonably safe for one special and primary purpose, although the work which he assigns to his servants may render it absolutely necessary to use them for other purposes as well,—as, where brakemen and other employees working about trains have been held unable to maintain an action, on the ground that the purpose of a roadbed of a railway is to serve as a track for the running of trains, and not as a path for employees to walk upon.⁶ Such decisions, it is submitted, really beg the very question to be determined; that is to say, whether there was really a diversion of the instrumentalities within the meaning of the principle. It seems impossible, without an essential logical inconsistency, to assert, as matter of law, that the master is not liable, and at the same time to lay it down that his liability is for the jury to determine when there is evidence that the use of the instrumentality which caused the injury was in pursuance of a custom acquiesced in by the master. See § 28, *post*. Acquiescence is not, to say the least, any stronger evidence of the master's authority to make that use of it than is the fact of the servant's being required to do work which cannot be done without putting it to that use. Whether the instrumentality in question was actually designed for the use to which it was put is, in doubtful cases, a question for the jury.⁷ The mere fact that an appliance happens to be placed where it can be used for the performance of the work which the injured servant undertook to do with it does not warrant the inference that the master intended that he should use it as he did, or the inference that he was in fault in not knowing that he was likely to do so. Any other rule would involve the consequence that every master who leaves any implement

⁶Allowing a cross-tie to remain on a trestle, with a bit of decayed sap in it, is not negligence as regards a conductor who has to cross it to flag a train, where there is no evidence that the tie was not otherwise sound and suitable for the use for which it was intended. *East Tennessee, V. & G. R. Co. v. Reynolds* (1894) 93 Ga. 570, 20 S. C. 70. A switchman who is injured while attempting to couple cars upon a track used for the purpose of making repairs to cars placed thereon, and not for making up trains, cannot recover for such injury, where it was caused by his accidentally stepping upon a car spring concealed from sight by grass growing on the track. *Williams v. St. Louis & S. F. R. Co.* (1893) 119 Mo. 316, 24 S.

W. 782. For other cases to the same effect, see chapter VIII., *post*.

⁷Where a brakeman in alighting from a train in the discharge of his duty, while crossing a bridge, stepped into a recess or pocket which was surrounded by a railing which broke, causing him to fall to the ground, it is proper to instruct the jury that the company was liable to him for the injuries which he received, if the recess was intended for the use of employees, and the railing was defective, and its defective condition was known, or might by the exercise of ordinary care have been known, to defendant, and was unknown to plaintiff, and could not, by the exercise of reasonable care, have been known to him. *Southern R. Co. v. Cooper*

upon his premises, which his servants cannot safely use for every purpose which suits their convenience, sets a trap for them.⁸

27. Rationale of this limitation.—The nonliability of the master under the circumstances referred to in the preceding section may be rested upon various grounds.

In one point of view its essential basis is that, if new functions are imposed upon the instrumentalities by the servants themselves, a situation supervenes which the master cannot be held to have anticipated. The necessary inference, therefore, is that he is not bound to provide for the dangers created by it. See chapter x., *post*.

In another, it may be said that the servant who departs from the directions of the master as to the manner of using the instrumentalities is chargeable with a full comprehension of the conditions, and therefore assumes all the risk incident to his action.¹

In another, the inability to maintain the action is considered as resulting from the servant's contributory negligence.²

As indicated by such decisions as those cited in subd. 4 of note 4 of the preceding section, the logical situation involved in cases of this type is to some extent analogous to that presented by those in which the master is absolved for the reason that, as respects the time or place of the accident, the injured servant was a mere trespasser, or at most a licensee, because he was not acting within the scope of his employment. See chapter xxxiii., *post*.

28. Diversion to new uses by the master himself, or with his consent.—If new functions are imposed upon an instrumentality by the

(1901) 23 Ky. L. Rep. 290, 62 S. W. 858.

⁸ *Morrison v. Burgess Sulphite Fabr. Co.* (1900) 70 N. H. 406, 47 Atl. 412, 414 (facts stated in note 3, *supra*). The court said: "There is no force in the plaintiff's claim that the defendants set a trap for him when they covered this part of their elevator with canvas, and did not tell him of the fact; for a master sets a trap for his servant only when he invites him into a dangerous situation, or creates or suffers one to exist in a place where he knows or ought to know his servant is likely to go. . . . The case does not show that the defendants either intended for the plaintiff to use this elevator as he did, or knew, or were in fault for not knowing, that he was likely to do so. A person is not in fault for not knowing particular facts, unless circumstances exist which would put a man of average prudence upon inquiry, . . . and no such circumstances were shown.

. . . If the jury had found that the defendants ought to have known that he would use it, they could then say a trap was set for him when the defendants left the gutter as they did; for that would be finding that they suffered a dangerous situation to exist upon a part of their premises which they knew their servants were accustomed to use in doing their work." See also the case cited in note 4, *supra*.

¹ *Illinois C. R. Co. v. Daniels* (1895) 73 Miss. 258, 19 So. 30.

² "If the servants undertake to use machinery or instruments for purposes for which they were not designed, and for which the employer had no reason to suppose they would be used, it is their own fault or folly if harm comes from it." *Fitch v. Allen* (1868) 98 Mass. 572. See, to same effect, *Guthrie v. Lockhart* (1891) 40 N. Y. S. R. 912, 16 N. Y. Supp. 717, *Adams v. . .* (1893) 137 N. Y. 529, 33 N. E. 336.

master himself or his representative, and the servant is thereby exposed to undue risks, the master must answer for any injury resulting from those risks, and cannot excuse himself by showing that the instrumentality was a suitable one for the performance of the work for which it was originally supplied.¹ The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose.² Accordingly, a qualification of this rule, that a servant cannot recover in the absence of evidence showing that the appliance in question was constructed with reference to the use to which it was being put when the accident occurred, is admitted in cases where it appears that it was customary for employees to put it to that use, and that the master knew of this custom.³ But the mere fact that an appliance had been diverted to new uses before the accident in suit will not render the master liable, if that diversion occurred without his knowledge or consent.⁴ Nor is an occasional

¹ *Richards v. Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 234; *Bowen v. Chicago, B. & N. W. Ry. Co.* (1888) 95 Mo. 268, 8 S. W. 230 (holding that, where a temporary bridge designed, among other things, for the support of a pile-driver, gives way owing to the oscillation produced by the operation of the machine, the fact that it was built on a standard plan found to be safe for ordinary purposes does not absolve the master). Where an ordinary road engine is used by order of the foreman of a switching crew, a member of that crew who is injured owing to the want of the footboard and hand-holds ordinarily found on engines specially constructed for switching purposes may recover damages. *Illinois C. R. Co. v. Johnson* (1900) 95 Ill. App. 54. Affirmed in (1901) 191 Ill. 594, 61 N. E. 334, where only a point of practice was considered. The use of a crane for tearing up rails on a disused track may properly be found to be negligence. *Wish v. Noir* (1885) 12 Sc. Sess. Cas. 11th series, 590. On the other hand, it has been held that negligence could not be inferred from the use of a traction engine to pull up an old wreck from the bottom of a harbor. But this case seems to be really based upon the fact that the *modus operandi* had been carefully explained to the workmen, and that they were quite as competent to judge of the danger of this extemporized use of the engine as the master himself. *Bruce v. Barclay* (1890) 17 Sc. Sess. Cas. 4th series, 811.

² *Lauter v. Duckworth* (1897) 19 Ind. App. 535, 48 N. E. 864.

³ *Young v. Boston & M. R. Co.* (1898) 69 N. H. 356, 41 Atl. 268. A brakeman was set to work in switching with a road engine regularly used for that purpose, but unprovided with any special hand-hold in front necessary to his work. No particular projection was used, and the use of any particular one was not forbidden. The brakeman used the figure plate, which was adapted thereto, and was most convenient for a man of his size. Held, that the company owed him the duty of inspecting the plate, commensurate with the purpose for which it must be assumed that it knew it was used. *Dunn v. New York, N. H. & H. R. Co.* (1901) 46 C. C. A. 546, 101 Fed. 666.

⁴ That employees had without permission used an elevator constructed to carry freight only, on the first day it was operated, and before an injury to an employee who was riding thereon at the time it fell, does not change the fact that it was made to carry freight only, or increase the duty of the proprietor with reference to its maintenance. *Sievers v. Peters Box & Lumber Co.* (1898) 151 Ind. 642, 50 N. E. 877. Rehearing denied in 151 Ind. 662, 52 N. E. 399. In *Miller v. Union P. R. Co.* (1883) 5 McCrary, 300, 17 Fed. 67, it was left to the jury to say whether the company had acquiesced in the use of push cars for the conveyance of workmen.

improper use of an appliance, not in pursuance of a recognized custom, sufficient to render the master liable on the ground of acquiescence.⁵ Nor will negligence be imputed to an employer of experienced men, so as to render him liable for injuries sustained by them, because he permits them to relax his regulations or disregard his general instructions or advice, when they choose to do so for their own convenience and with knowledge of the risk.⁶

29. Servants engaged in construction, alteration, or repair of instrumentalities; standard of safety lower as regards.—It is well settled that, where the instrumentality which caused the injury was still incomplete at the time of the accident, and the injured servant was engaged in the work of bringing it to completion, the question whether the master was in the exercise of due care is determined with reference to a lower standard than that which is applied in the case of instrumentalities which have been put into a finished condition and are in regular use in the normal course of the business.¹ A similar qualification of the master's liability is admitted where the injured

⁵ *Teetsel v. Simmons* (1895) 69 N. Y. S. R. 35, 34 N. Y. Supp. 972.

⁶ *The Persian Monarch* (1893) 5 C. C. A. 117, 14 U. S. App. 158, 55 Fed. 333 (stevedore passed the fall rope of a derrick to a lighter, to haul it alongside a wharf, and the strain broke the guy rope of the derrick, and the boom struck the plaintiff, who was participating in the illegitimate use of the derrick sufficiently to make him an actor in the transaction, and to place him in the position of one who assumed the risk).

¹ In *Walling v. Congaree Constr. Co.* (1893) 41 S. C. 388, 19 S. E. 723, where the injury was caused by the spreading of the rails on a road under construction, a new trial was ordered for the reason that the lower court had proceeded on the hypothesis that there was no distinction between the measure of duty in respect to a road under construction and one that is finished and in operation. In *Colorado Midland R. Co. v. O'Brien* (1891) 16 Colo. 219, 27 Pac. 701, a charge to the effect that the defendant was not bound to have its roadbed in as perfect a condition before it was finished as when it was opened for public travel was approved. The fact that a railway track, owing to its having been recently ballasted, is in a less secure condition than it will be eventually when the ballasting has settled, has been held not to be negligence *per se*. *Illinois C. R. Co. v. Quirk* (1893) 51 Ill. App. 607. A civil en-

gineer engaged upon a road which is under construction cannot recover merely on the ground that the track is wet and spongy, owing to the fact that the culverts are not yet completed. *McLay v. Chicago & N. W. R. Co.* (1889) 77 Iowa, 744, 4 L. R. A. 287, 42 N. W. 563. The failure of a railway company, while constructing its road, to maintain a turntable at each gravel pit and unloading of each car, is not negligence. *Carr v. North River Constr. Co.* (1888) 48 Hun. 266. In an action for injuries received by a switchman while in the employ of a railroad in the course of construction, it is error to refuse an instruction that if the road at the point where the injury occurred, or at that period of construction, was in the usual and customary condition of roads under good management, the plaintiff can not recover. *St. Louis, P. & N. R. Co. v. Cronin* (1900) 87 Ill. App. 524. See also *Bedford Belt R. Co. v. Brown* (1895) 142 Ind. 659, 42 N. E. 359 (bridge carpenter not entitled to recover for an injury caused by the slipping out of a wedge used in the construction of a track for the carriage of heavy timbers); *Bennett v. Long Island R. Co.* (1900) 163 N. Y. 1, 57 N. E. 79 (use of switch without lock a target, on a road under construction held not to be negligent); *Allen v. Coston, H. & S. A. R. Co.* (1896) 14 Tex. Civ. App. 344, 37 S. W. 171 (recovery denied where the injured serv-

servant was hired for the express purpose of assisting in the repair, demolition, or alteration of some instrumentality, and the unsafe conditions from which the injury resulted arose from or were incidental to the work thus undertaken by him.²

ant was engaged in constructing a bridge).

"A condition of disrepair does not import negligence as regards a servant whose business it is to make repairs. *Bendham v. Camden Cotton Mill* (1901) 61 S. C. 491, 39 S. E. 708. In *Dartmouth Spinning Co. v. Achord* (1889) 84 Ga. 14, 6 L. R. A. 190, 10 S. E. 449, Blackley, Ch. J. said: "While it is the duty of a master to furnish his servant safe machinery for use, he is under no duty to furnish his machinist with safe machinery to be repaired, or to keep it safe whilst repairs are in progress. Precisely because it is unsafe for use, repairs are often necessary. The physician might as well insist on having a well patient to be treated and cured, as the machinist to have sound and safe machinery to be repaired. The plaintiff was called to this machinery as infirm, not as whole. An important part of his business was to diagnose the case and discover what was the matter." In *Brick v. Rochester, N. Y. & P. R. Co.* (1885) 98 N. Y. 211, a laborer on a construction train met his death owing to the unsafe condition of a crossing. The court said: "It may be assumed, we think, that the deceased, in performing the services in which he was engaged, and in traveling on the construction train, understood that he was not working upon a road which was finished and in good repair, but upon one which, having been long neglected and but little traveled, and latterly only by construction trains, subjected him to greater risks and perils than would be incurred under ordinary circumstances. In entering the defendant's service he assumed the hazards incident to the same. One of these hazards was the condition of this crossing, which was at this time, in connection with the remainder of the road, out of order, and its liability at that season of the year to be obstructed in the manner it was. The obstruction was not a defect of an intrinsic character, and no reported case holds that, under the circumstances here presented, the master would be liable. While it is difficult to define the exact duty to employees devolving upon corporations in reference

to maintaining their roads in good condition in all cases, it can scarcely be said that they are bound to protect them against obstructions which arise from temporary and extrinsic causes. There certainly should be great hesitation in exacting the same measure of protection in a case presenting the features of the one now considered as would be demanded where the road was in good repair and in actual use." Where a servant is employed to assist in repairing or opening a railroad which is in a dilapidated condition and out of repair, the master does not owe to him the same duty to furnish a safe roadbed as to that portion of the road out of repair as it does to a servant engaged in the operation of trains upon the road in the ordinary course of business, or in riding upon the road in the course of his employment. *Carlson v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 450, 28 Pac. 497. A railroad company which is constructing new switches does not owe to a brakeman the duty of blocking a frog which is a part of the new construction, during the progress of the work, since it is impracticable to block it till the tracks are ballasted and the alignment of the rails of the frog is perfected; and it is enough to give him such notice and warning as will put him on his guard against the dangers from use of the track while the work is in progress. *Haus v. Lake Erie & W. R. Co.* (1901) 46 C. C. A. 34, 105 Fed. 733. To a servant engaged in taking damaged cars to the repair shop, a railway company does not owe the same duty to see that they are in good repair as it owes to men hired to handle the same in the ordinary course of its business. *Flannagan v. Chicago & N. W. R. Co.* (1880) 50 Wis. 462, 7 N. W. 337. The duty of a railroad company toward its employees, to keep its cars in a reasonably safe condition, does not apply to a car which is placed upon the repair track for the purpose of being repaired. *Brown v. Chicago, R. I. & P. R. Co.* (1898) 59 Kan. 70, 52 Pac. 65. Where a servant is engaged in pulling down a building, there is no obligation to make it or any part of it secure. On the contrary, the work of

The precise scope of this rule under its various aspects is not quite clear from the decisions as they stand. Language is sometimes used by the courts which, if taken literally, would entirely free the master from liability for failing to supply safe instrumentalities, whenever the work to be done by the servant consists in making safe the instrumentality the condition of which is alleged to import negligence.³ But it cannot be really intended to concede this unqualified immunity to the master. It has been expressly declared in one of the cases cited in this section,⁴ and it is implied in the reasoning of all the

demolition is one by which each part of the structure is, in turn, rendered insecure, and this the workman understands. *Clark v. Liston* (1894) 54 Ill. App. 578. In *Wannamaker v. Burke* (1886) 111 Pa. 423, 2 Atl. 500, it was held that it would be unreasonable to hold a master to the same degree of strictness while a building is being altered as might be required after such alterations were completed. The fact that alterations were being made in the presence of the employees is notice to them of the possibility of danger of some sort, and of the necessity of exercising greater caution. To leave a small hole in the floor, useful for the purpose for which the room is used, unprotected for a few days

while changes and repairs in the room are being made, is not such evidence of negligence as would justify a verdict for an employee who was helping to make the changes and was injured by falling into the hole. "If the hole," said the court, "had been in the middle of the room, near a passageway, or where persons were accustomed to pass and repass in the regular course of business, it would have been, perhaps, a question for the jury whether leaving it uncovered or insufficiently protected, even for a short space of time, was not negligence. But here was a small hole in the floor on the extreme side of the building, within 1 inch of the wall, outside of the ordinary walks of anyone, which had always been carefully guarded until the alterations rendered it necessary to take the guards away; which was being used constantly during the alterations to get rid of the sweepings; which was only open for from two to four days while the alterations were in progress, and only open then when not in actual use; which was intended to be, and was, permanently

covered as soon as the alterations were finished." No action can be maintained by a miner who is injured by the fall of a mass of gouge while he is engaged in his regular work of timbering up the space opened up by the blasting. *Finalyson v. Utica Min. & Mill. Co.* (1895) 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 507. Sanborn, J., dissented, but merely on the ground that, according to his view of the evidence, the defendant's foreman had been aware, some time before the accident, that the mass of gouge was likely to fall, and neglected to take steps to have it dislodged, and that the plaintiff's work had no relation to the gouge.

³See, for example, *Bedford Belt R. Co. v. Brown* (1895) 142 Ind. 659, 42 N. E. 359; *Finalyson v. Utica Min. & Mill. Co.* (1895) 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 507. In *Madden v. Minneapolis & St. L. R. Co.* (1884) 32 Minn. 303, 20 N. W. 317, the court, in referring to the contention of counsel that, where servants are employed to put a thing in safe condition and good repair, it would be inconsistent and absurd to require of the master to have it in safe condition and good repair for the purpose of such employment, remarked that this argument was undeniable, when the servant had nothing to do with the thing but to repair it.

⁴*Brown v. Chicago, R. I. & P. R. Co.* (1898) 59 Kan. 70, 52 Pac. 65. In *Missouri, K. & T. R. Co. v. Quarles* (1899) 22 Tex. Civ. App. 83, 54 S. W. 251, it was held that a machinist's helper was injured by the blowing off of a cap on a locomotive which he was engaged in tightening, the cause of the accident being the defective work of a machinist who had repaired it the day before. The court based its decision on the ground that it was not shown to have been the duty of the servant to

other cases, that the servant's restricted right of action in this instance is ultimately referable to his presumed knowledge of the conditions. This circumstance suggests that the principle under discussion is a protection to the master, only in cases where the risk from which the injury resulted was so far a normal incident of the servant's work that he must be taken to have contemplated the necessity of encountering it when he entered the employment. As a mere matter of principle, it is doubtless possible to reconcile upon this basis the cases already cited with those in which recovery has been allowed for the reason that the instrumentalities by means of which the work of construction, repair, or alteration was being carried out were unnecessarily dangerous.⁵ But it must be admitted that to harmonize them with reference to the actual facts involved is a task of great, perhaps insuperable, difficulty.⁶

The standard of safety required in respect to a portion of a railway already in operation is, of course, the same where employees on construction trains are concerned as it is where members of the regular operating staff are the complaining parties.⁷

As to the effect of the doctrine discussed in this section upon the

discover and repair the defect, as that required the skill of a machinist. In the last analysis, therefore, the case is evidently to be distinguished from those cited in note 2, *supra*, on the ground that the servant was excusably ignorant of the conditions.

⁵ The single spiking of three ties, and an entire failure to spike the fourth on a curve of five or six degrees, in the construction of a railroad, is negligence exposing an employee engaged in the construction to a hazard not contemplated in his employment. *Colorado Midland R. Co. v. Vaulon* (1892) 17 Colo. 501, 30 Pac. 249. A complaint which bases the plaintiff's right to recover upon the failure to fence or light a large tank on a ship, near which the employees are obliged to pass after dark, is not rendered demurrable by the fact that the averments show that the ship was in course of construction. *Jamieson v. Russell* (1892) 19 Sc. Sess. Cas. 4th series, 898. A company does not, as matter of law, exercise reasonable care towards an employee riding on a caboose before the construction of the road is completed, where it omits to provide a target for a switch by the opening of which, due to such omission, such employee is injured. *Bennett v. Long Island R. Co.* (1897) 21 App. Div.

25, 47 N. Y. Supp. 258. See also *Van Amburg v. Vicksburg, S. & I.* (1885) 37 La. Ann. 650, 55 Am.

517 (temporary bridge on road in course of construction collapsed); *Rosenbaum v. St. Paul & D. R. Co.* (1888) 38 Minn. 173, 36 N. W. 447; *Meloy v. Chicago & N. W. R. Co.* (1889) 77 Iowa, 743, 4 L. R. A. 287, 42 N. W. 563 (temporary track was in bad repair); *Stackman v. Chicago & N. W. R. Co.* (1891) 80 Wis. 428, 50 N. W. 404 (bank left close to track caused injury to servant who was pushing a car); *Texas & P. R. Co. v. Hohn* (1892) 1 Tex. Civ. App. 36, 21 S. W. 942 (scaffolding near track, erected for the purpose of repairing a tank).

⁶ It is not easy to see why the defective crossing in *Brick v. Rochester, N. Y. & P. R. Co.* (1885) 98 N. Y. 211, note 2, *supra*, should be deemed a normal incident of the work of constructing a railway, any more than the dangerous conditions involved in the cases adverted to in the last note.

⁷ *Evansville & R. R. Co. v. Maddux* (1893) 134 Ind. 571, 33 N. E. 345, 34 N. E. 511. The fact that the work in which the servant is employed is that of repairing or making preparations to repair a railroad track does not diminish the company's duty to furnish safe

extent of the master's duty to warn a servant of transitory dangers which may supervene while the work is in progress, see § 209d, note 3, *post*.

and suitable means and instruments to for that purpose. *Madden v. Minneapolis & St. L. R. Co.* (1884) 32 Minn. 303, 20 N. W. 317.

CHAPTER IV.

OBLIGATIONS OF A MASTER, CONSIDERED WITH REFERENCE TO THE DUTY OF SERVANTS AND THIRD PERSONS TO USE REASONABLE CARE.

30. Generally.

30a. Master entitled to rely on the presumption that due care will be exercised by each servant to avoid injuring himself.

a. Generally.

b. Dangerous structures above or beside railway tracks.

30b.—and by each servant to avoid injuring his fellow servants.

31. Negligence inferable where instrumentalities furnished cannot be safely used by servants exercising ordinary care.

32. Master entitled to rely on the assumption that due care will be used by strangers with whom he requires his servant to work.

30. Generally.— One of the grounds upon which the servant's right to recover was denied in the earliest reported decision in which the liability of employers was discussed was that "the mere relation of the master and the servant can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself."¹ This principle involves, as corollaries, the two following propositions:

(1) In selecting and continuing to use any particular instrumen-

¹ *Priestley v. Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987 (per Lord Abinger), quoted in *Burns v. Gaston Gas Coal Co.* (1885) 27 W. Va. 285, 55 Am. Rep. 304; *Hoffman v. Dickenson* (1888) 31 W. Va. 142, 6 S. E. 53. A master is not negligent who takes as much care of his servant as he takes for his own safety. *Sykes v. Pucker* (1882) 99 Pa. 465; *Green & C. Streets Pass. R. Co. v. Bresmer* (1881) 10 W. N. C. 379. While "the law requires of an employer a high degree of care in furnishing his workmen with safe tools, it will also, in the case of a skilled workman operating with a dangerous tool, require a correspondingly high degree of care on his part in its use." *Chicago & A. R. Co. v. Mahoney* (1879) 4 Ill. App. 262. The duty created by a statute requiring certain safeguards to

be added to an instrumentality is not owed to a servant who, fully understanding for what purposes it is designed, employs it for another purpose for his own convenience. *Guenther v. Lockhart* (1891) 40 N. Y. S. R. 942, 16 N. Y. Supp. 717. Affirmed (1893) 137 N. Y. 529, 33 N. E. 336. In *Leak v. Carolina C. R. Co.* (1899) 124 N. C. 455, 32 S. E. 884, the following instruction was held to be erroneous as being too general: "The law imposes upon the employer the duty of exercising greater care of protecting the employee from injury due to the defective condition of appliances than is required of the employee in guarding against accident." It will be shown, however, in the chapter dealing with the constructive knowledge of the servant (XXI.), that, while the law thus assimilates, in

tality, a master is entitled to proceed upon the hypothesis that his servants will use as much care for their own safety as he himself would use for his own safety under similar circumstances, supposing him to act as a prudent man would act.²

The logical connection between this doctrine in one of its phases and the doctrine which is discussed in the next chapter is indicated by the fact that the absence of any obligation to furnish a safer kind of instrumentality may sometimes be a necessary inference from the consideration that, up to a certain point, the master may rely on the servant's avoiding the dangers incident to the use of the inferior instrumentality by the exercise of a degree of care proportioned to the circumstances. Hence, a form of expression sometimes found in cases embodying the doctrine referred to, that it was not negligent to adopt a less safe description of instrumentality, although in the use of it greater care on the servant's part might be required.³

(2) A master is guilty of a breach of duty, if he fails to see that the instrumentalities supplied are of such a character and maintained in such a condition that his servants will be able to carry on their work without the risk of injury as long as they exercise proper care in the use of those instrumentalities.

In the absence of other controlling considerations, therefore, the question whether an injured servant can recover will, in certain states of the evidence, hinge upon the question whether the instrumentality which caused the injury was one which, with reasonable care and caution, could be used by him without danger at the place and in the manner in which it was used.⁴

It will be observed that this doctrine is closely related to that which rests upon the simpler conception that the existence or absence of a contractual duty on the master's part is determined by the servant's knowledge or ignorance of the risk. See chapter vii. The connecting link between the two doctrines is, of course, this very knowledge or ignorance, which is an element, expressed or understood, in any case which involves the inquiry whether due care was used. See chapter x. Under most showings of fact, indeed, it will apparently

a sense, the obligations of the master and servant in respect to the duty of exercising care, it also recognizes that, in view of their respective positions, the master is bound to be more vigilant than the servant in regard to the inspection of the instrumentalities.

²The general rule in this connection is that "the law will never hold it imprudent in anyone to act upon the pre-

sumption that another in his conduct will act in accordance with the rights and duties of both." *Newson v. New York C. R. Co.* (1864) 20 N. Y. 390. See *Shearn. & Redf. Neg.* § 92.

³*Indianapolis, B. & W. R. Co. v. Flanigan* (1875) 77 Ill. 365.

⁴*Glover v. McInerath* (1895) 133 Mo. 292, 34 S. W. 72.

make no material difference, so far as regards the practical consequences, whether the servant's right to recover is tested with reference to one of these doctrines or the other. The closeness of the association which exists between them, and the virtual identity of the results produced by their application in particular instances, are indicated by the fact that, in some cases, it is difficult to say with certainty whether the court intended to deduce the servant's inability to maintain the action from the general consideration that the danger in question was known to the servant or from the special consideration that the master was entitled to rely upon the presumption that, as the danger was thus known, the servant would use due care to avoid it.⁵

30a. Master entitled to rely on the presumption that due care will be exercised by each servant to avoid injuring himself.—*a. Generally.*—The most numerous illustrations of the first of the two propositions formulated in the preceding section are to be found in the cases in which the person whose probable course of conduct is the element with reference to which the master is deemed to be justified in transacting his business is the injured servant himself. Recovery is here denied upon the ground that, under the circumstances, the master is within the protection of the rule that the extent of his legal obligation is merely to provide instrumentalities which can be used without any abnormal danger by a servant who uses ordinary care.¹ That is to say, no breach of duty is predicable where the instrumentalities are

⁵ See, for example, the opinion in *Atchison, T. & S. F. R. Co. v. Plunkett* (1881) 25 Kan. 188. In *Jennings v. Tacoma R. & Motor Co.* (1893) 7 Wash. 275, 34 Pac. 937, we find the court laying it down that the assumption that the employer has furnished a safe place of work cannot be relied on after actual knowledge to the contrary has been brought home to the servant. The assumption will control only when the danger is not apparent. No sane man is expected to act on an assumption which he knows to be false. It is the servant's duty to exercise common sense when in the employment of a master, as at any other time. The master has a right to rely upon the servant's doing this.

¹ *Payne v. Reese* (1882) 100 Pa. 301; *Bemis v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998; *Davis v. Augusta Factory* (1893) 92 Ga. 712, 18 S. E. 974; *Gulf, C. & S. F. R. Co. v. Welis* (1891) 8 Tex. 685, 17 S. W. 511; and the cases

cited *infra*. The question of the fulfillment of the master's duty to provide safe machinery and a safe place "must be tested by the experience of employees who are themselves in the exercise of due care and vigilance, and not with reference to those who are themselves either negligent or the unfortunate victims of simple and unaccountable accidents. . . . No machinery can be deemed safe for those who are thoughtless and inattentive, or reckless and venturesome." *Cunningham v. Bath Iron Works* (1899) 92 Me. 501, 43 Atl. 106. The responsibility of the master ceases when he employs a man experienced in the operation of the appliance, or properly instructed how to handle it, and warned of the danger of improper methods. *Smith v. Foster* (1901) 93 Ill. App. 138. The master is not bound to protect the servant against his own carelessness, neglect, and default. *Ploughs v. Raleigh & A. Air-Line R. Co.* (1886) 95 N. C. 195.

such as can, with reasonable care, be used "without danger except such as may be reasonably incident to the business,"² or "without more danger than is ordinarily incident to the business."³ The master is under no obligation to provide against any special risks incident to the peculiar manner in which the servant may perform the contract of service.⁴ Nor is he required to guard the servant against dangers of which the servant himself is equally or more competent to take notice, and against which he is guarding himself more effectually than could anyone else.⁵ "Something," as has been remarked, "may be left to the sense and volition of persons having intelligence."⁶ Al-

² *Wormell v. Maine C. R. Co.* (1887) 79 Me. 397, 10 Atl. 49.

³ *Chicago & G. W. R. Co. v. Armstrong* (1895) 62 Ill. App. 228.

⁴ *Murphy v. Greeley* (1888) 146 Mass. 195, 15 N. E. 654 (servant attempted to go through a dark passage in a building under construction, without a light, and fell into an opening). Compare § 26, note 4, subd. 4, *ante*.

⁵ *Texas & P. R. Co. v. Eason* (1899) 34 C. C. A. 530, 92 Fed. 553 (culpability not predicable of the omission of a section foreman to direct his subordinates to desert a hand car when a train is so close that there is no time to get it off the track).

⁶ *Couch v. Charlotte, C. & A. R. Co.* (1884) 22 S. C. 557 (leaving waterway through a roadbed not negligence as regards a section hand who fell into it while pushing a hand car). Negligence cannot be predicated of the maintenance of a cattle chute in close proximity to the track, unless "it is dangerous to trainmen when they are exercising what is, under the particular circumstances, ordinary care." *New York, C. & St. L. R. Co. v. Ostman* (1896) 146 Ind. 452, 45 N. E. 651. Reversing on rehearing (1895) 41 N. E. 1037. The fact that a machine may be dangerous if improperly used, or that it actually injures its operator, is not the test of the master's liability. If the machinery is of ordinary character, and such as can, with reasonable care, be used without danger to the servant, it is all that can be required of the master. *Smith v. Foster* (1901) 93 Ill. App. 138 (emery wheel burst), quoting doctrine enunciated in *Chicago, R. I. & P. R. Co. v. Loneygan* (1886) 118 Ill. 48, 7 N. E. 55. A railway company is not bound to make a door for a freight car so strong and stable as to be capable of resisting any kind of heavy blow which

it may suffer through the reckless handling of freight by the employees. *Chicago, R. I. & P. R. Co. v. Becker* (1890) 38 Ill. App. 523. The maintenance of a trap door which is frequently opened within 6 feet of the car-penter's bench where a servant works is not negligence. The abnormal danger of such a door arises from a cause essentially the same as that which may render any instrumentality insecure, *viz.*, the servant's failure to use ordinary precautions in moving from the place of safety which he occupies. *Kupp v. Rummel* (1901) 199 Pa. 90, 48 Atl. 679. There can be no recovery for the death of an old and experienced conductor of a coal train on a gravity road, in a collision caused by his allowing his section of cars to proceed after it had been drawn up an inclined plane, during a storm, instead of looking to see if the preceding sections had gone ahead or had stopped, as was customary on stormy days, to be doubled up before proceeding. *Moulton v. Delaware & H. Canal Co.* (1891) 141 P. 632, 21 Atl. 733. In a case where it was denied that a railway company was bound to give a servant hired to clear snow from a track any special warning as to the movements of trains on the adjoining track, the court said: "It is a fair presumption, not only that men take the risks of their employment, but that they are competent to keep themselves out of manifest and unnecessary exposure to danger. It is argued that the storm made the situation one of unprecedented peril to Nye and his fellows, and the court therefore could not say, as matter of law, that the railroad owed no unusual duty for the protection of its employees." But the situation was no more unprecedented for one than for the other, and the danger, though greater in degree,

instructions which contravene or ignore this principle are erroneous.¹

A proposition of equivalent import, so far as the immunity of the master is concerned, is that a servant "assumes the risk of all dangers,

was no different in kind from that under ordinary circumstances, and the more manifest the danger the more the employer was entitled to rely on the presumption that the employee would not unnecessarily incur it." *Age v. Pennsylvania R. Co.* (1896) 178 Pa. 134, 35 Atl. 627. In *Stringham v. Stewart* (1885) 100 N. Y. 516, 3 N. E. 575, one of the facts emphasized was that the elevator in question was safe when used with ordinary care. See also *Huffer v. Herman* (1896) 60 Ill. App. 481 (employer not bound to anticipate that an inexperienced employee

will put his hand under the cap covering the knives of a planing machine); *Young v. Burlington Wire Mattress Co.* (1890) 79 Iowa, 415, 44 N. W. 693 (recovery denied for an injury due to unguarded machinery, partly on the ground that it could have been used, in the exercise of due care, with reasonable safety); *Forster v. Chicago & N. W. R. Co.* (1884) 61 Wis. 159, 21 N. W. 40 (use of a common passenger engine for switching purposes denied to be negligent because it could be safely handled by men exercising due care); *McGinn v. Chicago, B. & Q. R. Co.* (1896) 22 C. C. A. 99, 40 U. S. App. 181, 76 Fed. 125 (verdict for the defendant rightly directed where an engine wiper placed his bare hand upon a splinter attached to the driving wheel of an engine, 6 inches long and projecting from 1/2 to 1 inch beyond the tire, for the purpose of supporting himself in cleaning the engine, when the smooth surfaces of all the other parts of the engine were open to his use for the purpose).

In *Gould v. Chicago, B. & Q. R. Co.* (1885) 66 Iowa, 590, 24 N. W. 227, it was held error to charge the jury that, if they found that a water column was placed in such close proximity to the tracks as to be dangerous to the persons operating the trains, they would be justified in finding that the defendants were guilty of negligence in the erection and location of the column. The court said: "It is not true that a railroad company is to be regarded as negligent in erecting or maintaining contrivances or things for use in the

operation of their roads, for the reason that they are 'dangerous to the persons operating the trains.' Indeed, the whole business of operating trains is 'dangerous.' It is full of perils to those employed therein. Because there is danger, it does not follow that the companies are negligent as to the things from which the danger springs. The instruction should have expressed the thought that, if the crane was dangerous to persons operating trains in the exercise of ordinary care, the defendant was negligent in constructing it." In *Pittsburgh & C. R. Co. v. Sentmeyer* (1879) 92 Pa. 276, 37 Am. Rep. 684, the trial judge told the jury that if they believed that it was required of the employees of the company of the same class as Sentmeyer, the injured servant, to be on the top of freight cars while in motion, and the defendant permitted a bridge to be maintained over its track, of a height insufficient to allow the safe passage of persons while on the top of such cars, and that the servant was knocked off, they might find that the injury of Sentmeyer was caused by the negligence of the company. The court said this charge "amounts to an instruction that the defendant was bound to have all the bridges crossing its road of such a height that whether its employees were careful or negligent no damage could result to them therefrom. But what is the logical result of a doctrine such as this? Is it not that the company must not only guard its servants from probable, but also from possible, dangers, and that it must place no dependence on their care and skill, even in the matter of their own preservation and personal safety? That it must provide against their very negligence, and become an insurer of their limbs and lives? We need not say this will not do; that neither natural nor artificial persons can bear a burden such as this, neither ought they so to do. When men are hired, something must be predicated of their judgment and prudence, and hence, when the employer furnishes them with tools and appliances which, though not the best possible, may, by ordinary care, be used without danger,

however they may arise, against which he may protect himself by the exercise of ordinary observation and care."⁸

Two important applications of the principle are that a master is entitled to conduct his business on the assumption that his servants will make use of appliances furnished by the master for the special purpose of preventing accidents like the one which caused the injury in suit,⁹ and on the assumption that any duty which is legitimately cast upon the servant, and having for its object the maintenance of the place of work or machinery in suitable condition, will be properly performed.¹⁰

b. Dangerous structures above or beside railway tracks.—That there is room for a considerable diversity of views in regard to the practical application of the rather vague principle under discussion is indicated by no class of cases in a more striking manner than by those which deal with accidents caused by dangerous structures above or beside railway track.

Some courts have concluded that, as to a servant who understands the conditions, negligence cannot be predicated of the maintenance of such structures, for the reason that he is presumably able, under all circumstances, to avoid coming into collision with them

he has discharged his duty, and is not responsible for accidents." It is a misdirection to state without qualification that, if the unboxed machinery which caused the injury was dangerous under the circumstances in which the plaintiff was operating it, the defendant was negligent. *Meyer v. Meyer* (1890) 86 Ill. App. 417.

⁸ *Pittsburgh & C. R. Co. v. Schumacher* (1879) 92 Pa. 276, 37 Am. Rep. 684.

⁹ For example, an electric light company which, by means of a cut-off switch, the use of which the plaintiff knew, had guarded a lineman absolutely against danger from the wires coming in contact with those of other companies, is not liable for an injury arising from that cause. *Carr v. Manchester Electric Co.* (1900) 70 N. H. 308, 43 Atl. 286. So, an electric light company is not liable for an injury received by an experienced lineman in handling live electric wires with his bare hands, where gloves have been provided which, if used, would have enabled him to do the work in safety. *Junior v. Missouri Electric Light & P. Co.* (1895) 127 Mo. 79, 29 S. W. 988. No fault is imputable to a brewer, where he sends some servants to deliver beer barrels to a custom-

er, furnishing the ordinary appliances, and one of them is injured in consequence of their pursuing a method of their own for piling the barrels, for the reason that the appliances furnished were not suitable for the place. It is their duty to make complaint when they ascertain the insufficiency of the appliances, and procure new ones. *Ramsay v. Robin* (1889) 16 Sc. Sess. Cas. 4th series, 6.

¹⁰ The owner of a sawmill is not guilty of negligence toward an employee in charge of a saw, in allowing dirt to accumulate about the saw so as to clog its frame and slides and prevent its working properly, when it is the duty of such employee to clean the saw, and no one else operates it. *Johnson v. Hovey* (1894) 98 Mich. 343, 57 N. W. 172. A railroad company is not liable for injuries to one of its own brakemen, caused by a defect in the condition of the brake under his charge. *Illinois & C. R. Co. v. Jewell* (1867) 46 Ill. 99, 92 Am. Dec. 240. A verdict for a miner injured by the fall of the roof of a passage which he was excavating, owing to the want of proper propping, is not warranted where the evidence is that it was the duty of the employer to supply

by keeping a proper lookout.¹¹ In the New Jersey case cited below, the court expressly rejected the contention that the action was maintainable because the servant was engrossed in his duties and failed to observe his peril.¹² Others arrive at what is practically the same result by means of the theory that, even if the maintenance of the structures implies culpability, it must always be inferred that a servant who knew or ought to have known of the risk was able to protect himself, and was therefore negligent if he failed to do so.¹³ Under this theory also, the servant's position does not seem to be in any wise improved by the fact that his attention was engrossed by his duties.¹⁴ The same view seems to be taken in Alabama.¹⁵

The results of a doctrine like that applied in the cases so far cited are manifestly the same as if the servant's duty to exercise care were not taken into account at all, and his inability to maintain the action referred to the theory of an acceptance of the risk. In fact, all the decisions cited are put partially upon that ground. A more merciful and more rational doctrine is that the maintenance of these structures is *prima facie* a breach of duty, but that, at all times after the

wood for the purpose of propping the roof, and that this duty had been performed, and that it was the duty of the miners themselves to put up the props, and to decide when they should cease excavating and leave the pillars. *Cook v. Bell* (1857) 20 Se. Sess. Cas. 2d series, 137. An instruction which makes the place of work in a mine an important inquiry, but states that, notwithstanding the accident may have been in an entry, yet the defendant was not liable if, by general usage, or for any other reason, it was plaintiff's duty to look after the roof, is not erroneous. *Taylor v. Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249.

Baylor v. Delaware, L. & W. R. Co. (1878) 40 N. J. L. 25, 29 Am. Rep. 208; *Baltimore & O. R. Co. v. Stricker* (1878) 51 Md. 57, 34 Am. Rep. 291; *Pittsburgh & C. R. Co. v. Schumacher* (1879) 92 Pa. 276, 37 Am. Rep. 684.

Some remarks on the preposterous standard of vigilance prescribed for the servant by cases of this type will be found in § 63b, *post*.

This is undoubtedly the conception of the court in the Alabama cases cited in note 4, *infra*, and seems to express the point of view in three Virginia cases: *Clark v. Richmond & D. R. Co.* (1884) 78 Va. 709, 49 Am. Rep. 394; *Sheeler v. Chesapeake & O. R. Co.*

(1885) 81 Va. 188, 59 Am. Rep. 654; *Chesapeake & O. R. Co. v. Hafner* (1894) 90 Va. 621, 19 S. E. 166 (1898) 96 Va. 528, 31 S. E. 899. This is an extreme case, as the bridge was only 24 inches above the top of the car, and the brakeman had just responded to a sudden call to apply the brakes.

¹² See facts stated in *Chesapeake & O. R. Co. v. Hafner* (1894) 90 Va. 621, 19 S. E. 166 (1898) 96 Va. 528, 31 S. E. 899, *supra*. Much of what was said by the court seems to amount to something very like a complete retraction of what had been said in *Beard v. Chesapeake & O. R. Co.* (1893) 90 Va. 351, 18 S. E. 559, as to the effect of the diversion of the servant's attention, though the two cases may stand together on the ground that, in the earlier one, the accident was proximately caused by a defective brake.

¹³ In *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710, 6 So. 277, and *Louisville & N. R. Co. v. Banks* (1894) 104 Ala. 508, 16 So. 547, the doctrine was laid down that a servant is guilty of contributory negligence if through inattention or forgetfulness he fails to inform himself as to the position of the bridges on the line, after he has been put on inquiry by his superiors, or fails to take the necessary steps to avoid being injured.

servant has become chargeable with a knowledge of their position and characteristics, he must avoid them at his peril under normal circumstances, when there is nothing to divert his attention.¹⁶ But the applicability of this doctrine has in one case been denied under circumstances which have brought the court very near the position taken in those decisions which have been already referred to.¹⁷ The converse principle deduced from this conception is that a train hand who, at a time when he is not required to do so, either by the orders of his superiors or by the demands of an emergency arising in the management of the train, stands upon a car which, as he knows or ought to know, is too high to leave room to enable him to pass safely a bridge which the train is about to reach, is, as matter of law, guilty of contributory negligence.¹⁸

Still another theory is that the maintenance of such structures always warrants the inference of negligence on the company's part, and that the contributory negligence of the servant, if relied upon as a defense, must always be established by specific evidence unaided by any such presumptions, whether absolute or qualified, as those which arise out of the doctrines adverted to in the preceding paragraphs. As adherents of this theory it is probably permissible to cite all the courts whose decisions are cited in §§ 69a and 70a, *post*. Such a point of view, of course, renders it still more impossible than under the Kentucky doctrine to debar the servant from recovery, as a matter of law, for the reason that he did not remember the precise position of the train with regard to the particular bridge which caused his injury.¹⁹

¹⁶ In *Cincinnati R. Co. v. Sampson* (1895) 97 Ky. 71, 30 S. W. 12, and *Louisville & N. R. Co. v. Conley* (1898) 20 Ky. L. Rep. 1372, 19 S. W. 339, the company was held to be guilty of wilful neglect as to a brakeman who failed to stoop because his attention was diverted by an emergency requiring prompt action. See also *Nance v. Newport News & O. F. R. Co.* (1891) 13 Ky. L. Rep. 551, 17 S. W. 570.

¹⁷ In *Hughes v. Cincinnati, N. O. & T. R. Co.* (1891) 91 Ky. 528, 16 S. W. 275, where, although brakemen are compelled to be on the tops of cars in passing through a certain tunnel, so that they might control the speed of the train, the court laid it down that "if the deceased, knowing he could not pass through these tunnels standing upon the top of the car, neglected to take the usual precaution of sitting down, there can be no recovery." This decision was quoted with approval in *Southern R. Co. v. Durall* (1899) 20 Ky. L. Rep. 1915, 50 S. W. 535, and therefore represents the views still prevailing in Kentucky.

¹⁸ *Southern R. Co. v. Durall* (1899) 20 Ky. L. Rep. 1915, 50 S. W. 535; *Derby v. Kentucky C. R. Co.* (1887) 9 Ky. L. Rep. 153, 4 S. W. 303; *Jones v. Louisville & N. R. Co.* (1885) 82 Ky. 610.

¹⁹ On this ground the plaintiff was allowed to recover in *Wallace v. Central Vermont R. Co.* (1893) 138 N. Y. 302, 33 N. E. 1069, the effect of which, according to two later cases, is that a train hand engaged in the performance of some duty which distracts his attention cannot be adjudged negligent, as a matter of law, because he is, for the time being, unmindful of the proximity

The writer has no hesitation in expressing his opinion that, when the ordinary conditions of traffic and the circumstances under which servants are often obliged to do their work are taken into account, a railway company ought not to be considered free from culpability if the track and its appurtenances are laid out on the assumption that the attention of trainmen will never be diverted at times when they need all their faculties to enable them to avoid danger, or that the want of light or inclement weather may not render the task of self-protection so unusually difficult as to be impossible. It follows, therefore, that just as an apparatus designed to support a heavy weight is not adequate unless it is strong enough to support the heaviest weight which will be laid upon it in the course of the master's business, a structure above or near the track is not a suitable one unless it is so placed and arranged that a trainman can perform with reasonable safety any rightful function connected with his duties, at any time during the twenty-four hours, and in any weather that is likely to be encountered on the railway in question, even though his attention may be in some measure diverted from the task of self-protection by some special emergency which produces a more or less complete forgetfulness of the perils by which he is surrounded. See, further, § 63, *post*.

30.b. — and by each servant to avoid injuring his fellow servants.—

In another class of cases the theory of the decision in the master's favor is that his duty is fulfilled if the instrumentalities furnished are reasonably safe so long as they are carefully used by the fellow-servants of the employee whose security depends upon their quality.¹

of a certain structure to the track. [1895] 88 Hun. 359, 34 N. Y. Supp. 824), the ground upon which recovery was denied was simply that the evidence was not sufficient to show that the servant's death was due to the bridge. In *Greenleaf v. Dubuque & N. W. R. Co.* (1871) 33 Iowa, 52, where a brakeman was injured by the spout of a water tank, the court observed that, if the service to be performed by him was of a character to require that his exclusive attention be fixed on it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect, or be prepared at all times to avoid it.

¹ *Burke v. Witherbee* (1885) 98 N. Y. 562, followed in *Coppins v. New York C. & H. R. R. Co.* (1887) 43 Hun. 26, where it was said that "it may not be left to the jury to say what switches, what

Bentley v. New York C. & H. R. R. Co. (1897) 24 App. Div. 302, 48 N. Y. Supp. 503; *Brown v. New York C. & H. R. R. Co.* (1899) 42 App. Div. 548, 59 N. Y. Supp. 672. The *Wallace Case*, seems to be, upon the facts, inconsistent with an earlier ruling by the supreme court in *Fitzgerald v. New York C. & H. R. R. Co.* (1891) 59 Hun. 225, 12 N. Y. Supp. 932, where it was laid down that a brakeman who is aware that there is a low bridge in a certain place, and that there are no warning signals to remind him of its existence, must, at his peril, take proper precautions to avoid being injured by it, and cannot recover for an injury caused by it, on the ground that the company is under a statutory duty to provide the signals. On the final appeal of this case ([1897] 154 N. Y. 263, 48 N. E. 514, Reversing

Unless the work is of such a nature that a prudent regard for the safety of the servants indicates that they should receive special instructions, or that, while doing it, they should be placed under the control of a skilled overseer, the master has a right to assume that, where he gives them a task to perform, and leaves the method of performance to their own selection, they will select a reasonable and proper method for the performance of their task.²

In so far as the doctrine now under consideration is applicable to cases of this type, it manifestly overlaps the domain of the familiar principle, to be discussed in the third volume of this treatise,—*viz.*, that a servant cannot recover for injuries proximately caused by a co-servant's carelessness in handling the agencies supplied by the master.

31. Negligence inferable where instrumentalities furnished cannot be safely used by servants exercising ordinary care.—The second of the propositions formulated in § 28, *ante*, carries with it the inference that there is negligence on the master's part if the business, as conducted, will "inflict damage upon those who are guilty of no neglect or prudence."¹ The fact that a dangerous machine could be safely

patented articles, or contrivance shall be used by a railroad company in order to escape liability for injury to an employee caused by the negligence of a co-employee." *Alford v. Metcalf Bros. & Co.* (1889) 74 Mich. 369, 42 N. W. 52 (the use of a plank, instead of a skid with hooks, on which to unload boxes from an elevator to trucks in an alley adjoining, is not, in itself, negligence). An employer is not negligent, as matter of law, because of the fall of a scaffold which was adequate to the work for which it was originally erected, but proved inadequate to an extra strain which was put upon it by the negligence of fellow servants, and was not contemplated when it was built. *Chicago Architectural Iron Works v. Nagel* (1898) 80 Ill. App. 492.

² *Karr Supply Co. v. Kröenig* (1897) 167 Ill. 560, 47 N. E. 1051. Reversing 63 Ill. App. 219 (master not liable for injury caused by attempting to lower a heavy cylindrical tank into a basement by a method which the plaintiff knew to be dangerous without a larger number of hands); *Spencer v. Ohio & M. R. Co.* (1892) 130 Ind. 181, 29 N. E. 915 (no action maintainable where a servant ordered to clean an engine at a time when it is standing still on the track goes under it, and is injured by its being put in motion). When a servant has

received an injury through a defective appliance, the master cannot escape liability on the ground that another servant might, by the use of some unusual means, have prevented the accident. *Texas P. R. Co. v. Johnson* (1890) 76 Tex. 421, 13 S. W. 463. There a train was derailed because the spring of a switch was not strong enough to throw the point to the main rail and hold it there when the lever indicated that the rails were in proper position for the passage of cars. The contention of the defendant was that some employee might have placed the switch rail in proper position by the use of an axe or in some other way, and that the injury was therefore proximately due to the negligence of a fellow servant.

Diamond State Iron Co. v. Gibbs (1887) 7 Houst. (Del.) 557, 11 Atl. 189; *Hannah v. Connecticut River R. Co.* (1891) 154 Mass. 529, 28 N. E. 682 (railway company, although not bound to have the distance between a switch rail and the ground the least that will admit of the working of the switch, is required to use reasonable care in seeing that the place is such that employees necessarily passing over it can do so safely in the exercise of due care); *Goodrich v. New York C. & H. R. R. Co.* (1889) 116 N. Y. 398, 5 L. R. A. 750, 22 N. E. 397 (railway company liable

worked by a careful man will not remove the liability from the master.² In estimating the effect of this doctrine it is important it should be remembered that a master is not entitled to rely upon the assumption that a servant will take precautions to avoid dangers of which he has no knowledge.³ An inference drawn from this doctrine in some cases is that the master is culpable if the construction of his machinery or the location of dangerous structures is such that the slightest indiscretion on the part of a servant may prove fatal.⁴ If this conception were consistently carried out, it is clear that servants would be allowed to recover in some large and important classes of cases,—notably those in which the instrumentalities which caused the injuries were uncovered machinery, low overhead bridges on railway lines, structures dangerously near to railway tracks, and unblocked frogs and guard rails. But such cases are controlled, at least in some courts, by other considerations the practical effect of which is to require the servant to exercise at his peril a degree of care which is entirely beyond the capacity of ordinary men. See §§ 30a, 30b, *ante*, and §§ 54, 63, 69, 70, 72, *post*.

32. Master entitled to rely on the assumption that due care will be used by strangers with whom he requires his servant to work.—Where an employer's own servants are required, in the course of his business, to work in combination with other parties for the performance of something in which he and those parties have a common interest, it is

for injury caused by bumpers of insufficient rigidity and strength to sustain, without yielding, the shock of a car backed up, without undue speed, against it (to be coupled); *Texas P. R. Co. v. McC* (1884) 61 Tex. 695 (car brake so defective as not to operate effectually with proper use). In *Norfolk & W. R. Co. v. Brown* (1895) 91 Va. 668, 22 S. E. 496, the court qualified its ruling that the use of cars with couplings of unequal height is negligence by the proviso that the difference in height should not be so great as to allow the bumpers to miss each other altogether. "It is a part of the implied contract between master and servant (where there is only implied contract) that the master provide suitable instruments for the servant with which to do his work, and a suitable place where, when exercising due care himself, he may perform it with safety, or subject only to such hazards as are necessarily incident to the business." *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396. See also, to Vol. I. M & S.—6.

the same effect, *Shaffer v. Haish* (1885) 110 Pa. 575, 1 Atl. 575; *Mississippi River Logging Co. v. Schneider* (1896) 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. 195; *Chicago Anderson Pressed Brick Co. v. Sobkowick* (1892) 45 Ill. App. 317. Affirmed in (1894) 148 Ill. 573, 36 N. E. 572, and the cases as to low bridges cited in § 30a, b, *ante*.

² *Boardman v. Brown* (1887) 44 Hun, 336.

³ *Harkins v. Johnson* (1885) 105 Ind. 29, 55 Am. Rep. 169, 4 N. E. 172. This principle is also assumed in the low-bridge cases cited in § 30a, b, *ante*.

⁴ *Toledo, W. & W. R. Co. v. Fredericks* (1874) 71 Ill. 294 (couplings radically defective where the drawbars are so short as to endanger an employee going between the cars); *Chicago, B. & Q. R. Co. v. Gregory* (1871) 58 Ill. 272 (mail-catcher near the track); *Nadan v. White River Lumber Co.* (1890) 76 Wis. 120, 43 N. W. 1135 (uncovered cog wheels).

not negligence for him to act on the assumption that they will exercise proper care.¹

¹ In *Foley v. Chicago & N. W. R. Co.* (1882) 48 Mich. 622, 42 Am. Rep. 481, 12 N. W. 879, it was held that the representatives of a railroad switchman who had been sent by the defendant to switch a car owned by another railroad company, to be loaded with nitro-glycerine by the consignor of that company, and who was killed by an explosion caused by the negligence of the servants of that consignor, could not recover damages. The court said: "The question, then, seems to be this: Whether defendant, in complying with a proper request from another railroad company to run for it a short distance one of its cars, to be loaded with an article which was safe when properly handled, but exceedingly dangerous when carelessly handled, was bound to assume that negligence on the part of those handling it would occur, and bound to take measures for the protection of its servants on that assumption. And if this question shall be answered in the affirmative, the further question will be presented: What measures of protection could the defendant take, short of absolute refusal to move the car at all? The switchman knew what was to be loaded, and had a general knowledge of its qualities; but more particular and specific information to him on that subject would have been entirely without value. He was not to handle the nitro-glycerine, and he could exercise no control over the action of those who were. Caution from him on the subject would not be likely to receive attention from the men whose business it was and who handled it constantly. The only caution to decedent which could have been of the least service would be the caution to keep away altogether. If he was entitled to this, it necessarily follows that defendant should have refused altogether to move the car over its track. But it was not claimed on the argument that this could have been properly and even lawfully done."

CHAPTER V.

OBLIGATORY QUALITY OF INSTRUMENTALITIES, CONSIDERED WITH REFERENCE TO THE RIGHT OF A MASTER TO CARRY ON HIS BUSINESS IN HIS OWN WAY.

34. Generally.

35. Master is not bound to adopt any particular instrumentalities or methods.

a. Rule stated and illustrated.

b. Instructions required by the rule.

c. Immaterial that the instrumentality adopted requires greater care in the handling.

36. Rationale of this principle.

a. An application of the doctrine of assumption of risks.

b. Rendered necessary by the jury system of trials.

c. Master not an insurer of the servant's safety.

37. Feasibility of the changes suggested; evidential significance of.

38. Negligence not inferable from the use of dissimilar appliances for the same purpose.

39. Master's duty to introduce new appliances.

40. General doctrine not a protection where the instrumentalities are of a pattern that is not reasonably safe.

41.—nor where they are specifically defective.

42.—nor where the risks incident to using them were not fully understood by the injured person.

34. Generally.—The general result of the authorities cited thus far is that the extent of the master's responsibility is measured and defined by these two fundamental principles,—that he is bound to protect his servants from exposure to unnecessary and unreasonable risks, so far as he can do so by the exercise of ordinary care, and that he is bound to provide such instrumentalities and to adopt such methods that servants who exercise ordinary care will be able to perform their duties in reasonable safety. But these principles are, for practical purposes, greatly qualified and restricted by the operation of the doctrines discussed in the three following chapters. It is not too much to say that the actual effect of those doctrines, as applied by the courts to certain states of fact, has been to attach to the terms "unnecessary" and "reasonable safety" an arbitrary, legal signification which is totally different from that which they bear in the language of common life. Judged by the standards which that language naturally sug-

gests, many of the decisions to which we shall have occasion to refer—more especially those which deny the servant's right to recover for injuries caused by low overhead bridges on railways and structures in close proximity to the track—can only be regarded as amounting to a virtual declaration that an employer may, without incurring liability, maintain imminently and inherently dangerous instrumentalities which can be usually altered without serious difficulty or inconvenience, and which, under circumstances which will inevitably supervene with more or less frequency in the course of a servant's employment, render it virtually impossible for him to escape injury by the exercise of any degree of care which can fairly be exacted from him.

The first of these qualifying and restrictive doctrines which claims our attention is that every one has the legal "right to carry on a business which is dangerous, either in itself or in the manner of conducting it, if it is not unlawful, and interferes with no rights of others, and is not liable to one of his servants, who is capable of contracting for himself and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom."¹ The deduction drawn from this doctrine, *viz.*, that "so long as the premises were maintained in a reasonably safe condition the defendants had the right to use their own judgment as to the material and the method of construction employed,"² is on its face quite unexceptionable. It has led the courts to harsh conclusions mainly because they have, to a degree which the present writer ventures to think unwarrantable, excluded juries from the function of considering the question of fact involved in the limitation to which (as is shown by the above statement and many others of a similar tenor which occur in the cases cited in this chapter) the doctrine is subject.

35. Master is not bound to adopt any particular instrumentalities or methods.—a. Rule stated and illustrated.—From the above-stated con-

¹ *Ladd v. New Bedford R. Co.* (1876) 119 Mass. 413, 20 Am. Rep. 331; *S. P. Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506; *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396; *Hayden v. Smithville Mfg. Co.* (1861) 29 Conn. 548; *Roth v. Northern Pacific Lumbering Co.* (1889) 18 Or. 205, 22 Pac. 842; *Stone v. Oregon City Mfg. Co.* (1870) 4 Or. 52; *Guinand v. Knapp-Stout & Co. Co.* (1897) 95 Wis. 482, 70 N. W. 671; *Winkler v. St. Louis Basket & Box Co.* (1897) 137 Mo. 304, 38 S. W. 921; *Tuttle v. Detroit, G. H. & M. R. Co.* (1887) 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166; *Sweet v. Ohio Coal Co.* (1890) 78 Wis. 127, 9 L. R. A. 861, 47 N. W. 182; *The Sara Toga* (1898) 87 Fed. 349; *Osborne v. Lehigh Valley Coal Co.* (1897) 97 Wis. 27, 71 N. W. 814; *Cass v. Chicago, St. P. M. & O. R. Co.* (1895) 90 Wis. 113, 62 N. W. 624.

² *McCarthy v. Shoneman* (1901) 198 Pa. 568, 48 Atl. 493. The master has the right to exercise a "reasonable judgment and discretion." *Morris v. Duluth, S. S. & A. R. Co.* (1901) 47 C. C. A. 661, 108 Fed. 747 (phrase used in syllabus written by court).

ception of the extent of the master's obligations is drawn the very important practical deduction, constantly reiterated and applied, that he cannot be charged with a breach of the duties owed to his servants, simply on the ground that a safer method or a safer instrumentality than that from which the injury resulted was available and might have been adopted by him.¹ In other words, the question whether the particular machinery provided by a master is proper and suitable is to be determined by its actual condition, and not by comparing it with other machinery.² Or, as the doctrine may also be expressed in more general terms, evidence which merely tends to show that the particular accident which caused the injury might not have happened if a particular precaution had been taken goes for nothing, in considering the question of legal liability on a charge of negligence.³

¹ "That a method is less safe than another does not make it improper to be used." *Dunnen v. Leach* (1857) 26 L. J. Exch. N. S. 221, per Bramwell, B. A master "is not required to adopt any particular method of construction, or any particular contrivance or device, in order to be in the exercise of ordinary care." *Chicago & E. I. R. Co. v. Driscoll* (1898) 176 Ill. 330, 52 N. E. 921, Reversing (1897) 70 Ill. App. 91. A servant cannot recover for an injury received in the discharge of his regular duties, when the apparatus which he was required to use was of an approved and practical kind, was familiar to him, and was perfect as to each of its parts. *Murphy v. Lake Shore & M. S. R. Co.* (1896) 67 Ill. App. 527 (coupling devices not similar, and therefore harder to couple). The furnishing or retention of an instrumentality of peculiar construction, however great the resulting danger may be, cannot be imputed as negligence. See *Beaudin v. Central Vermont R. Co.* (1891) 38 N. Y. S. R. 473, 14 N. Y. Supp. 700.

² *Wood v. Heiges* (1896) 83 Md. 257, 34 Atl. 872. "No employer by any implied contract undertakes that his buildings are safe beyond a contingency, or even that they are as safe as those of his neighbors, or that accidents shall not result to those in his service from risks which others would guard against more effectually than is done by him. Neither can a duty rest upon anyone which can bind to so extensive a responsibility." *Diamond State Iron Co. v. Giles* (1887) 7 Houst. (Del.) 556, 11 Atl. 189.

³ *Auerstein v. Jones* (1891) 139 Pa. 183, 21 Atl. 24. In *Northern C. R. Co. v. HURSON* (1882) 101 Pa. 1, 47 Am. Rep. 690, the trial judge had charged as follows: "If you believe that the deceased was, under the circumstances of this case, subjected to such extraordinary risk, which the company could have avoided, the company is liable." But the supreme court rejected this theory, saying: "We cannot agree that the risk to which an employer subjects his employee suffices to impose liability upon the former as being extraordinary in character merely because the injury in a particular case might possibly have been prevented by some different device. Almost all accidents could be avoided if the special manner of their occurrence could be foreseen." To the same effect see *Glorer v. Meinrath* (1896) 133 Mo. 292, 34 S. W. 72; *Fried v. Citizens' R. Co.* (1893) 115 Mo. 503, 22 S. W. 498; *Muirhead v. Hannibal & St. J. R. Co.* (1888) 31 Mo. App. 578 (former appeal [1885] 19 Mo. App. 634); *Young v. Virginia & N. C. Constr. Co.* (1891) 109 N. C. 618, 14 S. E. 58; *Innes v. Milwaukee* (1897) 96 Wis. 170, 70 N. W. 1064; *Chicago & G. W. R. Co. v. Armstrong* (1895) 62 Ill. App. 228; *Chicago, R. I. & P. R. Co. v. Lonegan* (1886) 118 Ill. 41, 7 N. E. 55; *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582, and the cases cited in the following notes to this section and to § 38, *post*. The fact that there is a difference of opinion among experts as to the relative safety of two kinds of apparatus is naturally regarded as conclusive against the inference of culpability,—as where an employer was held not negligent towards an employee in using cross pieces to raise a platform,

"It is not the duty of the master to furnish any particular kind of tools, implements, or appliances."⁴

"The test is not whether the master omitted to do something he could have done, but whether in selecting tools and machinery for their use he was reasonably prudent and careful; not whether better machinery might not have been obtained, but whether that provided was in fact adequate and proper for the use to which it was to be applied."⁵

The true question for the jury is not whether the master could have done something to prevent the injury; but whether he did anything which, under the circumstances, in the exercise of ordinary care and prudence, he ought not to have done, or omitted any precaution which a prudent and careful man would or ought to have taken.⁶

although it might have been more easily accomplished by blocks and tackle. *Hast St. Louis Ice & Cold Storage Co. v. Sculley* (1895) 63 Ill. App. 147. Compare *McGill v. Bourman* (1890) 18 Sc. Sess. Cas. 4th series, 206, cited in § 38, post.

⁴*Bohn v. Chicago, R. I. & P. R. Co.* (1891) 106 Mo. 429, 17 S. W. 580.

⁵*Stringham v. Hilton* (1888) 111 N. Y. 188, sub nom. *Stringham v. Stewart*, 1 L. R. A. 483, 18 N. E. 870.

⁶*Leonard v. Collins* (1877) 70 N. Y. 90; *Hewitt v. Flint & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 659. For other cases in which the principles stated in the text were applied, see *Southern P. Co. v. Selby* (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530 (use of unblocked frogs not negligence as matter of law); *Morris v. Duluth, S. S. & A. R. Co.* (1901) 47 C. C. A. 661, 108 Fed. 747 (use of a piece of lumber 1 inch thicker, 6 inches wider, and 1 foot longer, than the customary blocking, to fill the space between a guard rail and a main rail, is no evidence of negligence as to a brakeman who stumbles over it); *Reichel v. New York C. & H. R. R. Co.* (1892) 130 N. Y. 682, 29 N. E. 763 (negligence not inferable from the simple fact that the relative location of a water plug and an ash pit was such that an engine could take water and discharge its ashes simultaneously); *Oregon Short Line & U. N. R. Co. v. Tracy* (1895) 14 C. C. A. 199, 29 U. S. App. 529, 66 Fed. 931 (railway company is not required to clear its track of brush. It has the right to suffer it to grow to any extent, provided it does not lead the employees

into an undisclosed danger); *Goldthwait v. Haverhill & G. Street R. Co.* (1894) 160 Mass. 574, 36 N. E. 486 (tracks placed so together and so curving in opposite directions that cars upon them will come together do not import culpability); *Smith v. St. Louis, K. C. & N. R. Co.* (1878) 69 Mo. 32, 33 Am. Rep. 484 (fact that there was another kind of rail of which a guard rail might have been constructed, which would have been safer for employees, and would equally have answered its purpose, held not to be sufficient to render the company liable for an injury caused by its failure to use that other kind of rail); *Brossman v. Lehigh Valley R. Co.* (1886) 113 Pa. 491, 57 Am. Rep. 479, 6 Atl. 226 (master not bound to raise a low bridge); *McGhee v. North British R. Co.* (1887) 14 Sc. Sess. Cas. 4th series, 499 (railway company which changes a road line from a single line worked by horses to a double line worked by locomotives is not bound to pull down and rebuild a bridge for the mere reason that the alteration brings the stone work of the bridge dangerously near the track); *Chicago & E. I. R. Co. v. Driscoll* (1898) 176 Ill. 339, 52 N. E. 921, Reversing (1897) 70 Ill. App. 91 (not negligence to have no butt post at the end of a stub switch); *Grattis v. Kansas City, P. & G. R. Co.* (1900) 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108 (maintenance of stub switch not negligence, though a split switch would probably have prevented a derailment); *Ladd v. New Bedford R. Co.* (1876) 119 Mass. 412, 20 Am. Rep. 331 (absence of check chain on railway cars; negligence not predicable of);

The principle thus enunciated is available as a protection to the master, whether the conditions charged as negligence existed in the instrumentality as originally supplied, or were created by some

Texas & P. R. Co. v. Minnick (1893) 6 C. C. A. 387, 13 U. S. App. 520, 57 Fed. 362 (smoke stack on locomotive was of peculiar design and allowed sparks to escape); *D'Arey v. Long Island R. Co.* (1898) 34 App. Div. 275, 54 N. Y. Supp. 553 (railroad company not liable for personal injuries sustained by an employee who was injured by the falling of a plank or iron plate extending between a platform and a car, while assisting to unload the car, although it was not supplied with hooks or fastenings in order to render it impossible to slip from its place); *Conroy v. Hannibal & St. J. R. Co.* (1887) 24 Mo. App. 235 (evidence not admissible to show that a derrick car might have been more safely run with the boom pointing to the rear); *Hamilton v. Chicago, R. I. & P. R. Co.* (1894) 93 Iowa, 46, 61 N. W. 415 (railway company not bound to supply hand cars of any particular pattern); *Hayden v. Smithville Mfg. Co.* (1861) 29 Conn. 548 (no obligation to fence machinery); *Foley v. Pettie Mach. Works* (1889) 149 Mass. 294, 4 L. R. A. 51, 21 N. E. 304 (servant injured by putting his hand into cogwheels uncovered, but in plain sight, not entitled to recover simply because the machinery might have been made less dangerous by being covered); *Rock v. Indian Orchard Mills* (1886) 142 Mass. 522, 8 N. E. 401 (where the question is whether defendant had given a minor servant instructions as to the danger of the machine, it is proper to exclude evidence that a gate might have been put in front of the cotton-winding machine at small expense, or that the machine in question, and another article of machinery standing over 1 foot distant, might as well have been separated further); *Plunkett v. Donoran* (1891) 36 N. Y. S. R. 91, 12 N. Y. Supp. 454 (held error to submit to the jury the question whether it was negligence not to furnish a guard to a machine); *Townsend v. Langles* (1890) 41 Fed. 919 (leaving cogwheel uncovered not negligence *per se*); *Kleinest v. Kunhardt* (1893) 160 Mass. 230, 35 N. E. 458 (no recovery where servant slipped on a wet and slippery floor and struck against an uncovered pulley); *Fevly v. Pearson Cordage Co.* (1894) 161 Mass. 426, 37 N. E. 368 (similar facts); *Cagney v. Hannibal & St. J. R. Co.* (1879) 69 Mo. 416 (railway company not liable because it uses a single former in its shops, instead of a double one, though the latter is safer); *Jacobson v. Carnelius* (1889) 52 Hun, 377, 5 N. Y. Supp. 506 (omission of a counter shaft and a fast and loose pulley, which would have made it safer to connect and disconnect the power from a machine, does not constitute actionable negligence); *Joyce v. Worcester* (1885) 110 Mass. 245, 4 N. E. 565 (no recovery where servant was injured by the fall of a derrick used for drawing up the shoring planks from a sewer after it had been filled up, the contention being that hand power would have been safer than steam power); *Rosa v. Volkening* (1901) 64 App. Div. 426, 72 N. Y. Supp. 236 (negligence not inferable from the mere fact that a derrick which fell was not provided with guy ropes, and proved to be too light to accomplish the work for which the plaintiff and his co-servants used it); *Kemmerer v. Manhattan R. Co.* (1894) 81 Hun, 444, 31 N. Y. Supp. 82 (employer not liable for an injury to an employee resulting from a collision between trains during a fog, although a better system for giving signals during fogs is in existence, where the one employed by it is reasonably safe); *Burning v. Medart* (1894) 56 Mo. App. 443 (employer is not negligent because guards furnished for emery wheels used for certain work are lighter than those for emery wheels used for other work, where a satisfactory reason for the difference exists, as shown by plaintiff's own evidence); *Winkler v. St. Louis Basket & Box R. Co.* (1897) 137 Mo. 394, 38 S. W. 921 (no recovery where brake which caused the injury was perfect of its kind, but was alleged to be more dangerous than another pattern); *Service v. Shaneman* (1900) 196 Pa. 63, 46 Atl. 292 (negligence not inferable simply because a boiler which burst might have been made safer by adding certain attachments); *McCarthy v. Shoeman* (1901) 198 Pa. 568, 48 Atl. 493 (employer cannot be charged with negligence because a passageway and steps therein, in the basement of his store, on which the plaintiff fell, are cut out of the solid earth, instead of the walk being made

change in the method of using.⁷ A servant, therefore, will not be allowed to retain any verdict in his favor which is based on the hypothesis that negligence is imputable to the master because his instrumentalities or methods do not answer to one or the other of the following descriptive epithets and phrases: "Best;"⁸ "best known;"⁹ "best possible;"¹⁰ "best of known or conceivable;"¹¹ "newest and best;"¹² "of the very best and newest device attainable;"¹³ "safest;"¹⁴ "safest known;"¹⁵ "safest possible;"¹⁶ "in the safest pos-

sible" (from stone, wood, or cement). A single ladder of 120 feet in length, for the purpose of ascending and descending a shaft, was held not to be an improper appliance, in *O'Neill v. Wilson* (1858) 20 Se. Sess. Cas. 2d series, 427. Plaintiff contended that several shorter ladders with landing stages should have been provided. For other cases to same effect, see also §§ 36, 39, *post*. Those collected in chapter VIII., *post*, declaring the nonliability of railway companies for injuries due to permanent conditions, such as low bridges, structures near the track, etc., also should be compared, though they are not all referred directly to the principle now under discussion. See also the cases as to instructions, in *subsec. b, infra*.

Two Virginia cases carry the application of the general rule further than many courts would be willing to go, except in so far as the decisions might be deemed justifiable on the distinct ground that the risks were known to and assumed by the servants. In *Stewart v. Newport News & M. Valley Co.* (1890) 86 Va. 988, 11 S. E. 885, approved in *Richmond & D. R. Co. v. Risdon* (1891) 87 Va. 335, 12 S. E. 786, it was denied to be negligence for a railway company to maintain a coal chute which was a "mantrap," if it is of first-class construction. In *Robinson v. Dinwiddie* (1898) 96 Va. 41, 30 S. E. 442, it was held that negligence was not predicable of the method of cleaning out an old shaft by excavating the debris from a passage which entered it at the bottom.

⁷ *Glover v. Meinrath* (1896) 133 Mo. 292, 34 S. W. 72. In this case, where the risks incident to the use of a corn-meal dryer were altered by the substitution of hot water for steam, it was held to be error to give an instruction which allowed the plaintiff to recover unless he knew or ought to have known of the change.

⁸ *Payne v. Reese* (1882) 100 Pa. 301; *Kennedy v. Alden Coal Co.* (1901) 200

Pa. 1, 49 Atl. 341; *Louisville & N. R. Co. v. Orr* (1882) 84 Ind. 50; *Jenny Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 566, 18 N. E. 30; *Chicago, B. & O. R. Co. v. Smith* (1885) 18 Ill. App. 119; *Strattner v. Wilmington City Electric Co.* (1901; Del.) 50 Atl. 57; *Burns v. Chicago, M. & St. P. R. Co.* (1886) 69 Iowa, 450, 58 Am. Rep. 227, 30 N. W. 25; *Wormell v. Maine C. R. Co.* (1887) 79 Me. 397, 10 Atl. 49.

⁹ *Harley v. Buffalo Car Mfg. Co.* (1894) 142 N. Y. 31, 36 N. E. 813; *Spencer v. Worthington* (1899) 44 App. Div. 496, 60 N. Y. Supp. 873; *Walsh v. Commercial Steam Laundry Co.* (1895) 11 Misc. 3, 31 N. Y. Supp. 833; *Allison Mfg. Co. v. McCormick* (1888) 118 Pa. 519, 12 Atl. 273.

¹⁰ *Hickey v. Taaffe* (1887) 105 N. Y. 26, 12 N. E. 286; *Eldridge v. Atlas S. S. Co.* (1890) 58 Hun, 96, 11 N. Y. Supp. 468; *O'Hare v. Keeler* (1897) 22 App. Div. 191, 48 N. Y. Supp. 376.

¹¹ *Stringham v. Hilton* (1888) 111 N. Y. 188, *sub nom.* *Stringham v. Stewart*, 1 L. R. A. 483, 18 N. E. 879; *Thorn v. New York City Ice Co.* (1887) 11 N. Y. S. R. 845.

¹² *Titus v. Bradford, R. & K. R. Co.* (1890) 136 Pa. 618, 20 Atl. 517 (a master is not bound to adopt every novelty in bridge construction); *Hlick v. Flint & P. M. R. Co.* (1888) 67 Mich. 632, 35 N. W. 708 (not negligence to maintain a bridge with the truss 2 feet 3 inches from the sides of freight cars).

¹³ *Augerstein v. Jones* (1890) 139 Pa. 183, 21 Atl. 24.

¹⁴ *Dymon v. Leach* (1857) 26 L. J. Exch. N. S. 221; *Wormell v. Maine C. R. Co.* (1887) 79 Me. 397, 10 Atl. 49; *Payne v. Reese* (1882) 100 Pa. 301; *Diamond State Iron Co. v. Giles* (1887) 7 Houst. (Del.) 556, 11 Atl. 189.

¹⁵ *Shadford v. Ann Arbor Street R. Co.* (1897) 111 Mich. 390, 69 N. W. 661.

¹⁶ *Chicago Anderson Pressed Brick Co. v. Eobkowiak* (1892) 45 Ill. App. 317.

sible condition;"¹⁷ "best and safest;"¹⁸ "best, safest, or newest;"¹⁹ "most expensive;"²⁰ "most approved;"²¹ "as safe as can be provided;"²² "best and most improved;"²³ "best and most approved;"²⁴ "latest, best and most approved."²⁵ A *fortiori* is a jury not warranted in finding for the plaintiff where there is no evidence that the alternative arrangements suggested would have been safer than those actually adopted, and it is apparent that the latter were reasonably safe.²⁶

As a matter of procedure, the effect of the principle now under discussion is that evidence going to show that some other kind of instrumentality would have been safer and better than that which caused the injury should be excluded.²⁷

b. *Instructions required by the rule.*—The subjoined cases indicate the bearing of the above-stated principle upon the correctness or incorrectness of instructions to juries.²⁸

¹⁷ *Diamond State Iron Co. v. Giles* (1887) 7 Houst. (Del.) 556, 11 Atl. 189.

¹⁸ *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 36 Am. Rep. 454.

¹⁹ *Mississippi River & Logging Co. v. Schneider* (1896) 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. 195.

²⁰ *Borns v. Gaston Gas Coal Co.* (1885) 27 W. Va. 285, 55 Am. Rep. 304.

²¹ *Hevitt v. Flint & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 659;

Jenney Electric Light & P. Co. v. Murphy (1888) 115 Ind. 566, 18 N. E. 30.

²² *Hart & C. Mfg. Co. v. Tima* (1899) 85 Ill. App. 310.

²³ *Camp Point Mfg. Co. v. Ballou* (1874) 71 Ill. 417.

²⁴ *Kreider v. Wisconsin River Paper & Pulp Co.* (1901) 110 Wis. 645, 86 N. W. 662.

²⁵ *Davis v. Augusta Factory* (1893) 92 Ga. 712, 18 S. E. 974. In Illinois it has been laid down that the employer is not bound "to seek and apply every new invention, but must adopt such as is found, by experience, to combine the greatest safety with practical use." *Toledo, W. & W. R. Co. v. Ashbury* (1877) 84 Ill. 429. But the standard designated by the last clause of this statement has been explicitly condemned. *Sappenfield v. Main Street & Agri. Park R. Co.* (1891) 91 Cal. 48, 27 Pac. 590.

²⁶ *Nolan v. Montana C. R. Co.* (1901; Mont.) 63 Pac. 926. The contention there was that, while a train of dirt cars was on a curve, a block and tackle should have been provided to guide the chain which pulled the plough by which they were unloaded. At the time of the accident the chain was simply laid in a groove in one of the stake sockets on the side of a car, and thus prevented from being pulled towards the inside of the curve. Compare also *McGinnis v. Canada Southern Bridge Co.* (1882) 40 Mich. 466, 13 N. W. 819.

²⁷ *Kent v. Yazoo & M. Valley R. Co.* (1899) 77 Ala. 494, 27 So. 620; *Gravendahl v. Chicago Ref. Co.* (1899) 85 Ill. App. 34; *Chicago & E. I. R. Co. v. Finnan* (1899) 84 Ill. App. 383; *Conway v. Hannibal & St. J. R. Co.* (1887) 24 Mo. App. 235.

²⁸ *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 36 Am. Rep. 454 (approving a charge to the effect that a railway company is not bound to provide the "best and safest track," but only to use ordinary care in this regard); *Kennedy v. Alden Coal Co.* (1901) 200 Pa. 1, 40 Atl. 341 (charge approved was that the master was not bound to furnish the "best" appliances); *Hevitt v. Flint & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 659 (approving an instruction that "a railroad company is not bound to change its manner of using its side tracks"); *Augerstein v. Jones* (1891) 139 Pa. 183, 21 Atl. 24 (instruction erroneous by which the jury was told that if the accident could have been prevented by screwing down a heavy iron plate over an emery wheel which burst, the plaintiff would be entitled to recover); *Muirhead v. Hannibal & St. J. R. Co.* (1885) 19 Mo. App. 634 (instruction held erroneous

c. Immaterial that the instrumentality adopted requires great care in the handling.—If the facts are such as to bring the case within the operation of the general principle, culpability will not be predicated simply from the fact that the appliances objected to cannot be

which was based on the theory that evidence showing the manner in which a derrick car was run in a wrecking train, viz.,—with the boom pointing forwards—was not the safest way in which to run it, was proof of negligence; *Lytle v. Chicago & N. W. R. Co.* (1890) 84 Mich. 280, 47 N. W. 571 (held proper to charge a jury that a railroad company is bound to furnish for its employees and the transaction of its business reasonably safe and proper rolling-stock and locomotives, and appliances thereto, and a competent engineer and fireman, considering all the circumstances and nature of the employment, but is not bound to furnish the best machinery or men that can be procured); *Tabler v. Hannibal & St. J. R. Co.* (1887) 93 Mo. 79, 5 S. W. 810 (instruction erroneous which directs the jury to find for the plaintiff if the defendant railway company used a rope, instead of a chain, for a coupling between two of the cars of a wrecking train); *Muirhead v. Hannibal & St. J. R. Co.* (1890) 103 Mo. 251, 15 S. W. 530 (involving same facts); *Glorer v. Minnath* (1896) 133 Mo. 292, 34 S. W. 72 (for instruction held erroneous see note 7, *supra*). It is error to qualify a requested instruction that it is not negligence for a railroad company to use cars on its railroads and in its yards, the couplings or deadwoods of which are not of uniform or equal heights, by the condition that such deadwoods or couplings are in other respects safe appliances,—especially where there is no allegation or issue that the couplings or deadwoods are otherwise unsafe. *Pennsylvania Co. v. Ebaugh* (1895) 144 Ind. 687, 43 N. E. 936. In *Louisville & N. R. Co. v. Orr* (1882) 84 Ind. 50, the trial judge instructed the jury as follows: "It would be negligence upon the part of the defendant to use a crab for hoisting timbers, that was defective in its construction, when said crab could have been made complete and safe, or there were others to be secured that were complete and not dangerous. The defendant was bound to procure the best crab for the purposes it was used; otherwise the defendant must be held responsible for the injury resulting to the plaintiff from

the use of such defective crab without fault or negligence on the part of the plaintiff." The supreme court said: "This instruction was erroneous. It is not negligence necessarily to use a defective machine. The master does not warrant the strength or safety of his machinery. He only undertakes to employ reasonable care and prudence in selecting such as is fit for the purpose, to attend, and is only responsible when he has failed to use such care. When an injury results from the use of defective machinery, it must not only appear that the machinery was defective, but that the master was either negligent in its selection or in continuing to use it. The instruction in question informs the jury that the master is liable if the machinery is defective; in other words, that the use of defective machinery is negligence. The instruction renders the master liable if the machinery is defective, however much care and prudence have been exercised in its selection or use, and notwithstanding the fact that the master may be ignorant of the defects in the machine. No case goes to this extent. In an earlier decision by the same court the following instruction was approved: "It is the imperative duty of railway companies to adopt and use all improvements in cars and machinery calculated to insure safety to employees and passengers, and to discard all insecure and dangerous cars and machinery." *St. Louis & N. E. R. Co. v. Livingston* (1877) 56 Ind. 511. This ruling seems to have confounded the measure of care owed to passengers with that owed to servants. It is evidently inconsistent with the case just cited, and has been condemned in *Lake Shore & M. S. R. Co. v. McCormick* (1881) 74 Ind. 410; *Unback v. Lake Shore & M. S. R. Co.* (1882) 83 Ind. 191.

An instruction to the effect that it is in the opinion of the jury, the defendant, in the use of ordinary care, ought to have furnished an appliance similar to that used by a specified person who had testified in the case, they should find for the plaintiff, is not open to the objection that it is equivalent to an instruction that the defendant is bound to adopt some particular improvement. It

used without the exercise of greater care than usual on the servant's part.²⁹ See §§ 30 *et seq.*, *ante*.

30. Rationale of this principle.—(Compare §§ 55-57, *post.*)—

a. An application of the doctrine of assumption of risks.—Viewed from one standpoint, this principle is essentially a deduction from the principle, to be developed in a later chapter (xvii.), that a servant as-

is still left to the jury to determine whether the defendant has, in their opinion, exercised ordinary care. *Wheeler v. Wason Mfg. Co.* (1883) 135 Mass. 204. In *Lorimore v. Palmer Mfg. Co.* (1900) 60 S. C. 153, 38 S. E. 430, it was held that a requested instruction that the operation of all machinery is always attended with more or less danger was properly refused, as such instruction was a mere statement of fact. But *quarre*, considering that this statement was merely introductory to the assertion of the doctrine that the ground of liability is not danger, but negligence.

Indianapolis, R. & W. R. Co. v. Flanagan (1875) 77 Ill. 365 (double buffers in railway cars); *The Scorpion* (1892) 2 C. C. A. 102, 8 U. S. App. 49, 51 Fed. 91 Reversing (1891) 49 Fed. 393 (which required more care to operate it than some more modern machines). In *Et. Wayne, J. & S. R. Co. v. Gildersleeve* (1876) 33 Mich. 133, this particular phase of the general principle was thus lucidly expounded by Judge Cooley, in a case where a train hand was injured owing to the fact that an old car was much lower than those commonly used by the railway company: "The car which was the cause of the injury in this case was not in itself dangerous or unfit for use. In coupling it with other cars, peculiar caution was requisite, making it more liable to cause injury than would a car of more modern construction. Its use, therefore, made the employment more dangerous than it otherwise would be. In that particular the case may be compared to that of a farmer who, with knowledge on the part of himself and those in his employ that a horse he has had in use is disposed to be fractious and unmanageable, continues nevertheless to use him in his business. It may be compared to that of the merchant who continues to make use of a fluid for light, when something else which is within his reach has been demonstrated by experience to be safer. So far as we

can perceive, the case of the manufacturer would not be different in principle who should continue the use of a building which, in the event of a conflagration, would subject his employees to greater risks than would one of different construction. Comparisons innumerable might be made with this case in all the avocations of life. Now, any rule on this subject must be a general rule, and not one to be applied to railroad companies alone. It will be perceived that the risk in the case was such as would affect only the person employed, and that whatever duty was imposed by the circumstances upon any one could have had reference only to such persons. The case is consequently divested of any question except such as would concern the relation of master and servant, and the same rule would govern the case that would govern were the question to arise between the farmer, the mechanic, or the manufacturer and the persons in his employ. And treating it as a question of such broad application, we do not perceive any ground upon which the plaintiff's case can safely be planted, which comes short of this: That the employer is under obligation to his servants under all circumstances to make use of the safest known appliances and instruments, and is responsible for any failure to discard what is not such, and to supply its place with something safer. Any doctrine so far reaching as this would manifestly be destructive of the general rule, and would almost make the employer the guarantor of his servant's safety in his employ. But under any less serious responsibility it would be impossible to sustain a judgment against this defendant upon the sole ground of a failure to discontinue the use of this car. In any light in which the question can be viewed, no breach of duty can be charged against the defendant, unless it be the duty to make the employment as safe for the persons employed as was possible."

sumes all the ordinary and obvious risks of the service.¹ In all, or nearly all, the cases in which the master's exemption from liability has been put upon this ground, the servant's knowledge, actual or constructive, of the risk, has been adverted to as one of the elements involved.² The connection between the two principles is indicated by such forms of statement as this: That the servant assumes the risk of injury, not only from the perils ordinarily incident to his service, but also from special hazards existing because of the particular means or method used by the master in the conduct of his business, of which the servant is informed, or which ordinary care would disclose to him.³ Under this aspect of the doctrine its justification is to be de-

¹ So expressly stated in *Renne v. United States Leather Co.* (1900) 107 Wis. 305, 83 N. W. 473; *Anderson v. Illinois C. R. Co.* (1899) 109 Iowa, 524, 80 N. W. 561; *Bonnet v. Galveston, H. & S. A. R. Co.* (1895) 89 Tex. 72, 33 S. W. 334.

² See, for example, *Ladd v. New Bedford R. Co.* (1876) 119 Mass. 412, 20 Am. Rep. 331; *Fisk v. Fitchburg R. Co.* (1893) 158 Mass. 238, 33 N. E. 510; *Thain v. Old Colony R. Co.* (1894) 161 Mass. 353, 37 N. E. 309; *Olsen v. Andrews* (1897) 168 Mass. 261, 47 N. E. 90; *Hewitt v. Flint & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 659; *Anthony v. Levert* (1887) 105 N. Y. 591, 12 N. E. 561; *Robinson v. Dinwiny* (1898) 96 Va. 41, 30 S. E. 442.

³ *Burnham v. Concord & M. Co.* (1896) 68 N. H. 567, 44 Atl. 750. "He who enters the service of another with the machinery and implements of the employer's business in a given condition, with knowledge of such condition, waives any claim upon the employer to furnish other and greater safeguards." *Hayden v. Smithville Mfg. Co.* (1861) 29 Conn. 548. "Where the employer and the employee are equally competent to judge of the risks and hazards, and both have equal knowledge of the surroundings, the employer cannot be culpably negligent as towards the employee, although the work may be dangerous or hazardous, and although it might be made safer by the employer if he should choose to do so." *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582. "If a servant, knowing the hazards of his employment as the business is conducted, is injured while engaged therein, he cannot maintain an action against the master for the injury merely on the ground that there was a safer mode in

which the business might have been conducted, the adoption of which would have prevented the injury." *Simmons v. Chicago & T. R. Co.* (1884) 110 Ill. 340. In *Richards v. Rough* (1884) 53 Mich. 212, 18 N. W. 785, the court, after asserting the right of the employer to conduct his business in his own way, proceeded thus: "There is no question in this case but that the injured party had as much knowledge of the machine and appliances used, and of all the circumstances relating to the machinery and its safety, as did the defendants or their foreman. There is no showing in this case that defendants or their foreman did not use ordinary care and prudence in protecting the plaintiff against dangers not within his knowledge or observation and the accident of which he complains, and this is all they were required to do. The risks and dangers, whatever they were, so far as the record shows, were voluntarily assumed by the plaintiff, and no question is made but that he was fully capable of understanding and appreciating them; and in such case the risk was his, whatever it might be. No employer by an implied contract undertakes that his machinery and appliances are safe beyond a contingency, or even that they are as safe as those of others using the same kind of machinery, 'or that accidents shall not result to those in his service from risks which perhaps others would guard against more effectually than it is done by him.' Not only did the injured party in the case know all the danger there was in using the machine that the employers or their agents knew, but his position was such that if any change occurred or was made involving an increase of danger he would be the first to see it; and if he continued his serv-

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ice after it would he would

The fo judgment Y. R. Co. N. Y. S. ive: "I general ployee a learned this rule master l which re sonable servants ble app which, t of them. the func If, before have ass place p work, th sonable doctrine risks is means n whether machine of the failure and late of his d to provi doctrine and fou

gence. place to shall c takes t therein incident See also post. In Ro Co. (18 the deci bound t partly c to assu serve t what th 'st ap W. 100 In on already

duced, in the last analysis, from considerations referable to that hypothetical condition of social and economic freedom which is assumed to prevail in the countries where the common law is administered.⁴

ice after such change without protest, it would be at his option, and if injured he would be remediless."

The following remarks in a dissenting judgment in *Young v. Syracuse, B. & N. Y. R. Co.* (1899) 45 App. Div. 296, 61 N. Y. Supp. 208, will be found suggestive: "The prevailing opinion the general rule is recognized that the employee assumes apparent risks. The learned judge then proceeds to say that this rule has no application where the master has not fulfilled the obligation which rests upon him to exercise a reasonable degree of care in furnishing his servants safe places in which, and suitable appliances and machinery with which, to perform the services required of them. In this, to my mind, is found the fundamental error in this decision. If, before an employee can be held to have assumed the apparent risks of the place provided for him in which to work, the master is bound to use reasonable care to make that place safe, the doctrine of the assumption of apparent risks is stripped of its vitality, and means nothing. The jury may then say whether the master has the right to use machinery and appliances that are not of the latest pattern, and whether his failure to provide the best machinery and latest appliances is not a violation of his duty to use reasonable care. But to provide for just this condition, the doctrine of assumed risks has arisen and found its place in the law of negligence. The master may provide such place to work and such machinery as he shall choose. If the servant undertakes the employment, and continues therein, he assumes such risks as are incident to the situation and obvious." See also the cases cited in §§ 54 *et seq.*, *post*.

In *Ragon v. Toledo, A. A. & N. M. R. Co.* (1893) 97 Mich. 265, 56 N. W. 612, the decision that the defendant was not bound to ballast a side track was put partly on the ground that it had a right to assume that its employees would observe the conditions,—modifying somewhat the effect of what was said on the first appeal (1892), 91 Mich. 379, 51 N. W. 1004.

In one of the Massachusetts decisions already cited, Holmes, J., summed up

the situation with regard to one particular class of cases: "It is necessary for railroad companies to put up structures near enough to their tracks for it to be possible for persons on the trains to come in contact with them. . . . There must be some point within the limit which it is possible for a man on a train to reach, at which the railroad company has a right to build without notice, and to assume that those on the trains will keep out of the way. Everyone knows that there is danger as soon as he gets outside of the line of the train." *Thain v. Old Colony R. Co.* (1894) 161 Mass. 353, 37 N. E. 309. It must be admitted, we think, that the learned judge is not very happy in the choice of the parallel instances adduced to corroborate his conclusions. There is no inconsistency in conceding that parallel tracks may with propriety be built so close to each other that an employee putting his person outside the cars traveling on one of the tracks is in danger of being struck by those traveling on another, and in denying at the same time that a railway company is entitled to build scattered structures dangerously close to its lines. A perfectly satisfactory differentiating element is furnished by the fact that in the one case the danger is created by conditions which, as they subsist along the whole length of the track, the train hands are never permitted for a moment to forget; while in the other, as the servant is required to encounter a number of separate and distinct hazards as these present themselves at irregular intervals along a strip of space elsewhere free from obstructions, he is very apt, at critical conjunctures, to forget the existence of the particular one which it most concerns him to remember.

Compare § 63, *post*. The analogy of the passenger is still more irrelevant, for the obvious reason that it is scarcely possible to conceive of circumstances under which there can be any call of duty which would justify him in being outside a car, while in the case of train hands the necessity for assuming such a position is constantly arising.

⁴ See *Bethlehem Iron Co. v. Weiss* (1900) 40 C. C. A. 270, 100 Fed. 45.

A doctrine based upon this foundation evidently finds its most appropriate field of action in those conditions which are normal and permanent. An employer, it is laid down, owes a servant no duty to change the construction and arrangement of his plant in those parts which were in good repair and plainly visible when he entered into the contract of employment. It is one of the implied terms of the contract that the work shall be done with the construction and permanent arrangements which then appeared.⁵ Numerous exemplifications of this conception will be found in the cases cited in chapter VIII., *post*.

b. Rendered necessary by the jury system of trials.—In many of the cases the principle now under discussion is referred to another consideration, which places it upon a foundation which is entirely distinct from and independent of that supplied by the theory of an assumption of the risk,—*viz.*, that, under the common-law system of procedure, the effect of adopting a different principle would be to invest the particular jury which might happen to be impaneled with the function of determining absolutely, in each and every instance, whether the instrumentalities or method of work which caused the injury was as safe as it ought to have been. It is asserted that, under many circumstances, a jury is not an appropriate body to decide such a question.⁶ The argument which is supposed to be conclusive in

⁵ *Lemoine v. Aldrich* (1900) 177 Mass. 89, 58 N. E. 178. Compare the language used in *Hall v. Wakefield & S. Street R. Co.* (1901) 178 Mass. 98, 59 N. E. 668; *Phelps v. Chicago & N. W. R. Co.* (1899) 122 Mich. 171, 81 N. W. 101, 84 N. W. 66.

⁶ The earliest case in which this aspect of the principle is adverted to seems to be *Skipp v. Eastern Counties R. Co.* (1853) 9 Exch. 223, 3 C. L. Rep. 185, 23 L. J. Exch. N. S. 23, where it was held not to be a question for the jury whether the number of servants employed by the defendant was sufficient for the performance of the work. "As between the public and the company," said Alderson, B., "the former may be the proper judges of the number of servants required; but that is not so between the company and their own servants." "This is an attempt," said Parke, B., "to cast upon the jury the duty of fixing the number of servants which a railway company ought to have; but in a case like the present the company are themselves the proper judges of the number they require for carrying on the business of the line; and the question proposed was not a proper one for the jury." It has also been laid down that the determination of such engineering questions as the propriety of having a very sharp curve in a yard should not be left to the varying and uncertain opinion of jurors. *Tuttle v. Detroit, G. H. & M. R. Co.* (1887) 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166. This is a strong case, as the curve in question was so sharp that the draw-heads of cars ran past each other when they met. That the jury is not precluded from considering all questions of engineering, see § 68c, *post*, note 7. It is error to submit to a jury the question whether a siding was properly constructed with respect to security against a car being blown out on the main track. *Twitchell v. Grand Trunk R. Co.* (1889) 39 Fed. 419, following *Tuttle v. Detroit, G. H. & M. R. Co.* *supra*. That engineering questions are not proper ones for a jury to decide was also declared in *Chicago & E. I. R. Co. v. Driscoll* (1898) 176 Ill. 330, 52 N. E. 921, Re-

favor of denying the servant the privilege of having his rights considered upon this basis is that, if juries were permitted to apply the test of comparison in this manner, the views of different juries in the same jurisdiction as to the significance of facts substantially identical might be entirely antagonistic, the result being that it would be impossible to obtain any fixed standard of adequacy and safety.⁷

versing (1897) 70 Ill. App. 91 (use of butt post on stub switch). It has been held, however, that an instruction in an action for injuries to an employee in an iron manufactory, that the jury cannot undertake to say how defendant's railroad shall be located, what will answer its purposes, and what will not, is erroneous, as calculated to unduly restrict the legitimate inquiry of the jury. *Weiss v. Bethlehem Iron Co.* (1898) 31 C. C. A. 363, 59 U. S. App. 627, 88 Fed. 23.

⁷ *McGinnis v. Canada Southern Bridge Co.* (1882) 49 Mich. 466, 13 N. W. 819, where Cooley, J., said: "The plaintiff had no right to ask the court and jury to regard a single consequence of the adoption of the device, and to condemn the management of the railroad company on so narrow a view of its conduct, but it was his business to show that, on a survey of the whole field, the use of the block was prudent, and that it guarded against dangers in one direction without the introduction of perils in another. Without that showing it seems very manifest that, as the evidence stood, there was no case made for the adoption of the proposed device. Railroadings are at best a business with many dangers, and scarcely any machine, implement, or expedient made use of in it but is liable at some times and under some circumstances to imperil human lives. Suppose the block had been made use of, and an accident had occurred which was thought to be attributable to it: how, on the plaintiff's theory, would the defendant have excused itself for adopting it? A jury verdict in favor of its use in a previous case could be no protection, for a verdict makes no precedent, and settles nothing but the immediate controversy to which it relates; the next jury on precisely similar facts is at liberty to find to the contrary. The defendant would therefore be compelled to defend its adoption of the block by showing that it tended to make the management of trains more safe. But if the plaintiff in the suit were to proceed to show

—what fully appears in this case—that, though the device had been known for several years, the experts in charge of railroads the country over, naturally solicitous as they must be, on grounds of personal interest, if not of humanity, to diminish the risks to life, had failed to be convinced of the expediency of making use of the block, this showing would have made out a case against the defendant which could not well have been answered. The *prima facie* showing that the device had been hastily, if not heedlessly, adopted, would certainly have been very strong; and if the two cases charging respectively negligence in rejecting and then in adopting the same device could go to successive juries, we might witness the instructive result of a verdict against the defendant in both." In *Richards v. Rough* (1884) 53 Mich. 212, 18 N. W. 785, the court reasoned thus: "The testimony does not show or tend to show that the machinery from the use of which the injury occurred was defective either in construction or for want of repair; neither does it appear that anything could have been done to the machine by the defendants to guard against danger of accidents more than was done. All machinery is dangerous to a greater or less extent, and particularly when operated by steam. The defendants had to select the kind of machinery they wished in conducting their business. At this day, when inventions of machinery are of daily occurrence, frequently a large number of different kinds are made to accomplish the same purpose, and great difference of opinion exists as to the kind best adapted to the use intended, in the minds of men well skilled in their construction and use. The comparative merits of the different kinds, whether as to safety or utility, are questions most difficult to solve; and to say that it shall be left to a court or jury to determine in any given case which kind a manufacturer shall use in order to avoid liability in case of an accident to an employee while using it would be imposing a duty upon

The case with which witnesses can be found to testify on either side as to such a matter has also been referred to as an important consideration in this connection.⁸

the court and an injustice upon the party, alike intolerable. A manufacturer must be permitted to choose the machinery he desires to use, and to control his business in his own way, provided he does no unlawful act. He may use new or old machinery, according to his liking, and if it is sound, well made, and kept in repair he will not be liable for an accident occurring to an employee using it, so long as the only cause alleged is that there is a better and safer kind of machinery used for the same purpose." So in *Harley v. Buffalo Car Mfg. Co.* (1894) 142 N. Y. 31, 36 N. E. 813, we find Earl, J., reasoning thus: "Suppose, under the circumstances which exist here, the defendant had adopted one of the other fasteners for this particular belt, and an accident had happened from its parting; there would have been substantially the same evidence for the jury and the same claim could have been made which is now made, that there was a question of fact for the jury as to its negligence in making the selection. This judgment cannot be affirmed without subjecting the master in such a case as this to the risk of liability for injuries from the parting of a belt moving machinery in his shop, whatever fastener he may use, because if he uses one kind, according to the evidence in this case, it is easy to find persons who will testify that from their experience and observation some other kind was better." In *Boyd v. Harris* (1896) 176 Pa. 484, 35 Atl. 222, the court argued as follows: "This case presents a question, the importance of which extends far beyond the present parties and the judgment to be entered herein. It is whether the location of the permanent structures along a line of railroad necessary to accommodate its business is to be determined by the railroad company or by a petit jury. If by the former, they may be located with reference to the convenient and economical use of the railroad and the accommodation of its traffic. If by the latter, these considerations will be lost sight of, and the proper location will be a shifting one, to be settled by each successive jury in accordance with its own notions and the peculiar features of the case on trial.

One jury may hold a given location to be safe and proper. The next jury may hold it to be unsafe and therefore improper. There are many such structures necessary to the operation of a line of railroad. Among the more important of them may be mentioned the bridges, station houses, grain elevators, warehouses, water tanks, coal chutes, cattle chutes, signal stations, and tool houses. The position of these buildings with reference to the track of the railroad, their size, and the mode of construction must be determined with reference to their purpose and their convenient use as a necessary part of the physical plant of the railroad company. Where they shall be placed and how they shall be arranged are questions that belong to the railroad company as truly as the location of the switches and sidings, or of the track itself; and the discretion of its officers is no more under the control of a petit jury in the one case than in the other. This discretion is to be exercised in view of the conformation of the surface, the character of the business to be accommodated, and the convenience of the servants and employees by whom it is to be carried on. It is part and parcel of the work of construction, and is governed by the same principles." In *Bethlehem Iron Co. v. Weiss* (1900) 40 C. C. A. 270, 100 Fed. 45, the court, after laying down the general rules of law prescribing the duties of the master and the reciprocal undertakings of the servant, proceeded to explain that these rules, "while they limit, do not deprive the master of, the right to manage, and to direct his business according to his own judgment; and this is true, even though his methods be more dangerous than others that might be adopted. The so-called rule of a reasonably safe place, in order to be fitted into the structure of the law of master and servant, must be so limited and qualified by these other rules to which we have been referring as not to be inconsistent with them; otherwise, it cannot be recognized as a rule of law. It cannot be permitted to sanction the turning over to a jury the determination in every case of what is 'a reasonably safe place,' and thus substitute its varying judgment as to how a business must

This line of argument is plausible, but scarcely satisfactory. The reasons thus adduced are doubtless sufficient to justify an extremely free exercise of the right to control or set aside verdicts, to the end that something like reasonable uniformity in the law may be secured. But they do not, it is submitted, constitute an adequate basis for such a broad generalization as that embodied in a principle which virtually amounts to a declaration that a jury ought never to be permitted to consider the question of a defendant's negligence with reference to the feasibility of procuring a safer kind of instrumentality. In the practical administration of the law, it is always difficult, and often impossible, to disentangle the question of reasonable safety from that of comparative safety, and if the triers of fact are not allowed to consider the latter question, the former one is apt to be thrust into the background and unduly neglected. A more logical as well as a more equitable rule would therefore seem to be this,—that evidence tending to show that a safer instrumentality might have been used has an appreciable bearing upon the question whether the one actually used was reasonably safe, and may or may not be conclusive, according to the other elements presented by the case.

c. *Master not an insurer of the servant's safety.*—A third consideration which has been adverted to as affording a support for the principle is that a different rule would practically create a requirement that "employers should provide such machinery as would suffice to insure their employees against accidents."⁹ But this statement is

be carried on, for the lawful judgment of the owner or manager, who may have performed his duty in the premises, as prescribed by the well-established rules of law above adverted to. With the possible exception of some extreme conceivable cases, the master who has conformed to these rules of law has performed his duty as to furnishing a safe place for the workmen to work in, even though it may be more dangerous than it might be made to be." In *Chicago & E. I. R. Co. v. Driscoll* (1898) 176 Ill. 339, 334, 52 N. E. 921, Reversing (1897) 70 Ill. App. 91, the court said: "Public policy does not require courts to lay down any rule as to the manner of construction of railroads. The hazardous character of the business of operating a railroad, and the danger to life, body, and limb of employees thereon, may well call for specific legislation having for its object the protection of the person of the employee and of the traveling public; and yet it is not a question for a court to submit to a jury whether the

manner of construction of a railroad is proper or not. A verdict is not a precedent, and is not binding on another jury. One jury might find the construction a proper one, while another jury might find it an improper one, and the important engineering question of the manner of constructing a railroad would thus be left to the varying and uncertain opinions of jurors. The only question proper to submit to a jury in such cases is whether the premises as they existed at the time of the injury were reasonably safe." See also *Titus v. Bradford, B. & K. R. Co.* (1890) 136 Pa. 618, 20 Atl. 517; *Chicago & G. W. R. Co. v. Armstrong* (1896) 62 Ill. App. 228.

⁹ *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582.

¹⁰ *Augerstein v. Jones* (1891) 139 Pa. 183, 21 Atl. 24. Compare *Tabler v. Hannibal & St. J. R. Co.* (1887) 93 Mo. 79, 5 S. W. 810, where the court, in a case of this type (see above for facts), took occasion to declare that the

manifestly founded on a false conception. The proposition that the master is bound to supply a certain instrumentality because it is the best and safest available is not logically equivalent to the proposition that he is bound to insure the servant's safety. Even if the master were compelled, at his peril, to use instrumentalities answering that description, there would still be a greater or less residuum of risks which would not be covered by the obligation thus imposed.

37. Feasibility of the changes suggested; evidential significance of.—(Compare general principle discussed in § 23, *ante*.) In some cases the fact that the instrumentality which caused the injury would have performed its functions equally well if the suggested improvement had been made is mentioned as one of the elements going to show that it was negligent to maintain the existing arrangements.¹ In others the court mentions, as one of the reasons for absolving the defendant, the impossibility of doing the required work with the instrumentality if it had been altered in the manner proposed.² In others the im-

master is not an insurer. In *Young v. Burlington Wire Mattress Co.* (1890) 79 Iowa, 415, 44 N. W. 693, the court asserted the principle that a master is not required to use appliances so constructed that no injury can be inflicted by them under any circumstances.

¹ See, for example, *Renne v. United States Leather Co.* (1900) 107 Wis. 305, 83 N. W. 473 (steam pipe above track might have been raised without impairing its efficiency).

² *Sisco v. Lehigh & H. R. Co.* (1895) 145 N. Y. 296, 41 N. E. 90 (error to submit liability of railway company to jury, where a brakeman is injured by collision with a mail crane having a stationary arm of a pattern similar to that used by extensive lines of railroad, and it could not be placed further from the track and perform the service for which it is designed, although some other railroads use a crane with a movable arm which rises or falls automatically when not in use; the evidence being that the cranes with stationary arms are preferable to the others because they permit a greater space between the end of the arm and the side of the car. [1894] 75 Hun. 582, Reversing 27 N. Y. Supp. 671). A railroad company is not guilty of negligence in failing to erect any barriers around the pits used by its employees in its round house, where it would be impossible to erect barriers and do the work about an engine which is intended

when the pits are used. *McDonnell v. Illinois C. R. Co.* (1898) 105 Iowa, 459, 75 N. W. 336. In a recent case the court, in holding that the owner of a mill is not guilty of negligence in maintaining in the mill yard, not on or near the passageway leading to and from the mill, a cistern or reservoir used in the business, protected by a coping extending entirely around the same, and a chain fence which extends but partly around, a gap being necessary for the proper use of the cistern,—remarked that the cistern was as thoroughly protected as could reasonably be expected, considering the uses to which it was put. *McCann v. Atlantic Mills* (1898) 20 R. I. 566, 40 Atl. 500. See also *Kennan v. Waters* (1897) 181 Pa. 247, 37 Atl. 342 (employer not liable for an injury to an employee while engaged in operating a laundry machine which had no guard rails and could not be operated with guard rails, but was in perfect working condition and of a kind in general use, merely because other machines differently constructed and furnished with guard rails, the operation of which would be less dangerous, are in use); *Tisch v. Hirsch* (1898) 32 App. Div. 635, 52 N. Y. Supp. 1076 (employer maintaining an elevator cannot be charged with negligence upon the theory that he permitted a screw which held one end of a bar which guarded an entrance to the elevator shaft to become loose, thus allowing a play of the

practicability of employing the suggested device in connection with the instrumentality in question is adverted to.³

But it would seem that the only real significance which can justifiably be ascribed to these circumstances is merely that of corroborative factors. There does not seem to be any logical ground for asserting that, when the suitability of an appliance is being gauged with reference to the safety of a servant, it may be material to ascertain whether the changes indicated were possible, consistently with the continued use of that particular kind of appliance. If the master is not protected, independently of this consideration, by the general principles treated in this and the two ensuing chapters, there is a clear obligation on his part to change the appliance in some way calculated to secure greater safety, and the obvious conclusion is that, if the appliance cannot be operated after the proposed improvements are made, it ought to be discarded altogether.

38. Negligence not inferable from the use of dissimilar appliances for the same purpose.—The mere fact that a master uses simultaneously different types of the same kind of appliance does not import culpability. The risks arising from this difference are deemed to have been assumed by the servant, provided they are apparent and may be detected without any special skill and knowledge.⁴ He acts, therefore, within his rights when he makes a portion of some particular class of his instrumentalities more secure by adopting a new device, while he leaves unchanged the rest of the instrumentalities of that class. The contingency that such a partial alteration may be made is a risk

bar, which permitted it in its descent to pass outside instead of into a hasp on the other side of the entrance, rendering it necessary to guide the bar by hand into the hasp, where it was absolutely essential to the use of the bar that there should be enough play to permit it to pass outside of the hasp). In some cases where the absence of a guard to a machine has been denied to be negligence, the impracticability of operating it with a cover has been emphasized *arguendo*. *Palmer v. Harrison* (1885) 57 Mich. 182, 23 N. W. 624; *Mackin v. Alaska Refrigerator Co.* (1894) 100 Mich. 276, 58 N. W. 999. But the decisions seem to be independent of this factor. The case of *Scymour v. Maddox* (1851) 16 Q. B. 326, 20 L. J. Q. B. N. S. 327, 15 Jur. 723 (see § 2, *ante*), was explained by Mr. Justice Erle in *Roberts v. Smith* (1857) 2 Hurlst. & N. 213, 26 L. J. Exch. N. S. 319, 3 Jur. N. S. 469, as having been decided with ref-

erence to the fact that "the arrangement was an indispensable part of the stage mechanism." That the impracticability of making a change is always an element to be considered by the jury, see *Maxwell v. Zdurski* (1900) 93 Ill. App. 334.

³As, where it was denied to be negligence not to have a "shifter" for the purpose of pulling a belt on to a fixed pulley, the evidence being that such a device can only be used in moving belts from fixed to loose pulleys. *Young v. Burlington Wire Mattress Co.* (1890) 79 Iowa, 415, 44 N. W. 693. It is a question for the jury whether a belt shifter should have been used, where the evidence as to its utility and practicability is conflicting. *McDougall v. Ashland Sulphite-Fibre Co.* (1897) 97 Wis. 382, 73 N. W. 327.

⁴*Peirce v. Banc* (1897) 27 C. C. A. 361, 53 U. S. App. 297, 80 Fed. 988.

incidental to the duties of a servant hired while the original devices were alone in use, and is therefore one of the risks assumed by him.² *A fortiori* must the master be regarded as free from culpability where the evidence clearly shows that several methods are in general use, the choice being a matter of judgment, depending on the surrounding conditions. The law then allows him absolute discretion to select according to his own judgment.³ A master is not liable merely because an appliance which he furnishes is novel, and requires a different kind of management on the part of servants using it.⁴ If, after the introduction of an approved appliance, the master is compelled, owing to its failure to perform its functions properly, to revert for a short time to the use of the appliance formerly furnished for the same purpose, he cannot be held liable for an accident resulting from this resumption of the discarded article, where the temporary substitute is the best of its kind that can be obtained, and, while it was still in general use, was considered adequate and suitable.⁵

39. Master's duty to introduce new appliances.—(See also §§ 43 *et seq.*, *post.*) What may be regarded either as a corollary from the principles discussed in the preceding sections, or as another mode of stating it from one particular standpoint, is the doctrine that "an employer owes his employee no duty to change a business in order to make it safer, even though in some parts his ways and works would not be deemed reasonably safe and proper if he were starting a new

² *Pittsburgh & L. E. R. Co. v. Henly* (1891) 48 Ohio St. 608, 15 L. R. A. 284, 29 N. E. 575 (couplings of different patterns).

³ *Kehler v. Schwenc* (1891) 144 Pa. 348, 13 L. R. A. 374, 22 Atl. 910. "It must always be true," Earl, J., said in *Harley v. Buffalo Car Mfg. Co.* (1894) 142 N. Y. 31, 36 N. E. 813, "that where several appliances are in use, each of which is regarded by men of skill and experience as safe and proper, the master cannot be made liable for an injury to one of his servants, if in selecting the particular appliance he takes what according to his judgment is the best or most suitable, guided by his experience and observation and those of the skilled men in his employment. . . . Under such circumstances, how can it be said that the defendant violated any duty it owed to the plaintiff? It was impossible from the evidence to determine whether these fasteners were or were not the best in use for such a belt and such machinery as the defendant

had at the time and place of the accident. Suppose a master needing fasteners in his shop makes inquiry among men of skill and experience as to the best kind of fasteners to use, and he is informed by some that one kind is the best, and by others that another kind is the best, and so on, and he finally makes a selection, using his best judgment; and suppose it should turn out that it was not the best, could he, under such circumstances, be held liable for an injury received by a person in his service from the parting of a belt on account of the insufficiency of the fastener under any particular strain to which the belt had been subjected?"

⁴ *Gulf, C. & S. F. R. Co. v. Williams* (1888) 72 Tex. 159, 12 S. W. 172.

⁵ *Red River Line v. Smith* (1900) 39 C. C. A. 620, 99 Fed. 520 (electric lights failed on a Mississippi river steamboat, and kerosene lanterns were supplied to the workmen who were unloading cotton).

establishment to do the same kind of work under an arrangement with employees to serve in the business afterwards to be established."¹ An employer has a right to arrange his own premises in any way which suits his convenience, and is not bound to change the arrangement to secure greater safety to his employees.² He may, if he chooses, carry on his business with an old rather than a new machine, and he cannot be required to keep in his service persons who refuse to operate it.³ In other words, the rule that a master is bound to take certain precautions for the security of his servants does not abridge the liberty of contract between him and them as respects work upon old and well-known machines.⁴ He is not bound to change his machinery in order to supply every new invention or supposed improvement,⁵ nor "to employ every new device or improve-

¹ *Murch v. Thomas Wilson's Sons & Co.* (1897) 168 Mass. 408, 47 N. E. 111 (shipowner held not liable for the asphyxiation of a pilot, caused by a fellow servant's closing the door of a room which he was permitted to occupy, and which was liable, when closed, to be filled with dangerous fumes from the patent fuel burnt in the stove). The correctness of this particular application of the principle seems quite questionable, as the decision amounts to saying that a master is entitled to supply materials which may be converted into imminently dangerous articles by an act of a fellow servant, which is very likely to occur, and which does not import negligence on his part. See also *Gleason v. Smith* (1898) 172 Mass. 50, 51 N. E. 460 (no obligation to guard more effectually the knives of moulding machinery); *Fisk v. Fitchburg R. Co.* (1893) 158 Mass. 238, 33 N. E. 510 (no obligation to remove further from a railway track a structure which is dangerously close to it); *Ft. Wayne, J. & S. R. Co. v. Gildersleeve* (1876) 33 Mich. 133 (railway company not bound to discontinue using an old car, simply because it is so much lower than the others that coupling it involves exceptional peril); *Botsford v. Michigan C. R. Co.* (1876) 33 Mich. 256 (same point); *Whitram v. Wisconsin & M. R. Co.* (1883) 58 Wis. 408, 17 N. W. 124 (negligence not inferable from the use of a drawbar on a locomotive, so short that the operation of coupling it to a car was unsafe). See also cases of dissimilar couplings in § 71, *post*. It is proper to exclude evidence that plaintiff had told the master that there ought to

be a shipper on a belt, since, there being no evidence that the machine ever had a shipper, the master was not bound to change the condition of the machine in such respect. *Cushman v. Cushman* (1901) 179 Mass. 601, 61 N. E. 262. An employee who is caught by a derrick car on a bridge which he is crossing in order to reach his place of work cannot recover on the theory that his master was negligent in not providing some other mode of going to and from the work, or in failing to furnish a different kind of car, where such car was in use when the servant began work, and was suitable for the use for which it was intended. *Olsen v. Andrews* (1897) 168 Mass. 261, 47 N. E. 90.

² *Anthony v. Leuret* (1887) 105 N. Y. 591, 12 N. E. 561 (location of trap door in a passageway not culpable *per se*).

³ *Sweeney v. Berlin & J. Envelope Co.* (1886) 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358.

⁴ *The Maharajah* (1889) 40 Fed. 786. "We are of opinion that where a workman is employed to do certain work with a machine which he fully understands, though it may not be of the newest pattern, but nevertheless is in perfect order of its kind, and may require more care than those of newer patterns, he takes the risk of all accidents which may befall him in its use." *The Scarpis* (1892) 2 C. C. A. 102, 8 U. S. App. 49, 51 Fed. 91.

⁵ *Wander v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143 (not bound to exchange hooks for eyebolts as a means of attaching brakes, though the latter may be superior); *Chicago, R. I. & P. R. Co. v. Lonergan* (1886) 118 Ill.

ment the moment it is invented,"⁶ nor "the newest pattern or invention,"⁷ nor to adopt "all the latest improvements,"⁸ nor to adopt "the most approved appliances."⁹ Especially is there no such obligation, if in choosing the instrumentality actually put into use he acted on the recommendation of persons of skill and experience,¹⁰ or if there is no evidence to show that the suggested alteration, although it may avert some dangers, will not introduce others equally serious.¹¹ It is immaterial that the newer machines may have some additional safeguards.¹² The servant having accepted the service subject to risks, with knowledge of the kind of tools and implements used, the master is not required to furnish new appliances, or to elect between the expense of so doing and damages for injuries to servants from the use of an older or a different pattern.¹³ The servant is deemed to be suf-

41, 7 N. E. 55, citing Wharton, Neg. § 213; *Toledo, W. & W. R. Co. v. Asbury* (1877) 84 Ill. 429 (no obligation to introduce the "Miller" self-coupling apparatus); *Louisville & N. R. Co. v. Allen* (1885) 78 Ala. 491; *Georgia P. R. Co. v. Propst* (1887) 83 Ala. 518, 3 So. 764; *Camp Point Mfg. Co. v. Ballou* (1874) 71 Ill. 417; *Galveston, H. & S. A. R. Co. v. Gurnley* (1894) Tex. Civ. App. 27 S. W. 1051 (disapproving instruction that appliances should be "of modern improvement").

⁶ *Faber v. Carlisle Mfg. Co.* (1889) 126 Pa. 387, 17 Atl. 621.

⁷ *Chicago & G. W. R. Co. v. Armstrong* (1895) 62 Ill. App. 228.

⁸ *Sappenfield v. Main Street & Agri. Park R. Co.* (1891) 91 Cal. 48, 27 Pac. 596.

⁹ In *Harvitt v. Flint & M. R. Co.* (1887) 67 Mich. 61, 3 W. 659, it was held that the plaintiff had not succeeded in establishing a want of ordinary care on the defendant's part where the evidence (as stated by the court) was to the following effect: "The platform car which caused the accident had stood upon the track for a month, and during the entire existence of the siding no car was shown ever to have left it before without being moved by the defendant's servants. Those connected with the freight train which backed in upon the siding just before the accident say it did not touch the car, and this testimony is substantially undisputed. The wind which, it is claimed, moved the car, is shown to have produced a pressure against the end of the car not exceeding 20 pounds, which would hardly be expected to move a car weighing 7

tens on a grade such as this siding was shown to have been. This side track had been in constant use for at least sixteen years, holds all kinds of cars, and no case of a car of any kind going out by force of the wind has ever been known at that station. It also appears by the testimony of competent and skillful engineers and mechanics and railroad men that upon this siding there was no occasion for using stop blocks; that their use was accompanied with inconvenience and danger; that good railroad management dispensed with them when not actually necessary; and that no necessity existed for their use upon this siding. There was no pretense but that all of the employees of the defendant were competent, skilled, and experienced men."

¹⁰ *McGill v. Borman* (1890) 18 Se. Sess. Cas. 4th series, 206. See also § 16b, ante.

¹¹ *McGinnis v. Canada Southern Bridge Co.* (1882) 49 Mich. 466, 13 N. W. 819 (blocking of frogs).

¹² *The Maharajah* (1889) 40 Fed. 786.

¹³ *Sweeney v. Berlin & J. Envelope Co.* (1886) 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358 (master not guilty of negligence in not providing a clutch for an embossing machine, other than the pedal, to prevent motion in the machine while the operator's hands were exposed to danger. The court said: "It is plain that the danger, to the knowledge of the plaintiff, was inherent in the use of the machine and to the work itself; the peril did not grow out of extrinsic causes or circumstances which could not be discovered by the use of ordinary precaution, nor to a condition

ficiently protected by the possession of his right to avoid exposure to those risks by quitting the employment.¹⁴ See also chapters xvii. and xx. He is "not bound to risk his safety in the service of the master, and may, if he thinks fit, decline any service in which he reasonably apprehends danger to himself."¹⁵

That the employer's privilege in respect to the retention of an inferior type of instrumentality is not entirely unlimited is indicated by the qualificative expressions used in some cases,—as, where it is laid down that to render an employer liable for furnishing an unfit appliance, it is not sufficient that there are better or safer appliances to be had, but that supplied must have some radical fault, or its use have become so generally obsolete or supplanted by others superior thereto that its adoption or retention will itself indicate negligence;¹⁶ or where it is said that a master is not required "to adopt any new device until its utility has been sufficiently tested, and it has been shown to be, as a whole, better than the appliance in use."¹⁷ These statements seem to recognize, though not very explicitly, the principle that in the process of improvement there may be a stage finally reached at which the disparity in point of safety between the instrumentalities or methods actually adopted and those available becomes so glaring that a verdict for the plaintiff based on the hypothesis that the retention of the old appliance was culpable ought not to be interfered with.¹⁸ Some judges have gone to the length of refusing to

of things different from those existing at the beginning of the service. It was part of the plaintiff's engagement that the master's work should be performed in the usual course and way of business. The work which the servant was called upon to do at the time in question was not of a different character from that which he originally undertook; and the machine upon which it was to be done was one then in use. No new duty or species of labor was imposed upon him, nor was he required to work a machine with which he was not familiar. He was simply called upon to do that for which he was engaged, and the doing of which formed the consideration of his employment. To say that the master shall be liable to the servant in such a case is to say that he shall not have the benefit of the labor for which he contracted"; *Arizona Lumber & Timber Co. v. Mooney* (Ariz. 1895) 42 Pac. 952 (no obligation to put a guard on a circular saw to prevent pieces of wood from flying off from it).

¹⁴ *Chicago & T. R. Co. v. Simmons*

(1882) 11 Ill. App. 147; *Hauck v. Pennsylvania R. Co.* (1887; Pa.) 11 Atl. 459; *Sweeney v. Berlin & J. Envelope Co.* (1886) 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358; *Wander v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143.

¹⁵ *Priestley v. Fowler* (1837) 3 Mees. & W. 1, 1 Murph. & H. 305, 1 Jur. 987.

¹⁶ *Sappenfield v. Main Street & Agri. Park R. Co.* (1891) 91 Cal. 48, 27 Pac. 590. As to the significance of the usages of other employers, see §§ 43 *et seq.*, *post*.

¹⁷ *Burns v. Chicago, M. & St. P. R. Co.* (1886) 60 Iowa, 450, 58 Am. Rep. 227, 30 N. W. 25 (negligence held not to be predicable merely from the failure of a railroad company to adopt the "Potter" draft iron with three couplings, there being nothing to show how long it had been in use, and no evidence that the single coupling was not still in use).

¹⁸ In *Smith v. New York & H. R. Co.* (1856) 6 Duer, 225, Affirmed (1859) in 19 N. Y. 127, 75 Am. Dec. 305, a rail-

impute negligence to the master where the alternative methods or appliances available to him were those most usually employed by other persons under like circumstances.¹⁷ But this doctrine is contrary to the weight of modern authority. See § 1076, *post*.

40. General doctrine not a protection where the instrumentalities are of a pattern that is not reasonably safe.—As already stated, in § 33, *ante*, the doctrine now under discussion is supposed to be applied subject to the qualification that the means and appliances furnished are reasonably safe and suitable for the servant's use. The full effect of this qualification and its operation with reference to the other elements by which, as explained in the next two chapters, the extent of the employer's obligation is tested, can be most clearly shown by collating the decisions with respect to specific instrumentalities. A summary of these decisions will be found in chapter VIII., *post*.

41. — nor where they are specifically defective.—Another qualification of the doctrine is that it furnishes no protection to a master who furnishes instrumentalities which are defective either in construction or for want of repair. The distinction between the liability incurred by the use of such instrumentalities, and by the use of instrumentalities in their normal condition, is recognized in a large number of

way company over whose lines the plaintiff's employer had running powers was held liable for its failure to adopt an improved form of switch which would have materially reduced the risk of accident. But this decision is not easy to reconcile with the later case of *Sweeney v. Berlin & J. Envelope Co.* (1886) 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358, cited in note 3, *supra*. In North Carolina it was remarked ten years ago that "in view of the changes incident to new inventions and discoveries, facts which would not have shown negligence a few years since may now or in the near future be declared in law ample evidence of culpable dereliction in duty;" and the opinion was expressed that the time had arrived when railroad companies should be required to attach the Janney or similar improved coupler, and perhaps air brakes to all passenger cars, though not to freight cars on account of the great expense involved. *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 487, 18 L. R. A. 846, 16 S. E. 699.

¹⁷ *Duncan v. Leach* (1857) 26 L. J. Exch. N. S. 221; *Wander v. Baltimore & O. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143. In the latter case the court

said: "It is now settled that there is no contract obligation imposed upon the master, from the mere relation that he bears to the servant, to provide machinery of any particular character or description to be operated by the latter, nor is there any implied undertaking on the part of the former, resulting from the mere relation as employer, that the machinery shall be kept free from defects such as may expose the servant to danger. The servant is a free agent to select the employment into which he enters, and, in contracting for the wages that he is to receive, must be supposed to take into account the risks to which the employment may expose him; and among those risks are the defects and accidents of the machinery, and the negligence and want of caution of fellow servants in the common employment. To hold the master liable to the servant for all the injuries resulting to the latter from defects in machinery or materials upon which he may be employed, or from the negligence of fellow servants engaged in the common employment, would go far to impede, if not to make it impossible, to carry on many of the great works of the country."

ases.¹ Other decisions in which it is taken for granted that the employer's right to carry on business in his own way is limited to this extent are those cited in chapter VIII, B, requiring him to answer for injuries due to abnormal conditions.

Tuttle v. Detroit, G. H. & M. R. Co. (1887) 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166, where the peril arising from the sharpness of a curve are distinguished from those arising from the defects of unsafe machinery which the employer has neglected to repair, and which his employees have reason to suppose is in proper working condition. *Hunt v. Kane* (1890) 40 C. C. A. 372, 100 Fed. 256, where it was held that the rule that a railroad company is not guilty of negligence in failing to block its frogs, which render it liable for an injury to a switchman working in such yards who has knowledge that no blocking is used, is not applicable to a case where a company undertakes to maintain blocking, but allows it to become defective. *Davis v. Tinsbury Co.* (1896) 22 Colo. 408, 45 Pac. 105, where one of the grounds for denying the servant's right to recover was that the omission to supply a trail car with a fender was not a defect of construction, though it enhanced the risks of the employment. *Kennan v. Waters* (1897) 181 Pa. 247, 37 Atl. 342, where the fact that the machine which, it was alleged, should have been discarded, was in perfect working condition was expressly mentioned among the reasons for negating negligence in using it. In *Bader v. St. Louis & S. F. R. Co.* (1897) 137 Mo. 240, 37 S. W. 132, a drawbar was defective, the "lug" or "lip" being so out of repair as to allow the cars to come dangerously close together. Counsel for defendant argued that no negligence could be inferred, since the break only left the apparatus, as a whole, in the same condition in which it would have been if it had been constructed without the lug. But this contention did not prevail, the court taking the position that the fact that it would not have been negligent for a master to use an appliance without a safety device thereon did not relieve him from the obligation of seeing that a device actually used in connection therewith was in a reasonably safe condition. In *Smith v. St. Louis, K. C. & V. R. Co.* (1878) 69 Mo. 37, 33 Am. Rep. 484, the court remarked that in some of the cases dangerous and defective machinery and implements are contemplated, and proceeded thus: "Machinery is not necessarily defective because dangerous. The most perfect steam engine requires skill and care in its management, and is a dangerous agent. Circular saws, planing machines, and nearly all machines used in wood work are dangerous, but not therefore necessarily defective. This distinction must be kept in view in determining all questions which arise in suits for injuries received by employees in using implements and machinery furnished by the employer." Compare *St. Louis, I. M. & S. R. Co. v. Davis* (1891) 54 Ark. 389, 15 S. W. 895, where it was said that, when a master employs a servant to do a particular work with a particular kind of implement or machine, he agrees that it is fit for the purpose intended, but not that it can be used without danger. See also these cases: *T. Scarpis* (1892) 2 C. C. A. 102, 8 U. S. App. 40, 51 Fed. 91; *Richards v. Rang* (1884) 53 Mich. 212, 18 N. W. 785 (*quendo*); *Swanson v. Berlin & J. Envelope Co.* (1886) 101 N. Y. 520, 524, 54 Am. Rep. 722, 5 N. E. 358; *Ellis v. New York, L. E. & W. R. Co.* (1884) 95 N. Y. 546; *Frid v. Citizens' R. Co.* (1893) 115 Mo. 503, 22 S. W. 498; *Mulvan v. Montana Union R. Co.* (1897) 19 Mont. 135, 47 Pac. 795; *Murphy v. Lake Shore & M. S. R. Co.* (1896) 67 Ill. App. 527; *Ryan v. Fowler* (1862) 24 N. Y. 410, 82 Am. Dec. 100; *Kennemer v. Manhattan R. Co.* (1881) 81 Hun, 441, 31 N. Y. Supp. 82; *Re v. Pearson Carden Co.* (1895) 161 Mass. 257, 41 N. E. 284; *Young v. Virginia & A. C. Constr. Co.* (1891) 109 S. C. 618, 14 S. E. 58. In any jurisdiction where this view is taken, a master who adopts an appliance for the purpose of enabling a defective machine to do certain work will be treated as culpable if the substituted appliance exposes his servants to greater danger than they would have incurred if the machine had been in good condition. *Muirhead v. Hannibal & St. J. R. Co.* (1885) 10 Mo. App. 634 (rope used as a coupling).

A few of the authorities, however, are adverse to the soundness of the distinction thus drawn,² and it certainly seems to be scarcely sustainable by any train of reasoning which will not lead to conclusions which are essentially irreconcilable with those discussed in the preceding part of this chapter.

It has been shown in § 35, *ante*, that the right of a master to carry on his business with such instrumentalities and by such methods as he may prefer rests primarily and fundamentally upon the hypothesis that the servant understands and therefore accepts the risks which he will have to encounter by reason of the use of those instrumentalities and methods. If it is shown, as a matter of fact, that he does not understand those risks, and that his want of understanding is not in itself culpable, the doctrine which accords this liberty of action to the master will clearly be no more a protection to him than in cases where the instrumentalities or methods are specifically defective. See chapter vii., *post*. The inference is that the distinction drawn between comparative inferiority resulting from intrinsic qualities, and unfitness produced by defective condition, has in this point of view no real doctrinal basis, and that, in the last analysis, the question involved is merely one of the incidence of the burden of proof. In the one case the master is given the benefit of the presumption that a servant, at all events when he is of full age and apparently in possession of an average measure of intelligence, appreciates the risks which he will encounter. In the other cases the master, if he seeks exemption from liability on the ground of appreciation of a risk, has the *onus* of making good that defense by positive evidence. See § 57, *post*, for some further remarks on this subject.

The inconsistent position in which the courts have placed themselves by propounding this distinction as one based upon doctrinal, instead of merely evidential, considerations, is brought into clear relief by some decisions which have virtually ignored it altogether, and in effect, if not in terms, have affirmed the principle that it is not negligence to suffer an appliance to sink to a lower level of safety which would not imply culpability in the case of an appliance which is being put into use for the first time.³

² *Dymen v. Leach* (1857) 26 L. J. Exch. N. S. 221; *Wonder v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143. "A manufacturer has the right to keep a machine in use after it has become old and defective, unless its defects expose the operator to some latent or extraordinary danger." *Kelley*

v. Silver Spring Bleaching & Dyeing Co. (1878) 12 R. I. 112, 34 Am. Rep. 615. In *Bracer v. Flint & P. M. R. Co.* (1885) 56 Mich. 625, 23 N. W. 440, it was held not to be negligence to use a car the drawbar of which, owing to the fact that the spring has grown weaker, has dropped below the normal level.

42.—nor where the risks incident to using them were not fully understood by the injured person.— There is also a third class of cases which is not controlled by the doctrine,—those, namely, in which the servant, from lack of experience or some other cause, was excusably ignorant of the properties of the instrumentality furnished.¹ This exception is implied in the theory that the doctrine is at least par-

The case was decided on the analogy of those which permit companies to use cars with couplings which are structurally of different heights. See §§ 39, *ante*, and 71, *post*. In *Bajus v. Syracuse, B. & N. Y. R. Co.* (1886) 103 N. Y. 312, 57 Am. Rep. 723, 8 N. E. 529, where it was held that a brakeman caught by the brake beam of a moving car could not recover on the ground that the engine attached to such car was, by reason of a defect in its fly and main steam valve, not sufficiently powerful to stop the car in time to avert the injury, the court reasoned thus: "The responsibility for the defects is no greater than it would have been if the defendant had furnished a new engine of precisely the same power. . . . Suppose, then, the defendant had furnished a new engine of 70-horse power, —precisely the same power which we may assume this had at the time of the accident; upon what principle could it be said that it would be liable for such an accident? Can it be laid down as a principle of law that it is bound to furnish to its employees engines suitable and adequate in power to every emergency? Who but the employer shall determine how powerful an engine shall be at any place and for any purpose? Suppose, at this place, the defendant had furnished an engine capable of moving but three cars at a time and running but 10 miles an hour, and the plaintiff had known it, could he justly complain of it? Would such an engine, in any legal or proper sense, be dangerous? If an employer should furnish to an employee a horse which, from natural weakness or from disease, should not have strength for the work in hand, and the employee should, in consequence thereof, receive some injury, could he hold the employer responsible for his damages? These inquiries need not be pursued. The answers to them are obvious." Danforth, J., dissented in an elaborate and well-reasoned opinion, in which he denied that, on the evidence, the defective condition of the throttle valve could, as the majority of the court

assumed, be left out of account, and argued that, if the accident was due to the failure of the engine to respond promptly to the reversal of the lever, the case presented was one, not of "a mere loss of power, but a misapplication of power." *Flike v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545, where the injury resulted from the inability of the trainmen to stop the train promptly, one of the brakemen being absent, was cited by the learned judge, who pointed out that this case and the one before the court were essentially similar, since in the latter a sound appliance was lacking, and in the former, the full number of employees. The evidence being, in his opinion, sufficient to justify the conclusion of the jury that the defendant had failed in its duty to supply machinery in a condition in which it would not endanger the persons of the trainmen, he considered that the verdict for the plaintiff should not be disturbed. But apart from the objections to the majority opinion which are thus put forward, it is clearly obnoxious to the still more fatal one that whether or not it would have been negligence to supply an engine of smaller power, the agreement of the plaintiff was to work with one of greater power, and that it was contrary to one of the fundamental principles of the law of employers' liability to hold that he undertook the risks arising from a temporary impairment of that power, unless it was shown that he appreciated the effect of the change in his environment caused by that impairment. The opinion of the majority introduces a theory of vast scope, which, if carried out to its logical conclusions, would prevent recovery in a large number of instances in which it is now allowed. If effect is to be given at all to the distinction between mere structural or qualitative inferiority and specific defects implying an actual deterioration, it should not be evaded where it happens to operate to the disadvantage of the master.

¹ See, for example, the ruling in *Louisville & N. R. Co. v. Binion* (1894)

tially based on the hypothesis of an assumption of known risks (see § 36*a*, *ante*), and is merely a particular application of the general principle that it is culpable to expose a servant to any risk which he does not comprehend (see §§ 58, 59, *post*), or of the correlative and logically equivalent principle that a servant only undertakes such risks as he appreciates. See chapter xvii., *post*.

107 Ala. 645, 18 So. 75, that a railroad company which employs hand brakes, some of which have stiff and others limber staffs, differing only in size, the latter of which are inherently dangerous in the hands of an inexperienced brakeman, owes the duty to such brakeman of using the less dangerous kind.

CHAPTER VI.

COMMON USAGE AS A TEST OF THE PERFORMANCE OF EMPLOYER'S DUTIES.

43. Competency of evidence of usage; generally.
44. Doctrine that a master who adopts instrumentalities in common use is, as matter of law, free from negligence.
45. Applicability of the doctrine where the negligence charged has relation to the employment of servants.
- 45a.— or to the methods of work.
46. Doctrine is applicable only to instrumentalities in good repair.
47. Doctrine not applicable where the negligence charged is the breach of a statute.
48. Relation of the doctrine to that which allows a master to carry on his business in his own way.
49. Negligence not inferable simply from the fact that the instrumentality or method adopted was one not in common use.
50. Doctrine that conformity to common usage is not conclusive in the master's favor.
51. Negligence not predicable of the failure to adopt instrumentalities or methods not in general use.
52. Proof of nonconformity to common usage warrants inference of negligence.
53. What kind of usage is competent as evidence to be introduced on the question of due care.
 - a. Competency considered with reference to the similarity of the circumstances.
 - b. The number of the employers following or not following the usage.
 - c. The territorial extent of the usage.
 - d. The practice of the defendant himself.

As to usage considered as a test of the master's performance of the duty to make suitable rules, see § 211, *post*. As to the effect of the master's conformity or nonconformity to usage, where the action is brought under statutes modifying the common law, see chapter xxxvii., *post*.

43. Competency of evidence of usage; generally.— It may be laid down as an undisputed proposition that, where the injury complained of was caused by an instrumentality or method which, at the time of the accident, was in its normal condition, evidence going to show that

such an instrumentality was or was not commonly used under similar circumstances by persons in the same line of business as the defendant is always competent for the purpose of proving that he was or was not in the exercise of due care in adopting or retaining that instrumentality as a part of his plant.¹ Nor is it disputed that, if the evidence is conflicting as to whether such machinery is in common and ordinary use, the question of negligence in using the machinery is not one of law, but of fact for the jury.²

There is, however, a remarkable conflict of opinion as to the extent of a court's right to set aside or control verdicts based upon the defendant's conformity or nonconformity to common usage.

44. Doctrine that a master who adopts instrumentalities in common use is, as matter of law, free from negligence.— A doctrine which has been extensively applied may be enunciated thus: Where the only inference that can reasonably be drawn from the evidence is that the master conformed to the general usage of the average member of his trade or profession in respect to the adoption or retention of the instrumentality in question, he may be declared, as a matter of law, to have been in the exercise of due care. The language in which this doctrine is formulated or referred to would, if taken literally, often convey the idea that the generality of the usage and the similarity of the business or establishment of which the usage is adduced as a standard of comparison are the only points to be considered, and that the manner in which that business or establishment is

¹ This doctrine is taken for granted in all the cases cited in the following sections, and is explicitly affirmed in the following cases, among others: *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; *Myers v. Hudson Iron Co.* (1889) 150 Mass. 130, 22 N. E. 631; *Austin v. Chicago, R. I. & P. R. Co.* (1895) 93 Iowa, 236, 61 N. W. 849; *Pennsylvania Co. v. Hankey* (1879) 93 Ill. 580 (admitted here with special reference to the question as to what degree of vigilance the servant was bound to exercise. See §§ 28 *et seq.* ante); *Atchison, T. & S. F. R. Co. v. Alsdorf* (1893) 47 Ill. App. 200; *Hennessey v. Bingham* (1899) 125 Cal. 627, 58 Pac. 200; *Indiana, I. & I. R. Co. v. Bundy* (1899) 152 Ind. 590, 53 N. E. 175; *Richmond & D. R. Co. v. Jones* (1890) 92 Ala. 218, 9 So. 276; *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524; *Storer Mfg. Co. v. Willane* (1900) 89 Ill. App. 532; *Anderson v. Illinois C. R. Co.* (1899) 109 Iowa, 524, 80 N. W. 561 (error to refuse to allow plaintiff to prove what were the ordinary implements for the work in question); *Bellerive Stone Co. v. Comben* (1898) 61 N. J. L. 353, 39 Atl. 641, Affirmed (1898) in 62 N. J. L. 449, 45 Atl. 1090 (not error to admit evidence of the manner in which swinging dragropes in other quarries were supported so as to prevent them from injuring the workmen); *Laporte v. Cook* (1901) 22 R. I. 554, 48 Atl. 798 (not error, in an action for injuries sustained by the caving in of a trench in which the plaintiff was at work, to admit evidence as to the custom of shoring up trenches of like character under similar circumstances); *Baird v. Reilly* (1899) 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884 (similar ruling).

² *Swift & Co. v. Holoubek* (1900) 60 Neb. 784, 84 N. W. 249 (first appeal [1898] 55 Neb. 228, 75 N. W. 584).

conducted and the character of the persons engaged in it are not material factors in the question to be determined.¹ But it is clear that, under the general principles of the law of negligence, these latter elements must be material, and that the test really propounded is not usage of any employers, however imprudent and unskilful, or of any concerns, however ill regulated, but the usage prevailing among prudent and skilful employers and in well-regulated concerns. That this is the actual position taken is shown by the following extract from the opinion in a leading decision by a court which has been one of the most uncompromising exponents of the doctrine now under discussion:

"All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement or nature of the mode of performance of any work, 'reasonably safe' means safe

¹Thus, we find such unqualified statements as the following: "Whatever is, according to the general, usual, and ordinary course, adopted by those in the same business, is reasonably safe within the meaning of the law." And, that a jury cannot be permitted to set up its judgment against the general customs of the business. *Kehler v. Schwenk* (1891) 144 Pa. 348, 13 L. R. A. 374, 22 Atl. 910. "No inference of negligence can arise from evidence which shows that the implement was such as is ordinarily used for like purposes by persons engaged in the same kind of business." *Bohn v. Chicago, R. I. & P. R. Co.* (1891) 106 Mo. 429, 17 S. W. 580. See, however, Missouri decisions in §§ 50, 51, *post*. "A party entering upon a particular employment assumes the risk and perils usual thereto, when the usual and customary means to guard against accidents are adopted." *King v. Ford River Lumber Co.* (1892) 93 Mich. 172, 53 N. W. 10. "It is sufficient if the machinery is of a kind in general use." *Davis v. Augusta Factory* (1893) 92 Ga. 712, 18 S. E. 974. In *Baylor v. Delaware, L. & W. R. Co.* (1878) 40 N. J. L. 23, 29 Am. Rep. 208, the court, in holding that a brakeman who sued for injuries caused by a low overhead bridge should have been nonsuited, said: "He was, according to his own showing, an employee of the defendant, injured by one of the dangers of the business in which he voluntarily engaged. There was no

evidence to show, nor was there pretense that it was customary for railroad companies to build bridges spanning the public roads with an elevation sufficient to admit of a man to pass under who is standing upright on the top of a car. Such is not the practice of this company, nor of any other, so far as appears. Such structures would often be inconvenient, and sometimes, perhaps, impracticable. It is, therefore, quite plain that the defendant did not owe any duty to this plaintiff not to subject him to the danger into which he fell." It has been held proper to instruct a jury that an employer discharges his duty towards his employees in that respect, if he furnishes appliances which are in common and "general use throughout the country in the same or similar lines of work." *Shadford v. Ann Arbor Street R. Co.* (1897) 111 Mich. 390, 69 N. W. 661. Language of the same unqualified description is also found in the following cases, as well as others cited in this section: *Rogers v. Louisville & N. R. Co.* (1898) 88 Fed. 462 (the doctrine applied in other Federal decisions is less favorable to the master. See § 50, *post*); *Washington Asphalt Block & Tile Co. v. Mackey* (1899) 15 App. D. C. 410; *Sappenfield v. Main Street & Agri. Park R. Co.* (1891) 91 Cal. 48, 27 Pac. 590 (*arguendo*; but see the other California cases to the contrary effect, cited in § 50, *post*); *Camp Point Mfg. Co. v. Bal-*

according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by these in the same business, is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community."²

Several of the courts in their statements of the doctrine give prominence to the fact that the legal standard is the usage of prudent men and well-regulated concerns.³ But there is no reason for supposing

lou (1874) 71 Ill. 417 (but see Illinois cases to the contrary effect, as cited in § 50, *post*); *Dingley v. Star Knitting Co.* (1890) 58 Hun. 605, 12 N. Y. Supp. 31. Affirmed (1892) in 134 N. Y. 552, 32 N. E. 35; *Pittsburgh & C. R. Co. v. Seutmeyer* (1879) 92 Pa. 276, 37 Am. Rep. 684; *Payne v. Reese* (1882) 100 Pa. 301; *Fritz v. Salt Lake & O. Gas & E. L. Co.* (1899) 18 Utah. 493, 56 Pac. 90. An instruction to the effect that an employer has "a right to use and employ such machinery as the experience of trade and manufacture sanctions as reasonably safe" has been held not to impose any additional obligation on the master, but to relax in his favor the rigor of the rule requiring him to use ordinary care in the selection of his machinery. *Washington & G. R. Co. v. McDade* (1890) 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044 (as to this decision, see further, § 50, *post*). It has been laid down that a verdict against the defendant based on the theory that he was guilty of a want of ordinary care in furnishing a certain appliance cannot stand, where the jury have also found that such appliance was a usual one and usually found safe. *Jones v. Milwaukee* (1897) 96 Wis. 170, 70 N. W. 1064. In *Reese v. Hershey* (1894) 163 Pa. 252, 29 Atl. 907, evidence of a custom to have sim-

ilar machines unguarded was denied to be conclusive in the master's favor, but this was merely because the evidence was offered in a case where the machine in question was usually guarded, but the guard had been removed on the occasion of the accident.

²*Titus v. Bradford, B. & K. R. Co.* (1890) 136 Pa. 618, 20 Atl. 517.

³"It is sufficient fulfillment of duty to adopt such [inventions and appliances] as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances." *Louisville & N. R. Co. v. Allen* (1885) 78 Ala. 494. "We know of no way of determining what ordinary care is, except to ascertain what men of ordinary care and prudence, engaged in a similar business on their own account and for their own profit and success, are in the habit of doing." *Kansas & T. Coal Co. v. Brownlie* (1895) 60 Arl. 582, 31 S. W. 453. "The duty of the defendant was to furnish a place as safe and free from danger as other persons of ordinary care, prudence, and caution, engaged in like business and in like circumstances, ordinarily furnished." *Prubiski v. Northwestern Coal R. Co.* (1898) 98 Wis. 413, 74 N. W. 117. Reasonable safety is "measured by the standard of good railroading." *Bathol v. Michigan C. R. Co.* (1895) 106 Mich.

that these differences of language are indicative of any actual corresponding differences of opinion as to the standards by which the master's exercise of due care is measured. In the subjoined note, therefore, in which are collected the cases in which common usage was held, as a matter of law, to repel the inference of culpability, it has been deemed permissible to group together both the decisions in which it is expressly recognized that it is the usage of the prudent man or the well-regulated concern that is the gauge and standard of the master's liability, and the decisions which seem to lay the whole stress upon the generality of the usage.⁴ Other decisions to the same effect are collected in § 163, *post*.

606, 65 N. W. 592. A master "is not bound to possess or exercise unusual foresight, or to discover and adopt unusual expedients,—that is, expedients not used by the most careful masters, but which may appear valuable when the matter is reviewed in the light of subsequent events." *Cook v. Bell* (1857) 20 Sc. Sess. Cas. 2d series, 137, per McNeill, Ld. Pres.; *Finnighan v. Peters* (1861) 23 Sc. Sess. Cas. 2d series, 260, per Ld. Inglis. The question is not alone whether the device which, as is alleged, should have been adopted, is serviceable in decreasing the risks of the work, but whether it is so manifestly serviceable as to command the consensus of intelligent men in the same business so generally as that it cannot be reasonably ignored or disregarded. *Louisville & N. R. Co. v. Hall* (1890) 91 Ala. 112, 8 So. 371 (said as to the adoption of whipping-straps to warn trainmen of the proximity of low overhead bridges). In *Guinard v. Knapp-Stout & Co. Co.* (1897) 95 Wis. 482, 70 N. W. 671, it was held to be error to give the following charge: "If the defendant furnished plaintiff a place which was as safe and free from danger as other persons of ordinary care, engaged in like business and under like circumstances, ordinarily furnish, then you will find for the defendant on such fact; but not if you find that places provided by such other employers of labor for their workmen or servants are not reasonably safe places in which their men are obliged to work." The court said: "Having observed such degree of care as ordinarily prudent men engaged in the same business observe, the law is satisfied, and no liability arises from accidents which may then happen, although they might

have been prevented by the exercise of a greater degree of care. No person is required to exercise a greater degree of caution and prevision than is exercised by the mass of mankind. More care than that is usually impracticable. Ordinarily, the very highest degree of care possible will defeat the success of the enterprise. The law aims to be practical, and to favor what is practicable. The standard by which the liability of the defendant is to be tested is the standard which the law has provided. The jury may not be allowed to make a new one, to suit their inclination, in the particular case." For other cases in which this factor is also emphasized, see *Northern P. R. Co. v. Blake* (1894) 11 C. C. A. 93, 27 U. S. App. 190, 63 Fed. 45; *Georgia P. R. Co. v. Propst* (1887) 83 Ala. 518, 3 So. 764; *Richmond & D. R. Co. v. Jones* (1890) 92 Ala. 218, 9 So. 276; *Mary Lee Coal & R. Co. v. Chambliss* (1892) 97 Ala. 171, 11 So. 897; *Kansas City, M. & B. R. Co. v. Burton* (1892) 97 Ala. 240, 12 So. 88; *Wabash, St. L. & P. R. Co. v. Locke* (1887) 112 Ind. 404, 14 N. E. 391; *Indiana, I. & I. R. Co. v. Bundy* (1899) 152 Ind. 590, 53 N. E. 175; *Choctaw, O. & G. R. Co. v. Nicholas* (1899) Ind. Terr. 53 S. W. 475; *Coal Creek Min. Co. v. Davis* (1891) 90 Tenn. 711, 18 S. W. 387; *Columbus & X. R. Co. v. Webb* (1861) 12 Ohio St. 475; *Burns v. New York, P. & B. R. Co.* (1892) 20 R. I. 789, 38 Atl. 926.

⁴ (1) *Instrumentalities of railway companies.*—*Wabash, St. L. & P. R. Co. v. Locke* (1887) 112 Ind. 404, 14 N. E. 391 (unusually tall brakeman, standing on top of a freight car somewhat higher than common, struck a telegraph wire and was dragged down); *Baylor v. Delaware, L. & W. R. Co.* (1878) 40

The qualification of the doctrine, viz., that common usage is a defense, as matter of law, only where the evidence that there is such a

N. J. L. 23, 20 Am. Rep. 208 (low overhead bridge); *Pahlan v. Detroit, G. H. & M. R. Co.* (1899) 122 Mich. 232, 81 N. W. 103 (coal bin close to track injured plaintiff while he was pushing a car); *Sheeler v. Chesapeake & O. R. Co.* (1885) 81 Va. 188, 50 Am. Rep. 654 (fireman while leaning out of his engine was struck by the timbers of a bridge which was of the same width as several others in the same state); *Nisco v. Lehigh & H. R. Co.* (1895) 145 N. Y. 296, 41 N. E. 90 (train hand struck by mail catcher); *Murray v. New York C. & H. R. R. Co.* (1900) 55 App. Div. 344, 66 N. Y. Supp. 856 (engineer struck by water plug between two tracks; no evidence that conditions were different on other roads; plaintiff nonsuited); *Bennett v. Long Island R. Co.* (1900) 163 N. Y. 1, 57 N. E. 79, Reversing (1897) 21 App. Div. 25, 47 N. Y. Supp. 258 (switch without lock or target on a temporary siding on a new road under construction); *Richmond & D. R. Co. v. Rindon* (1891) 87 Va. 335, 12 S. E. 786, Lewis, J., dissenting (unblocked frog of standard make); *Lake Shore & M. S. R. Co. v. McCormick* (1881) 74 Ind. 440 (judgment entered for defendant on special findings, one of which was to the effect that the frog which caused the injury was the same as those used by the principal roads in the country); *Spencer v. New York C. & H. R. R. Co.* (1893) 67 Hun, 196, 22 N. Y. Supp. 100 (negligence not inferable from absence of blocking, where there is no evidence that blocking is in general use on other roads); *Rajotte v. Canadian P. R. Co.* (1889) 5 Manitoba L. Rep. 365 (unblocked frogs: no evidence that they had become obsolete); *Pennsylvania Co. v. Hankey* (1879) 93 Ill. 580 (unballasted side track); *Atchison, T. & S. F. R. Co. v. Alsdurf* (1892) 47 Ill. App. 200 (spaces between ties on a side track not completely filled up; see, however, Illinois cases in § 50, post); *Hurst v. Kansas City, P. & G. R. Co.* (1901) 163 Mo. 309, 63 S. W. 695 (injury caused by gravel placed in piles in a railway yard for ballast purposes); *Smith v. St. Louis, K. & N. R. Co.* (1879) 69 Mo. 32, 33 Am. Rep. 484 (U-rail used for a guard rail instead of a T-rail; see, however, Missouri case cited in § 50, post); *Sheeler v. Chesapeake & O. R. Co.* (1885) 81 Va. 188, 50 Am. Rep. 654 (sides of bridge dangerously close to track); *Seidmore v. Milwaukee, L. S. & W. R. Co.* (1895) 89 Wis. 188, 61 N. W. 76 ("clearing post" near the junction of main and side tracks); *Randall v. Baltimore & O. R. Co.* (1883) 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322 (ground-switch between two tracks; one of the elements of the decision was that it was of the ordinary pattern; see, however, Federal cases in § 50, post); *Benson v. New York, N. H. & H. R. Co.* (1901; R. I.) 49 Atl. 689 (brakeman, when attempting to step from one car to another on a dark night, fell through a hole cut in the projecting part of the roof to admit of trainmen reaching the ladder); *Baxter v. Chicago & N. W. R. Co.* (1899) 104 Wis. 307, 80 N. W. 644 (unsafe locomotive boiler); *Davis v. Baltimore & O. R. Co.* (1893) 152 Pa. 314, 25 Atl. 498 (box car with no platform or guard rail at either end was used as a caboose); *Richmond & D. R. Co. v. Jones* (1890) 92 Ala. 218, 9 So. 276 (drawhead of a certain pattern); *Georgia P. R. Co. v. Propst* (1887) 83 Ala. 518, 3 So. 764 (drawheads of a certain pattern); *Northern P. R. Co. v. Blake* (1894) 11 C. C. A. 93, 27 U. S. App. 190, 63 Fed. 45 (double dead woods; see, however, the Federal decisions cited in § 50, post); *Osborne v. Knox & L. R. Co.* (1877) 68 Me. 49, 28 Am. Rep. 16 (double deadwoods); *Burns v. Chicago, M. & St. P. R. Co.* (1886) 69 Iowa, 450, 58 Am. Rep. 227, 30 N. W. 25 (failure to adopt "Potter" draft-irons with three couplings, held not to be negligence, as it appeared that the simple coupling was still extensively used; see, however, Iowa cases in § 50, post); *Henry v. Staten Island R. Co.* (1880) 81 N. Y. 373 (fact that brakes in question were such as were in common use on dirt cars was one of the elements mentioned); *Carey v. Boston & M. R. Co.* (1893) 158 Mass. 228, 33 N. E. 512 (projecting bolt on lever of hand car caught a section man's clothes); *Bohn v. Chicago, R. I. & P. R. Co.* (1891) 106 Mo. 429, 17 S. W. 580 (use of bridge timber as a lever to raise a broken turntable; see, however, Missouri case in § 50, post); *Bedford Bell R. Co. v. Brown* (1895) 142 Ind. 659,

usage is clear and undisputed, and that, if the evidence tending to establish the master's claim in this regard is conflicting, or of such a

42 N. E. 359 (track formed of boards along which push cars loaded with timber for a bridge under construction were run).

(2) *Instrumentalities in other kinds of business.*—A master is not under any duty to box a shaft on which is a projecting set-screw, or to change it for a safer kind. *Kents v. National Hoisting Mach. Co.* (1895) 13 C. C. A. 221, 21 U. S. App. 656, 65 Fed. 940. See, however, Federal decisions cited in § 50, *post*. *Rooney v. Sawall & D. Cordage Co.* (1894) 161 Mass. 153, 36 N. E. 789; *Hale v. Cheney* (1893) 159 Mass. 268, 34 N. E. 255 (boy of sixteen was injured here); *Goodhue v. Walpole Emery Mills* (1888) 146 Mass. 261, 15 N. E. 576; *Demers v. Marshall* (1899) 172 Mass. 548, 52 N. E. 1066, 8 C. (1901) 178 Mass. 9, 59 N. E. 454; *Kreider v. Wisconsin River Paper & Pulp Co.* (1901) 110 Wis. 645, 86 N. W. 662; *Hoffman v. American Foundry Co.* (1897) 18 Wash. 287, 51 Pac. 385; *Lewis v. Simpson* (1892) 3 Wash. 641, 29 Pac. 207 (see, however, Washington decisions in § 50, *post*). Nor is negligence predicable of his omission to fence other kinds of dangerous machinery. *Wabash Paper Co. v. Webb* (1896) 146 Ind. 303, 45 N. E. 474; *Mackin v. Alaska Refrigerator Co.* (1894) 100 Mich. 276, 58 N. W. 999; *King v. Ford River Lumber Co.* (1892) 93 Mich. 172, 53 N. W. 10; *Schrader v. Michigan Car Co.* (1885) 56 Mich. 132, 22 N. W. 220; *Sauborn v. Atchison, T. & S. F. R. Co.* (1886) 35 Kan. 292, 10 Pac. 860 (but see Kansas cases cited in § 50, *post*); *Arizona Lumber & Timber Co. v. Mooney* (1895; Ariz.) 42 Pac. 952; *Townsend v. Langley* (1890) 41 Fed. 919 (see, however, Federal decisions in § 50, *post*); *Cagney v. Hannibal & St. J. R. Co.* (1879) 69 Mo. 416 (see, however, the Missouri case cited in § 50, *post*); *Higgins v. Fanning* (1900) 195 Pa. 599, 46 Atl. 102; *Cunningham v. Bath Iron Works* (1899) 92 Me. 501, 43 Atl. 106 (plaintiff was a boy who was required by his duties to come within 3 feet of the cogwheels); *Young v. Burlington Wire Mattress Co.* (1896) 79 Iowa, 415, 44 N. W. 693 (negligence not inferable from the fact that the knives of a tenon machine are not covered, where there is no evidence that it was customary to cover them; see, how-

ever, Iowa cases in § 50, *post*); *Fritz v. Salt Lake & O. Gas & E. L. Co.* (1899) 18 Utah, 493, 56 Pac. 90 (dynamoes left unfenced). In the following cases, also, the master was absolved on the ground of conformity to general usage in respect to the maintenance of instrumentalities mentioned: *Rosa v. Pearson Cordage Co.* (1895) 164 Mass. 257, 41 N. E. 284 (belt shipper used for shifting belt from loose to tight pulley slipped and started a machine); *Kaye v. Rob Roy Hoisting Co.* (1889) 51 Hun. 519, 4 N. Y. Supp. 571 (verdict for plaintiff set aside, where elevator which fell, owing to the failure of a safety device to operate, was "of a plan and style approved by long and ample use"); *Biddiscomb v. Cameron* (1898) 35 App. Div. 561, 55 N. Y. Supp. 127 (elevator which was of a construction in common use and provided with safety appliances such as are ordinarily used for such a structure); *Stringham v. Hilton* (1888) 111 N. Y. 188, *sub nom. Stringham v. Stewart*, 1 L. R. A. 483, 18 N. E. 870 (freight elevator without safety clutches); *Boess v. Clauson & P. Breving Co.* (1896) 12 App. Div. 366, 42 N. Y. Supp. 848 (similar facts); *Allison Mfg. Co. v. McCormick* (1888) 118 Pa. 519, 12 Atl. 273 (paint of a well-known and commonly used brand); *Service v. Shoemaker* (1900) 196 Pa. 63, 46 Atl. 292 (type of boiler alleged by its manufacturer to be nonexplosive was widely used, but proved to be dangerous); *Schultz v. Bear Creek Ref. Co.* (1897) 180 Pa. 272, 36 Atl. 739 (machinery which fell on plaintiff was set up in the usual way); *Murray v. Merry* (1890) 17 Se. Sess. Cas. 4th series, 815 (no fence round the lower part of a shaft through which ironstone was raised to a furnace gangway about 50 feet above); *Lchigh & W. B. Coal Co. v. Hayes* (1889) 128 Pa. 294, 5 L. R. A. 441, 18 Atl. 387 (mine owner not guilty of negligence in failing to provide any appliance, means, or method by which warning can be given to men working in a pocket that a draw is about to be made of the coal from the chutes); *Wood v. Heiges* (1896) 83 Md. 257, 34 Atl. 872 (appliance for breaking castings, constructed on the plan used in other foundries); *Purdy v. Westinghouse Electric & Mfg. Co.* (1900) 197 Pa. 257, 51 L. R. A. 881, 47 Atl. 237

nature that more than a deduction from it may reasonably be drawn, the case is for the jury, has been recognized by one of the group of courts whose decisions have been collected,⁵ and is assumed as a rule of procedure by all the others.

In some of the cases cited in this section, various circumstances are referred to as additional reasons for refusing to hold the defendant to be culpable,—as, that where the instrumentality complained of was not dangerous at all when used with ordinary care;⁶ or that it had been purchased of a reputable maker, and thoroughly tested before it had been sold for use;⁷ or that it had been put in operating condition by manufacturers of high reputation;⁸ or that it was con-

(explosion ensued when employee was inspecting with a lighted match a barrel in which castings were packed, but which had originally contained oil, alcohol, turpentine, benzine, whisky, and other things, and had been bought from a secondhand dealer; liability denied partly on the ground that there was no evidence that such barrels were not commonly used for such purposes at manufactories); *Glover v. Meinrath* (1896) 133 Mo. 202, 34 S. W. 72 (use of hot water, instead of steam, for heating a drier); *Coal Creek Min. Co. v. Davis* (1891) 90 Tenn. 711, 18 S. W. 387 (wooden engine house and other buildings so close to the entrance of the passage which served as the intake air way that, in a case where they were set on fire, the passage was filled with smoke and suffocated an employee); *Choctaw, O. & G. R. Co. v. Nicholas* (1899) Ind. Terr. 53 S. W. 475 (failure to scaffold a part of a mine); *Moore v. Ross* (1890) 17 Se. Seas. Cas. 4th series, 796 (trap door in a laundry for passing goods from one floor to another); *Van Orden v. Acken* (1898) 28 App. Div. 160, 50 N. Y. Supp. 843 (negligence in respect to the failure to provide a proper safeguard to prevent the falling of materials in a building under erection, held not to be established by testimony which shows that the ladder well-hole, and the elevator well-hole were protected by planking in the manner which is customary where such work is in progress); *The Louisiana* (1896) 21 C. C. A. 60, 41 U. S. App. 324, 74 Fed. 748 (not negligence, as regards stevedores, to leave hatchways unguarded, where it is usual to leave them open until the hold is fully stored); *The Lizzie Frank* (1887) 31 Fed. 477 (recovery denied by a judge

sitting as a jury, where the "chock" of a tugboat was constructed and secured in the usual and customary manner at the port in question. But see Federal cases in § 50, *post*); *McCampbell v. Canard S. S. Co.* (1891) 36 N. Y. S. R. 852, 13 N. Y. Supp. 248 (truck and chock on which heavy barrels were transferred from a steamer to the wharf gave way); *Rosa v. Volkening* (1901) 64 App. Div. 426, 72 N. Y. Supp. 256 (derrick used for raising materials for a building under construction was not guyed); *Wyman v. The Duart Castle* (1899) 6 Can. Exch. 387 (cast iron used for stop valve on a steamer). In *Hall v. Johnson* (1865) 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week Rep. 411, personal negligence on the part of a mine owner in respect to the methods adopted for securing the roofs of the passages is negatived by evidence that "the mine had been worked on the ordinary course for the last six years." If this implies that the defendant was absolved on the ground of conformity to common usage, the decision is in conflict with the other English ones cited in § 50, *post*. The language is, however, somewhat obscure.

⁵ *Shadford v. Ann Arbor Street R. Co.* (1899) 121 Mich. 224, 80 N. W. 30.

⁶ *Melchert v. Robert Smith India Pale Ale Brewing Co.* (1891) 140 Pa. 418, 21 Atl. 755; *Stringham v. Hilton* (1888) 111 N. Y. 188, *sub nom.* *Stringham v. Stewart*, 1 L. R. A. 483, 18 N. E. 870.

⁷ *Fuller v. New York, N. H. & H. R. Co.* (1900) 175 Mass. 424, 56 N. E. 574. See, generally, § 153, *post*.

⁸ *Kane v. Rob Roy Hosiery Co.* (1889) 51 Hun, 519, 4 N. Y. Supp. 571.

structed in the manner approved by competent judges and by previous experience;⁹ or that it had been used by the public and by the master himself without any accident during a period of ten or twelve years;¹⁰ or that it had usually been found safe;¹¹ or that no previous injury had resulted from its use;¹² or that it was absolutely preferable to any known device;¹³ or that it was reasonably safe and suitable.¹⁴ But, so far as regards the group of courts with which we are now concerned, the quality of such evidence is, it is manifest, merely corroborative. Compare § 57, *post*.

On general principles, it is clear that the doctrine as to the conclusive effect to be ascribed to conformity to usage is conditional upon its being established or conceded that the servant was or ought to have been aware of the risks created by such conformity. The obvious character of the risk in question is not unfrequently adverted to.¹⁵ This limitation of the doctrine should always be brought to the attention of the jury when the facts are such as to render it a material element.¹⁶

Other cases embodying the theory that conformity to common usage is conclusive in the master's favor will be found in § 163, *post*.

45. Applicability of the doctrine where the negligence charged has relation to the employment of servants.—The courts belonging to the group by which common usage is regarded as a conclusive test of negligence are not entirely in agreement as regards the question whether this doctrine is applicable in cases where the employment of persons of a certain class is alleged to have been culpable. In some decisions on the subject, servants are placed upon the same footing as the other

⁹*The Lizzie Frank* (1887) 31 Fed. 477.

¹⁰*Allison Mfg. Co. v. McCormick* (1888) 118 Pa. 519, 12 Atl. 273.

¹¹*Jones v. Milwaukee* (1897) 96 Wis. 170, 70 N. W. 1064.

¹²*McCumple v. Cunard S. S. Co.* (1891) 36 N. Y. S. R. 852, 13 N. Y. Supp. 288.

¹³*Hale v. Cheney* (1893) 150 Mass. 268, 34 N. E. 255.

¹⁴*Fritz v. Salt Lake & O. Gas & E. L. Co.* (1899) 18 Utah, 493, 56 Pac. 90.

¹⁵See, for example, *Osborne v. Knorr & L. R. Co.* (1877) 68 Me. 49, 28 Am. Rep. 16; *Cagney v. Hannibal & St. J. R. Co.* (1879) 69 Mo. 416.

¹⁶Thus, if the construction of a

switching apparatus is possibly dangerous to employees working about it, an instruction that the company is not liable if that construction is similar to like devices maintained upon another first-class railroad should not be given without a proviso making the immunity dependent upon proof that the company had given the employee injured thereby notice of the attendant danger, or that he had such an opportunity of observing it as would have put a reasonably prudent person on guard. *Indiana, I. & L. R. Co. v. Bundy* (1899) 152 Ind. 590, 53 N. E. 175 (plaintiff tripped over uncovered wire extending from the switch to the point at which it was operated).

instrumentalities of the business.¹ But in Wisconsin a different rule has been laid down.²

It is not easy to see why the rule applied in the case of servants should not be the same as that applied in the case of other instrumentalities. Nor has any logical basis for such a differentiation ever been suggested. See, further, § 50, *post*.

45a.—or to the methods of work.—There is also a conflict between the authorities upon the question whether this doctrine is available as a protection to the master where the method or manner of doing the work, and not the quality or arrangement of the instrumentalities themselves, is the efficient cause of the injury. A Federal court of appeals has rendered a decision which proceeds upon the principle that usage is the proper standard of due care in the one case no less than in the other.¹ Nor does any distinction seem to be recognized in at least three other states.² The point, however, was not directly raised in any of the cases cited.

¹ In *Holland v. Tennessee Coal, I. & R. Co.* (1899) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524, the court said with respect to "well-regulated" concerns of the kind operated by the defendant, that, "if it is customary for them to employ a particular class of men for a particular purpose, the further presumption is that that class of men are competent for the work in hand; and their competency may be the result either of a special knowledge or experience with respect to the particular thing to be done, or from the work being such as to require no special knowledge or experience." But it should be observed that the precise point in dispute here was merely whether evidence of the usage was admissible. In *Kansas & T. Coal Co. v. Brownlie* (1895) 60 Ark. 582, 31 S. W. 453, it was held that employing a boy fourteen and a half years old as trapper to give signals to drivers in a mine is not negligence which will render the company liable to another employee for his failure to give a signal at a proper time, if it is a universal custom of miners to employ boys as trappers. In *Riordan v. Ocean S. S. Co.* (1890) 32 N. Y. S. R. 328, 11 N. Y. Supp. 56, it was laid down that the duty of a master to a servant does not require him to furnish a watchman to look after the servant to see that with a safe appliance, he does not put himself in a place of danger, where it appears that other masters in the same

line of business furnish no watchman. This case was affirmed (1891) in 124 N. Y. 655, 26 N. E. 1027, but the above point was not referred to.

² *Moluske v. Ohio Coal Co.* (1893) 86 Wis. 220, 56 N. W. 475, where it was held that the duty of giving a signal to the engineer of a hoisting apparatus by which coal buckets are hoisted at the rate of one a minute, when the buckets were filled and ready to be raised, is one which requires so much judgment and discretion and constant care and watchfulness that, if it is intrusted to a boy of twelve or thirteen years of age, and an injury to one of the workmen results from his prematurely giving a signal, the master has the burden of proving that he was competent for his position (decided both upon the analogy of the rule as to the rebuttable presumption of the incapacity of a child under fourteen to commit a crime, and upon considerations of public policy). Strangely enough, the decision to this effect has not been commented upon or distinguished in any of the later Wisconsin cases, in which a conclusive effect has been ascribed to evidence of common usage. Whether, in view of those decisions, it still embodies the accepted law in that state, is somewhat doubtful.

¹ *Hunt v. Hurd* (1900) 39 C. C. A. 226, 98 Fed. 683 (flying switch).

² See the facts and the language used in *Lehigh & W. B. Coal Co. v. Hayes*

On the other hand, it was laid down broadly by the supreme court of Alabama that the doctrine has never been supposed to cover the manner in which the means are made to accomplish the end,—the precise way of using machinery or directing the servants,—so that a result which is negligent in itself should be shorn of its negligent quality, not because it was not negligence in others to so act, but simply because, whether negligence or not, they did so act.³

These antagonistic views may possibly be reconciled on the basis of a distinction between methods for which the master is personally responsible for the reason that he or his representative has either prescribed them or has acquiesced in their adoption and continuance, and methods which the servants themselves have pursued in carrying out the details of the work. But this explanation is not altogether satisfactory in view of the fact that the negligent employees in the Alabama cases were vice principals by virtue of the statute under which action was brought.

46. Doctrine is applicable only to instrumentalities in good repair.—(Compare § 41, *ante*.)—That the exculpatory quality ascribed to the master's compliance with common usage is conceded only on the condition that the instrumentality is in good repair is clear both on principle and authority. If he uses a certain kind of appliance, he cannot escape liability for an injury caused by its defective condition, on the ground that this defect simply amounted to the absence of one of its parts, and that this part was not found in similar appliances commonly used by other employers. Having adopted that particular kind of appliance, he is subject to the duty of seeing that it is kept in reasonably safe condition.¹

(1889) 128 Pa. 294, 5 L. R. A. 441, 18 Atl. 387 (§ 44, note 4, subd. 2, *ante*); *Hennessey v. Bingham* (1890) 125 Cal. 627, 58 Pac. 200; *Wood v. Heiges* (1896) 83 Md. 257, 34 Atl. 872 (§ 44, note 4, subd. 2, *ante*).

Kansas City, M. & B. R. Co. v. Burton (1892) 97 Ala. 240, 12 So. 88, holding that if a car is left on one track too near another, it is negligence for which there is no justifying necessity,—a wrong, pure and simple,—and none the less a wrong because it is committed by other railroad companies, whether they are, in a general sense, well-regulated or not. Compare the decision that it is for the jury to say whether the usual and customary way of applying the brake to a hand car was sufficient to relieve a railroad company

from liability for injuries caused by an employee's falling therefrom, as it was struck by another, where the two hand cars were running very rapidly on a high trestle, one yard in front of the other, and a signal to stop the first car was given before signaling the second car to stop. *Jones v. Alabama Mineral R. Co.* (1894) 107 Ala. 400, 18 So. 30.

¹ *Bender v. St. Louis & S. F. R. Co.* (1897) 137 Mo. 240, 37 S. W. 132 (drawbar from which a safety lug had been broken off. "Ordinarily, a master will not be permitted to show, as a defense . . . that it was the general or universal custom of other masters to furnish defective implements or an unsafe place to work"); *Lake Erie & W. R. Co. v. Hugg* (1892) 132 Ind. 168, 31 N. E. 564 (sliver of old rail caught

47. Doctrine not applicable where the negligence charged is the breach of a statute.—However rigidly a court may uphold the right of a master to follow general usage, it is clear that evidence of a custom to disregard a law requiring employers to use an appliance calculated to preserve their servants from some particular danger can never be admissible where the question of the exercise of due care on the employer's part is raised.¹

48. Relation of the doctrine to that which allows a master to carry on his business in his own way.—The general effect of the doctrine that a master is allowed to carry on his business in his own way (see §§ 34 *et seq.*, *ante*) is that he cannot be found culpable merely on the ground that he did not furnish the best, safest, and newest instrumentalities. The general effect of the doctrine now under discussion is that he is not bound to furnish instrumentalities of that description, because common usage is the criterion of reasonable safety.¹ As regards the limits of liability in this respect, therefore, the broad results to which the two doctrines lead are essentially identical, and, in view of this circumstance, it is only to be expected that the courts should, in some of the cases where the defendant's right to conduct his business in his own way is the essential basis of the decision, have adverted to the fact that the instrumentality actually employed was one of an approved kind or in common use.² There does not, however, seem to be any reason why the two doctrines should not occa-

sioner's foot). In this case defendant's counsel cited *Doyle v. St. Paul, M. & M. R. Co.* (1889) 42 Minn. 82, 43 N. W. 787, a case involving similar facts. The court considered that it was not in point, as it was based on the peculiar wording of the complaint. This seems to be a mistaken view. The actual ruling was that it is error to exclude evidence of a general usage to use old rails for sidings. The decision was, therefore, really an authority against the right of the plaintiff to recover in the Indiana case. But it was plainly erroneous, for it does not follow that, because it may not have been negligent to use the old rails in the siding, the company was not culpable in maintaining those rails when they had become abnormally unsafe as compared with the average rail of that sort. See also *Kaye v. Rob Roy Hosiery Co.* (1889) 51 Hun, 519, 4 N. Y. Supp. 571, where the court adverts, *arguendo*, to the proviso that the appliance must be in good repair; and *Ross v. Pearson Cordage Co.* (1895) 164 Mass. 257, 41 N. E. 284,

where the fact is emphasized that the appliance was in the same condition at the time of the accident as when the servant began work.

¹ *Cayser v. Taylor* (1857) 10 Gray, 274, 69 Am. Dec. 317.

² See the quotation in § 44, *ante*, from the opinion in *Titus v. Bradford, R. & N. R. Co.* (1890) 136 Pa. 618, 20 Atl. 517.

³ *Murphy v. Lake Shore & M. S. R. Co.* (1896) 67 Ill. App. 527; *Muirhead v. Hannibal & St. J. R. Co.* (1885) 19 Mo. App. 634. It is worthy of observation that, on the first appeal of *Allen v. Burlington, C. R. & N. R. Co.* (1882) 57 Iowa, 623, 11 N. W. 611, the defendant relied on the theory that it had the right to construct a cattle chute in such proximity to the track as would best subserve the purposes of its business. On the second appeal (1884) 64 Iowa, 94, 19 N. W. 807, the ground on which the company sought to excuse itself was conformity to custom. Neither contention succeeded.

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sionally clash in their operation, when applied to particular sets of facts. Which of them should be treated as the dominating element when such a conflict arises is a question which, so far as the writer knows, has never been thoroughly discussed in the courts.³

It is observable that the logical order and relation of the conceptions involved will be somewhat different, according as the one or the other of these doctrines supplies the standpoint from which the evidence is considered. In the one case, the limitation of the master's obligation is viewed as the consequence of his right to manage his affairs as he pleases; in the other, the existence of that limitation seems to be rather an hypothesis from which a further limitation is deduced. But this distinction is of little or no practical moment. The doctrine as to common usage has become a substantive and independent one to such an extent that in many of the decisions the master is said to be free from liability on this ground, *although* he might have supplied a safer or newer instrumentality.⁴

The absence of evidence going to show either that the instrumentality suggested as a substitute was in general use, or that the instrumentality actually employed was not in general use, plainly leaves the case in the same condition as if the only element involved were the master's right to carry on business in his own way. In default of such evidence, therefore, the plaintiff will ordinarily be unable to maintain his action, a result indicated by the form in which some of the rulings cited in § 14, note 4, *ante*, are couched.⁵

³In one instance, evidence of usage was held to be properly excluded for the reason that the case was controlled by the rule which permits the master to conduct his business in his own way. *Chicago & E. I. R. Co. v. Driscoll* (1898) 176 Ill. 330, 52 N. E. 921, Reversing (1897) 70 Ill. App. 91. But this ruling was made in a state in which the evidence so excluded would not, as a matter of law, have negatived negligence if it had been admitted. See § 4, *post*. Such light, therefore, as it throws upon the comparative weight which should be ascribed to such evidence, considered as warranting a legal inference, is merely incidental. If it is to be taken as embodying the doctrine that the rule thus invoked is the controlling factor in cases where its application will not yield the same results as if the liability of the master were referred to the standard of common usage, it would seem to be scarcely sustainable. A more correct view seems

to be indicated by the decision that the existence of an obligation on the employer's part to abandon the use of an appliance which has become generally obsolete creates an exception to the rule that a master is not liable simply because there are better and safer appliances to be had. *Seppenfield v. Main Street & Agri. Park R. Co.* (1891) 91 Cal. 48, 27 Pac. 590.

⁴*Smith v. St. Louis, K. C. & N. R. Co.* (1879) 69 Mo. 32, 33 Am. Rep. 484; *Shadford v. Ann Arbor Street R. Co.* (1897) 141 Mich. 390, 69 N. W. 661; *Rosa v. Volkening* (1901) 64 App. Div. 426, 72 N. Y. Supp. 236; *Dooner v. Delaware & H. Canal Co.* (1895) 171 Pa. 581, 33 Atl. 415; *Hunt v. Hurd* (1900) 39 C. C. A. 226, 98 Fed. 683; *Rogers v. Louisville & N. R. Co.* (1898) 88 Fed. 462.

⁵See memoranda of facts appended in note 4, § 44, *ante*, to *Purdy v. Westinghouse Electric & Mfg. Co.* (1900) 197 Pa. 257, 51 L. R. A. 881, 47 Atl. 237;

49. Negligence not inferable simply from the fact that the instrumentality or method adopted was one not in common use.—In a recent Pennsylvania case it was pointed out that common usage is the test to disprove negligence, not to prove it, and that the party charged with negligence disproves it by showing that his instrumentalities were those in general use in the business, but that the converse does not follow. The party charging negligence, therefore, does not establish it by showing that the instrumentalities were not in common use. The result of a different rule would be that the use of the newest and best machinery, if it was not yet generally adopted, could be adduced as evidence of negligence.¹

50. Doctrine that conformity to common usage is not conclusive in the master's favor.—The principle upon which a large number of decisions are based, some of which emanate from the courts whose rulings are reviewed in the preceding sections, is that embodied in the remark of Willes, J., with reference to the plea put forward by the defendant in a well-known case, that "no usage could establish that what is in fact unnecessarily dangerous, was in law reasonably safe as against persons towards whom there was a duty to be reasonably careful."² That is to say, the position is taken, that custom fur-

Spencer v. New York C. & H. R. R. Co. (1893) 67 Hun, 196, 22 N. Y. Supp. 100; *Murray v. New York C. & H. R. R. Co.* (1900) 55 App. Div. 344, 66 N. Y. Supp. 586; *Rajotte v. Canadian P. R. Co.* (1889) 5 Manitoba L. Rep. 365; *Young v. Burlington Wire Mattress Co.* (1890) 70 Iowa, 415, 44 N. W. 693. See also *Whitley v. Block* (1894) 95 Ga. 15, 21 S. E. 985; *Hale v. New York & N. E. R. Co.* (1899) 174 Mass. 317, 54 N. E. 844; *Corcoran v. Wanamaker* (1898) 185 Pa. 496, 39 Atl. 1108; *Dooner v. Delaware & H. Canal Co.* (1895) 171 Pa. 581, 33 Atl. 415; *Banks v. Georgia R. & Bkg. Co.* (1901) 112 Ga. 655, 37 S. E. 992, and several other cases cited in § 51, notes 2, 3, post.

¹ *Cunningham v. Fort Pitt Bridge Works* (1901) 197 Pa. 625, 630, 47 Atl. 846. The court said: "Our attention has been drawn recently to a tendency to this misapplication of the principle on the part of counsel, and even the courts. In the present case the learned judge below, in a very clear and excellent charge, stated the true rule in behalf of defendant, that it 'cannot be held responsible if something happens to an employee in its employment, where the manner and machinery and

methods and appliances are alleged to have been defective, when it is shown they are the ordinary methods, machinery, and appliances used in that kind of work and business.' But he unguardedly follows this by summing up thus: 'We leave it to you to say under all the evidence in the case . . . whether the method of handling the structural iron by hand, shifting it by hand in the way it was shifted, was the ordinary method used, under all the circumstances of the case, and whether all the machinery and methods and appliances connected with the moving of these iron beams were such as were ordinarily used in the business generally for such work.' This might easily be construed by the jury as authorizing them to find negligence from the bare fact that the method was not in general use. There should always be a caution against such a construction, and the evidence should not, in the first instance, be admitted on behalf of the plaintiff.

Unless it tends to show that the method pursued was not only unusual, but more dangerous in itself than the ordinary one."

² *Undermaur v. Dames* (1866) L. R. 1 C. P. 274, 35 L. J. C. P. N. S. 184, 12

wishes no excuse, if the custom itself is negligent.² In this point of view, the master's conformity to general usage is regarded merely as evidence tending more or less strongly to exculpate him from the charge of negligence. After it has been shown that the defendant had complied with the usage of other employers in the same line of business, the question whether the particular instrumentality or method was reasonably safe still remains open, and, unless it is decided in the master's favor, he must indemnify the servant.

This principle has been applied in one decision of the Supreme Court of the United States, and in two of the lower Federal courts.³

Jur. N. S. 432, 14 L. T. N. S. 484, 14 Week. Rep. 586, 1 Harr. & R. 243 (action here was by a workman not in the employ of defendant). In another action by a third person, Cockburn, Ch. J., charged the jury: "It is not enough that they (the defendants) do what is usual, if the course ordinarily pursued is imprudent and careless," adding, however, that, "in considering what is reasonable, it is important to consider what is usually done by persons acting in a similar business." *Blackiron v. Great Central Gas Consumers Co.* (1860) 2 Fost. & F. 437, 3 L. T. N. S. 317. In *Mellors v. Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, evidence that the defendants exercised the same care and vigilance as was used in other collieries in the neighborhood did not prevent them from being held responsible for an accident to a miner, caused by the want of a lining to the shaft and the want of a "bonnet" on the hoisting cage. But the precise effect to be ascribed to such evidence was not discussed in the opinions of the judges. Compare the remarks of Lord Esher in *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 58 J. P. 38 (a case under the employers' liability act of 1880). "No custom, however uniform or universal, which unnecessarily exposes railroad employees to loss of life or limb, would seem to satisfy a duty which may be regarded as an implied condition of their charters." Ryan, Ch. J., in *Dorsey v. Phillips & C. Constr. Co.* (1877) 42 Wis. 597 (cattle chute near track). In view of the Wisconsin decision cited in § 44, it is somewhat singular to find this passage cited with approval in the very recent case of *Renne v. United States Leather Co.* (1900) 107 Wis. 305, 83 N. W. 473.

² *Austin v. Chicago, R. I. & P. R. Co.* (1895) 93 Iowa, 236, 61 N. W. 849.

³ In *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 451, 27 L. ed. 605, 2 Sup. Ct. Rep. 932, it was argued by defendant's counsel that "ordinary care in the employment and retention of railroad employees means only that degree of diligence which is customary, or is sanctioned by the general practice and usage which obtains among those intrusted with the management and control of railroad property and railroad employees." This contention did not prevail. Harlan, J., said: "There are general expressions in adjudged cases [these are not cited by name] which apparently sustain the position taken by counsel. But the reasoning upon which those cases are based is not satisfactory, nor, as we think, consistent with that good faith which at all times should characterize the intercourse between officers of railroad corporations and their employees. It should not be presumed that the employee sought or accepted service upon the implied understanding that they would exercise less care than that which prudent and humane managers of railroads ought to observe. To charge a brakeman, when entering the service of a railroad company, with knowledge of the degree of care generally or usually observed by agents of railroad corporations in the selection and retention of telegraphic operators along the line traversed by trains of cars, a branch of the company's service of which he can have little knowledge, and with the employees specially engaged therein he can ordinarily have little intercourse,—is unwarranted by common experience. And to say, as matter of law, that a railroad corporation discharged its obligation to an employee in respect of the fitness of co-employees whose negligence has caused

But, in view of other Federal decisions to the contrary (see § 41, *ante*), and the doubt which may be entertained as to the actual scope of the judgment rendered by the Supreme Court (see subjoined note) it seems to be still an open question whether the doctrine that conformity to usage is conclusive in the master's favor, or the doctrine now under discussion, is to be regarded as the one accepted by these courts.

The principle has been also applied in the following states: Cali-

him to be injured, by exercising, not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far towards relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants. If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and therefore not ordinary care, within the meaning of the law." It is not easy to say upon what footing, if at all, this decision is to be reconciled with the later one in *Washington & G. R. Co. v. McDade* (1890) 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044. See § 44, note 1, *ante*. One way of harmonizing them is to regard the earlier ruling as being applicable only to servants. This explanation, however, is not satisfactory, when the very general language of the court in the earlier case is adverted to. Nor has the *McDaniels Case* been so understood by the lower Federal courts, which, in deference to it, have declined to consider conformity to usage conclusive in the master's favor. In *Bean v. Oceanic Steam Nav. Co.* (1885) 24 Fed. 124 (appliance for unloading cargo), in discussing an instruction asked for by the defendant, the court said: "The defendant would make the employer's liability hinge upon the question whether the appliances were the approved or customary ones; and if they had received the general sanction of the employers, and had answered the purposes which they were designed to accomplish, the duty of ordinary care is complied with. The requisites of ordinary care are not satisfied by such a rule." So, also, an in-

struction assuming that negligence was conclusively negatived by the fact that a sawmill was "constructed in the customary manner of all mills" in that region, has lately been held erroneous. *Ayback v. Champagne Lumber Co.* (1901) 48 C. C. A. 632, 109 Fed. 732. In *Homestake Min. Co. v. Fullerton* (1895) 16 C. C. A. 545, 36 U. S. App. 32, 69 Fed. 923, the court refused, on the authority of the *McDaniels Case*, to uphold the contention of defendant's counsel that an employee might be held to assume the risk of bolts protruding from a coupling of a revolving shaft, notwithstanding a promise of the foreman to cover it, on the ground that such promise was, not to repair an existing defect in the machinery, but to supply a new or additional appliance, which the employer is under no obligation to furnish, and held that the doctrine that a master is not bound to abandon the use of a particular machine which is in common use, because there are other better and safer machines to be had, could not be successfully invoked for the purpose of excusing him for his failure to place a suitable guard around machinery which was of such a nature or so located as to be a constant menace to the safety of those who, in the discharge of their duties, were constantly compelled to pass in close proximity to it. In such a case, it was said, the obligation to place a suitable guard around the machinery is no less imperative than his duty to remedy a defect in the machine itself. Another alternative is to view the later case as being merely expressive of the narrow conclusion that the instruction objected to was not prejudicial, and not as announcing the doctrine that conformity to usage furnishes conclusive proof of the exercise of due care. The difficulty raised by a comparison of the two cases is still further enhanced by the fact that the earlier one is not referred to at all in the later one. A decision of which it is scarcely possible to estimate

fornia;⁴ Illinois;⁵ Iowa;⁶ Maine;⁷ Minnesota;⁸ Missouri;⁹ South Carolina;¹⁰ Texas;¹¹ Vermont;¹² Washington.¹³

the precise significance in the present connection is *Randall v. Baltimore & O. R. Co.* (1883) 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322. There a servant injured by a passing engine on one track, while he was shifting the switch rail of an adjoining track by means of a ground-switch of the ordinary pattern, was held unable to recover. But the naked question whether conformity to common usage was conclusive in the master's favor was not presented here, as the court was of opinion that the switch was, to say the least, quite as fit for its place and purpose as an upright switch would have been, and it was shown that it could have been safely and effectually operated if the plaintiff had stood midway between the tracks.

⁴In *Martin v. California C. R. Co.* (1892) 94 Cal. 326, 29 Pac. 645 (use of two patterns of couplings), it was held that an instruction to the effect that general usage conclusively negated negligence was properly refused. See also, to the same effect, *Redfield v. Oakland Consol. Street R. Co.* (1896) 112 Cal. 220, 43 Pac. 1117. These decisions supersede the statement in *Sappensfield v. Main Street & Agri. Park R. Co.* (1891) 91 Cal. 48, 27 Pac. 590, referred to in § 44, *ante*.

⁵*McCormick Harvesting Mach. Co. v. Burandt* (1891) 136 Ill. 170, 26 N. E. 588, affirming (1890) 37 Ill. App. 165 (plaintiff fell into unguarded trough; fact that no other person in a similar business had used a railing not conclusive that master was not negligent). In *Lake Erie & W. R. Co. v. Morrissey* (1898) 177 Ill. 376, 52 N. E. 299, affirming (1897) 75 Ill. App. 466, it was held that an instruction asked for by the defendant, to the effect that they were not liable to an employee who caught his foot under a rail and was run over, if it was customary for railways to ballast their tracks so as to leave a space of about an inch under the rails, was properly modified by the addition of the proviso that such a method of ballasting in yards was reasonably safe. An instruction that, if the top of a covered bridge was lower than is usual in such bridges, the railway company is negligent, is erroneous. The real question for the jury is whether the bridge, as constructed, was

of sufficient height to enable trainmen to pass through it in safety. If it was, it makes no difference whether it was higher or lower than other bridges. *Cleveland, C. C. & St. L. R. Co. v. Walter* (1893) 147 Ill. 60, 35 N. E. 529. These cases seem to show that the position taken in *Camp Point Mfg. Co. v. Ballou* (1874) 71 Ill. 417, where it was held error to refuse an instruction that ordinary use in similar establishments "is the standard of safety," no longer represents the doctrine accepted in Illinois.

⁶*Hosie v. Chicago, R. I. & P. R. Co.* (1888) 75 Iowa, 683, 37 N. W. 963 (railroad company not excused for negligence in loading its cars, for the reason that the manner of loading is customary with other railroad companies); *Austin v. Chicago, R. I. & P. R. Co.* (1895) 93 Iowa, 236, 61 N. W. 849 (brakeman's foot caught in space left unfilled between the ties on each side of the bars of a switch). An instruction is correct which states that a defendant cannot be found free from negligence simply for the reason that the distance of a cattle chute from the track was the same as that which is usual in the case of such structures. *Allen v. Burlington, C. R. & N. R. Co.* (1884) 64 Iowa, 94, 19 N. W. 807 (first appeal [1882] 57 Iowa, 623, 11 N. W. 614, but this point was not mentioned). Other Iowa cases are to a contrary effect. See § 44, *ante*.

⁷*Sawyer v. J. M. Arnold Shoe Co.* (1897) 90 Me. 369, 38 Atl. 333. There counsel for defendant requested this instruction: "However strongly the jury may be convinced that there may be better or less dangerous appliances or machinery, it should not say that the use of appliances or machinery commonly adopted by those in the same business is a negligent use for which liability should be declared or imposed." In answer to which the trial judge said to the jury: "Not if they (the jury) believe at the same time that it was reasonably sufficient themselves. . . . The common use will not, of course, prove its usefulness. That is evidence of its usefulness, but not conclusive." Whereupon defendant's counsel asked the court: "Would it not be due care to use as is ordinarily used by persons in the same line of business?" To which the court

In spite of the imposing array of authorities which have adopted the doctrine explained in §§ 44 *et seq.*, the present writer has no hesitation in saying that, in his opinion, the cases just cited embody the correct principle. The essential meaning of the theory that the case ceases to be one for the jury when conformity to common usage is once established is that employers ought to receive the benefit of a presumption which may be thus expressed: The persons who pursue a particular line of business at any given time are reasonably prudent, and the majority of a reasonably prudent body of persons will not use unsuitable instrumentalities or methods when suitable ones

replied: "Yes, but that must be reasonably safe and sound; or he should use due care to have it reasonably safe and sound." Defendant's counsel then requested this instruction: "That he does use reasonable care when he uses the same sort of machinery that is in use in the same sort of business." To which the court replied: "Though the jury should find that it was actually defective? I should not say to the jury that if they found that machinery actually defective and insufficient, it would be any better because others used it." It was held that the defendant had no cause of complaint in regard to any of the rulings of the justice presiding upon the point involved in these requests. The court quoted the language of an earlier case, that "it would be no excuse for a want of ordinary care that carelessness was universal about the matter involved, or at the place of the accident, or in the business generally." *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100. The earlier rulings of this court to the contrary effect (see § 44, *ante*) are apparently overruled, though, strange to say, they are not referred to in this case.

¹⁰ *Craver v. Christian* (1887) 36 Minn. 413, 31 N. W. 457 (master not absolved from duty of fencing machinery found to be dangerous, by the mere fact that similar machinery is ordinarily left uncovered by other masters).

¹¹ *Reichle v. Gruensfelder* (1892) 52 Mo. App. 43 (fact that other similar establishments do not put guards around a hot-water tank like that in which an employee was scalded, held not to be conclusive that the failure to do so is not negligence). Other Missouri decisions are to a contrary effect. See § 44, *ante*.

¹² *Laurimore v. Palmer Mfg. Co.* (1900) 60 S. C. 153, 38 S. E. 430 (instruction declaring usage of well-regulated companies in the same business to be conclusive in defendant's favor, held to be properly refused).

¹³ *Sinclair v. Union Compress & Warehouse Co.* (1897; Tex. Civ. App.) 40 S. W. 326.

But the case of *International & G. N. R. Co. v. Bell* (1889) 75 Tex. 50, 12 S. W. 321, seems to be to the contrary effect.

¹⁴ To exonerate a master from the charge of negligence in furnishing his employee unsafe appliances with which to work, it is not sufficient that the appliances furnished were such as were in common use for similar purposes, but they must have been such as would have commended themselves to a reasonably prudent man. *Geno v. Fall Mount. Paper Co.* (1895) 68 Vt. 568, 35 Atl. 475 (disapproving of the rulings of the Pennsylvania courts referred to in § 44, *ante*).

¹⁵ Proof that it is customary in other mines to employ boys to open doors set in the gangway, when an engine signals its approach, does not establish the competency of a boy so employed. *Carlson v. Wilkeson Coal & Coke Co.* (1898) 19 Wash. 473, 53 Pac. 725. The authority cited was the decision of the Supreme Court of the United States in *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932, and there is the same difficulty in reconciling this Washington case with the earlier one from the same state (see § 44, *ante*), as there is in reconciling the Federal decisions. See note 2, *supra*.

are available. As a basis for the doctrine founded upon it, however, this presumption seems to be extremely unsatisfactory.

Whether motives of self-interest will, in most instances, be adequate to induce men to adopt instrumentalities and methods which are suitable in the sense that they are effective for the performance of the work to be done is a point which does not seem to be by any means beyond controversy. But, waiving this question as being one with which we are not now concerned, it is at all events abundantly clear from the records of industrial development in all ages and countries that motives of this description cannot, except to a very limited extent, be relied upon as a practical influence determining employers to adopt instrumentalities and methods which are suitable in the sense that they may be used with reasonable safety by servants. The conclusive effect ascribed to common usage as a criterion of the exercise of due care could only be justifiable upon the assumption that the considerations which induce the majority of a given class of employers to carry on their business in a certain manner are entirely, or at all events, mainly, identical with those which would be kept in view if the security of the employees should be the object to which the regulation of the business were directed. Manifestly, such an assumption cannot be entertained. How little confidence is placed by the most enlightened nations of modern times in the comfortable theory that a regard for their own financial interests will lead employers to provide properly for the safety of their employees is shown, in a manner not to be misunderstood, by the long list of statutes enacted for the protection of persons engaged in mines, factories, and specially dangerous kinds of work. That this distrust is fully justified by the condition of things which existed before the date of the earliest of these statutes will hardly be disputed by a student of economic history.

But apart from this legislative condemnation of the theory, its weakness may be readily demonstrated by a very simple process of reasoning. Considered as a means of accomplishing work, the instrumentalities or methods used by any employer at a certain time must, when compared with others which would be superior in point of safety, be either less effective, or equally effective, or more effective. In the first alone of these three cases is there any real inducement of self-interest to substitute the safer for the more dangerous instrumentalities or methods, and the strength of that inducement will depend entirely upon whether the increase of effectiveness obtained by making a change will be sufficient to compensate him for

his outlay. In the second case the cost of the change still remains a dissuasive consideration, and it is not counterbalanced by any corresponding increase of effective power. In the third case the employer cannot give the servant a safer environment, unless he not only spends money, but diminishes the productive capacity of his plant. In the two latter cases, therefore, it cannot be said that there is any motive whatever working in favor of the change, except such as may be created by his apprehension of a possible difficulty in obtaining workmen, or of being compelled to indemnify such servants as may be injured. But it will scarcely be argued seriously that such extremely remote contingencies are likely to be taken into account by the average business man in countries where the labor market is normally overstocked, and a servant's knowledge of the risk is ordinarily treated as a complete bar to his action.

In its essential characteristics, therefore, the situation is not that which is taken for granted by the courts whose views are being criticised. The conception of an employer as a person acted upon by certain motives springing out of a regard for his financial interests, and leading him to see that his servants are not exposed to unnecessary risks, is not in harmony with or borne out by the real facts of the case. Suitability from the standpoint of effectiveness may or may not be associated with suitability from the standpoint of safety, and it is only the former kind of suitability that the employer usually takes into account. Under such circumstances, it is submitted, there is no sufficient basis upon which to found an inference of law that an employer fulfils his duty when he adopts instrumentalities and methods which are in common use.¹⁴

51. Negligence not predicable of the failure to adopt instrumentalities or methods not in general use.—In a considerable number of cases the doctrine has been applied that a jury cannot be permitted to find an employer guilty of negligence on the ground that a suggested instrumentality or method of work was better and safer than the one adopted by him, if there is no evidence, or insufficient evidence, that the utility of that instrumentality or method has received the stamp of a practical recognition from a considerable proportion,

¹⁴The gist of the whole matter is well summed up in the two following remarks extracted from recent cases: "Common sense and reason do not lose their sway because, through ignorance, inattention, or selfishness, unreasonable customs may have prevailed." *Yelack v. Champagne Lumber Co.* (1901) 48 C. C. A. 632, 109 Fed. 732. "Custom may originate in motives of economy, or the stress of pecuniary affairs, or in recklessness, and not from considerations based upon the proper discharge of the master's duty." *Redfield v. Grand Canal Street R. Co.* (1896) 112 Cal. 220, 43 Pac. 1117.

at least, of the persons in his own line of business. As was laid down in one case, the action cannot be maintained unless the suggested device, the nonadoption of which is alleged to be negligence, is "so manifestly serviceable as to command the consensus of intelligent . . . men [in the same business] so generally as that it cannot be reasonably ignored or disregarded."¹ The decisions to this effect proceed from courts which unquestionably hold conformity to usage to be conclusive in the master's favor;² from courts whose views

Louisville & N. R. Co. v. Hall (1890) 91 Ala. 112, 8 So. 371 (said of "whipping straps" as a means of warning brakemen of the proximity of low bridges); *Faber v. Carlisle Mfg. Co.* (1889) 126 Pa. 387, 17 Atl. 621; *Dingley v. Star Knitting Co.* (1892) 134 N. Y. 552, 555, 32 N. E. 35; *Douner v. Delaware & H. Canal Co.* (1895) 171 Pa. 581, 33 Atl. 415 (plaintiff asserted that a foreign railway car should have been provided with an additional handhold); *Giraffe v. Kansas City, P. & G. R. Co.* (1900) 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108 (fact that defendant had placed its switch-signal target on the same side of the main track on which its side track was placed, instead of on the opposite side, held not to constitute negligence, where the evidence showed that there was no uniform rule as to which side of the track it should be placed; train ran through a switch which the engineer would have seen to be open if it had been on the other side of the track); *Banks v. Georgia R. & Bky. Co.* (1901) 112 Ga. 655, 37 S. E. 992 (complaint failing to allege any defect other than an unblocked frog, held insufficient on the ground that it might be the general custom not to block frogs); *McNeil v. New York, L. E. & W. R. Co.* (1893) 71 Hun. 24, 24 N. Y. Supp. 616 (failure to block the space between guard rails and main rails, held not to be negligence, the usage of railways in this regard being conflicting); *Omaha Bottling Co. v. Theiler* (1899) 59 Neb. 257, 80 N. W. 821 (failure to provide screens to protect employees from fragments of exploding bottles in a bottling establishment); *Whitely v. Block* (1894) 95 Ga. 15, 21 S. E. 985 (employer held not negligent in not having a railing round a freight elevator, there being no evidence that a general custom to take this precaution prevails in respect to elevators of the same class); *Hale v. New York & N. E. R. Co.* (1899) 174 Mass. 317, 54 N. E. 841 (no evidence as to what method of fastening the arch pipe of a locomotive was in use elsewhere); *Corcoran v. Wana-maker* (1898) 185 Pa. 496, 39 Atl. 1108 (judgment for defendant based partly on the ground that there was no proof that it was not customary for employers in the same business to use certain acids which gave off poisonous fumes); *Ross v. Pearson Cordage Co.* (1895) 164 Mass. 257, 41 N. E. 284 (use of a machine with belt-shipper made in the ordinary way held not to be negligence rendering master liable for accident caused by its slipping and so starting a machine, though the accident might have been prevented by certain contrivances sometimes used on other shippers); *Delaware River Iron-Ship Bldg. & Engine Works v. Nuttall* (1888) 119 Pa. 149, 13 Atl. 65 (contention that the defendant should have provided a spreader for a saw held to be without merit, as the testimony showed that such an attachment was not in general use, and that there was no general agreement among millowners or practical sawyers that it was a desirable or a useful attachment); *Pryhillski v. Northwestern Coal R. Co.* (1898) 98 Wis. 413, 74 N. W. 117 (no covering to protect workmen on a coal dock from coal which fell when a bucket was unlatched; defendant absolved on the ground that there was no evidence to show that this device was used in similar docks on the lake ports). Where there is no proof that the manner in which a machine which fell upon the plaintiff was fastened down differed from that ordinarily adopted in the case of such machine, it is error to charge a jury that, if the accident could have been prevented by a certain precaution, the plaintiff would be entitled to recover. *Augerstein v. Jones* (1891) 139 Pa. 183, 21 Atl. 24. Where the evidence does not show that any particular method of moving the large driving

on this point are not precisely defined;³ and from courts which consider conformity to usage to be merely evidence of due care.⁴

In a logical point of view the theory of the last mentioned group of courts seems to be decidedly faulty. The position that the employer's culpability still remains a question for the jury after he has shown that he has done as much for the protection of the servant as other persons in the same line of business is, it is submitted, essentially inconsistent with the position that the absence of such culpability is inferable, as a matter of law, wherever the servant is unable to prove that the particular instrumentality or method which, according to his contention, should have been adopted, was in common use. The necessary complement of the doctrine that the question of negligence *vel non* is still an open one after conformity to common usage has been shown is that this question is also an open one after it has been ascertained that there is no common usage with reference to which the quality of the master's acts can be gauged.⁵

wheels of locomotives is generally known and practised in machine shops, or known to the defendant himself, it is error to leave it to the jury to say whether the defendant was negligent in not instructing the plaintiff how such a wheel could be moved with safety. *Richmond Locomotive & Mach. Works v. Ford* (1897) 94 Va. 627, 27 S. E. 509.

³*Southern P. Co. v. Selby* (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530 (charge approved by which the jury were told that the use of an unblocked frog was not negligence if they found from the evidence that railroad companies used both the blocked and the unblocked frog, and that it was questionable which was the safer or more suitable for the business of the roads); *Red River Line v. Smith* (1900) 39 C. C. A. 620, 99 Fed. 520, (no staging or connecting planks furnished for transferring cotton from a barge to a steamboat); *Mississippi River Logging Co. v. Schneider* (1896) 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. 195 (no guard provided to prevent a plank forced over the "dead" rollers in a sawmill from coming into contact with a slab saw); *Grant v. Union P. R. Co.* (1891) 45 Fed. 673 (no lights on switches in railway yards); *Lloyd v. Hanes* (1900) 126 N. C. 359, 35 S. E. 611. As to the Federal decisions generally, see § 50, *ante*.

⁴*Young v. Burlington Wire Mattress*

Co. (1890) 79 Iowa, 415, 44 N. W. 693 (no evidence that a guard to the machinery was usual or even practicable); *Bryant v. Burlington, C. R. & N. R. Co.* (1885) 60 Iowa, 305, 55 Am. Rep. 275, 23 N. W. 678 ("bucking snow" by means of a train with two engines and without a snow-plough, not shown to be an unusual method); *Lorimer v. St. Paul City R. Co.* (1892) 48 Minn. 391, 51 N. W. 125 (street-railway company held not to be negligent in not providing in its electric cars a resistance coil for the purpose of making the starting of its cars more gradual, there being no evidence that it had become known, approved, and recognized as a useful appliance); *Chicago, R. I. & P. R. Co. v. Lonergan* (1886) 118 Ill. 41, 7 N. E. 55 (railway company not liable for failure to use a new device for blocking, where the evidence shows that unblocked frogs had been in use on railroads all over the country for years and it is a fair inference that the blocking of switches is as yet but an experiment); *Chicago, R. I. & P. R. Co. v. Smith* (1885) 18 Ill. App. 119 (same point).

⁵This is the view taken in Colorado. See *Empson Packing Co. v. Vander* (1899) 27 Colo. 66, 59 Pac. 749, holding that the master's nonliability could not be affirmed, as a matter of law, where the evidence was that a steam cooker in a canning factory exploded owing to a sudden influx of steam from the boiler by which it was supplied, and the

As additional reasons for denying recovery in some of the cases which exemplify this principle, we find the courts adverting to the facts that the suggested change was not necessary for the safety of the servant,⁶ or was not a practical one,⁷ or was not reasonably feasible under the circumstances,⁸ or would render the appliance in question impossible to operate.⁹ But such elements must be regarded as merely cumulative in their significance, as the principle itself was sufficient to negative liability under the circumstances involved. Compare the similar enumeration of corroborative facts at the end of § 44, *ante*.

52. Proof of nonconformity to common usage warrants inference of negligence.—The courts not infrequently employ language which, if taken literally, would seem to embody the doctrine that nonconformity to common usage implies negligence, as a matter of law.¹ But an examination of the cases in which expressions of this sort occur will show that they merely amount to somewhat loose statements of a rule which may be enunciated more accurately as follows: The master's negligence is a question for the jury whenever it is warrantable to infer from the evidence that the injury would not have been re-

testimony was that some canning factories used the method adopted by the defendant, while others equipped their cookers with safety valves.

⁶ *Whitley v. Block* (1894) 95 Ga. 15, 21 S. E. 985 (for facts see *supra*, note 21).

⁷ *Red River Line v. Smith* (1900) 39 C. C. A. 620, 99 Fed. 520.

⁸ *Pogulski v. Northwestern Coal R. Co.* (1898) 98 Wis. 413, 74 N. W. 117.

⁹ *Keenan v. Waters* (1897) 181 Pa. 247, 37 Atl. 342 (no guard rails on a laundry machine of the pattern ordinarily used). Compare § 37, *ante*.

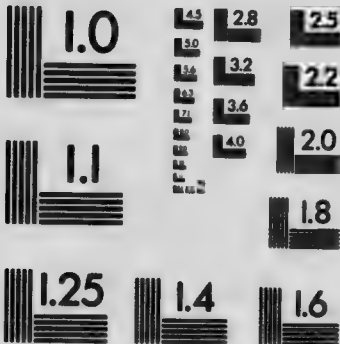
Thus, it has been declared that "the general rule requires of the master that he provide materials and implements for the use of his servant such as are ordinarily used by persons in the same business." *Allison Mfg. Co. v. McCormick* (1888) 118 Pa. 519, 12 Atl. 273. That the master "is bound to furnish machinery and appliances that are of ordinary character and reasonable safety, and the former is the conclusive test of the latter," was laid down by the same court in *Kehler v. Schurenk* (1891) 144 Pa. 318, 13 L. R. A. 374, 22 Atl. 910. In *Richmond & D. R. Co. v. Jones* (1890) 92 Ala. 218, 9 So. 276, it was said that a master, although not required to adopt every new improve-

ment, is bound "to discontinue old methods that are insecure," and keep himself reasonably abreast with improved methods, "so far as general usage demands." In *McGill v. Bowman* (1890) 18 So. Sec. Cas. 4th series, 200, the court said, *arguendo*, that the master is bound to abandon a system given up by most persons. In *Hart & C. Mfg. Co. v. Tuma* (1898) 85 Ill. App. 310, it was laid down that a master must provide appliances which are in "ordinary and common use." In North Carolina it has lately been held that automatic car couplings are now so generally used that it is negligence *per se* to operate cars without them. *Greenlee v. Southern R. Co.* (1898) 122 N. C. 977, 41 L. R. A. 399, 30 S. E. 115; *Trotter v. Southern R. Co.* (1899) 124 N. C. 189, 44 L. R. A. 313, 32 S. E. 550. In the former of these cases it was declared that an extension of time procured from the Interstate Commerce Commission by railroad companies for placing self couplers upon freight cars merely relieved the companies from the penalty provided in the Act to Regulate Commerce, but did not relieve them from the legal liability to employees for failure to provide suitable appliances in general use.



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ceived if a certain instrumentality or method had been substituted for that actually adopted by the defendant, and that this alternative instrumentality or method was one commonly used by other employers in the same line of business under similar circumstances. This rule is applied both by the courts which do, and by the courts which do not, accept the doctrine that conformity to common usage is a conclusive defense.² An instruction is erroneous or correct according

² See *Eastman v. Lake Shore & M. S. R. Co.* (1894) 101 Mich. 597, 60 N. W. 309 (statutory duty to block switches not discharged by adopting a method which the operation of the road renders ineffectual in a few days, where a simple, inexpensive, and common method is in common use); *Smizel v. Odanah Iron Co.* (1898) 116 Mich. 149, 74 N. W. 488 (platform in a mine only one plank thick, contrary to the usage of the locality); *Littlefield v. Edward P. Allis Co.* (1900) 177 Mass. 151, 58 N. E. 692 (master's negligence in failing to provide proper material is for the jury, where plaintiff, while holding a piece of iron pipe over the head of a bolt which was being driven, was injured by a chip flying from the pipe, and it appeared that the bolts were usually protected by holding some such metal over them, but that copper hammers had been made for a number of years for such work, and that piping was the least desirable of the metals used, because of its brittleness); *Cossetmon v. Dunfee* (1901) 59 App. Div. 467, 69 N. Y. Supp. 271 (master's negligence a question for the jury where plaintiff, whose duty it was to hook and unhook buckets from a derrick used in cleaning a canal, was injured by the bending of the hook, allowing a bucket to fall on him, and where there was also some evidence that the hook was smaller than those ordinarily used); *Flaherty v. Norwood Engineering Co.* (1898) 172 Mass. 134, 51 N. E. 463 (held to be for the jury to say whether a common round stick without holes in it, to use as a lever for tipping a large ladle of molten metal, was a defective appliance, the evidence being that it was not safe and that another kind of device was customary in large foundries); *Kehler v. Schwenk* (1892) 151 Pa. 505, 25 Atl. 130 (finding that master was negligent held to be justifiable where the appliance which caused the injury was only in partial use, and the testimony disclosed a perfectly simple device in extensive use, which would have practically removed all danger); *Bonner v. Pittsburg Bridge Co.* (1897) 183 Pa. 278, 38 Atl. 896 (case for jury where the evidence was that an injury caused by an accidental change in the gear of a crane could have been prevented by a safety lock, a well-known device, but the testimony was conflicting as to the general use of such a device in similar cranes); *Indiana, I. & L. R. Co. v. Bundy* (1899) 152 Ind. 590, 53 N. E. 175 (case held to be for jury, where the evidence was that the defendant did not, as was usual in first-class roads, cover the signal wires in a busy yard); *Fort Worth & R. G. R. Co. v. King* (1899) 21 Tex. Civ. App. 271, 51 S. W. 558, affirmed in (1899; Tex.) 54 S. W. 240 (low overhead bridge not guarded by usual telltales); *Bennett v. Northern P. R. Co.* (1891) 2 N. D. 112, 13 L. R. A. 465, 49 N. W. 408 (use of drawbars shorter than those in common use held to be evidence of negligence); *Galveston, H. & S. A. R. Co. v. Slinkard* (1897) 17 Tex. Civ. App. 585, 44 S. W. 35 (cattle guard left uncovered within yard limits); *Palmer v. Deater & R. G. R. Co.* (1882) 3 McCrary, 635, 12 Fed. 392 (jury may infer negligence where a few cars of a discarded pattern are used); *Jensen v. Hudson Sawmill Co.* (1897) 98 Wis. 73, 73 N. W. 434 (failure to guard machinery in sawmill); *Lamser v. St. Joseph Furniture Mfg. Co.* (1897) 70 Mo. App. 209 (master held to be negligent in failing to guard a circular saw in the usual manner, where he knows, or ought to know, that it is dangerous unless so guarded); *Ross v. Shanley* (1900) 185 Ill. 390, 56 N. E. 1105, affirmed (1899) 86 Ill. App. 144 (negligence not to shore trench in usual manner); *Schmit v. Gilman* (1899) 41 App. Div. 302, 58 N. Y. Supp. 458 (sheathing of trench set much further apart than usual; defendant held liable). To the same general effect see *Gulf, C. & S. F. R. Co. v. Warner* (1896; Tex. Civ. App.) 36 S. W. 118. A miner has the right to assume that a practice or custom resorted to

as it ignores or is in harmony with this principle.³ No declaration which shows a prima facie case of noncompliance with general usage is demurrable.⁴

A few cases embody a principle slightly different from that applied

in similar mines, to render safe the places where miners have to work, will be followed by his employer. *Bergquist v. Chandler Iron Co.* (1892) 49 Minn. 511, 52 N. W. 136. The same principle is applicable where the plaintiff is a stranger. *Vinton v. Schureb* (1860) 32 Vt. 612.

The principle is, of course, subject to any exceptions which may be indicated by circumstances warranting the application of the doctrine of assumption of risks. Thus, where a brakeman has been sufficiently long in the service to become acquainted with the low bridges along the track, the fact that the road on which he is employed does not use the danger signal common on other roads is immaterial, for the absence of the signals does not deceive him as to the degree of danger incurred. *Brossman v. Lehigh Valley R. Co.* (1886) 113 Pa. 491, 57 Am. Rep. 479, 6 Atl. 226.

In one of the earlier English cases, *Bramwell, B.*, expressed the opinion that negligence on the master's part is not a warrantable inference from the fact that the master uses machinery less safe than some other kind in general use. *Dymen v. Leach* (1857) 26 L. J. Exch. N. S. 221. But even in England this dictum would now hardly be accepted as good law. See cases cited in § 50, *ante*. In Illinois it was held lately that expert testimony to the effect that the hook which broke was not constructed on the principle of standard hooks was not evidence from which negligence could be inferred. *Hart & C. Mfg. Co. v. Tima* (1899) 85 Ill. App. 310. But here the principle relied upon was that the master is not bound to furnish the best appliances, and the attention of the court does not seem to have been directed to the possibility that the rule as to general usage may sometimes operate so as to qualify this principle. See § 48, *ante*. If, as may be assumed, the expression "standard hook" implies that it was in general use, the case is plainly contrary to the weight of authority.

³An instruction which is susceptible of being understood as laying down the

rule that it was the duty of the master, in providing reasonably safe machinery, to furnish that which was safer and better, if such was in general use, is erroneous. *Stiller v. Bohn Mfg. Co.* (1900) 80 Minn. 1, 82 N. W. 981. There the majority of the court held that this was not the effect of an instruction by which the jury were told that, if there were in general use tools and machinery that were safer and better than those used, they would be justified in finding that, if the master did not provide the safer machinery in general use, but used machinery that was not safe,—not reasonably safe,—he did not use reasonable care. Two judges dissented from the construction thus put upon the words of this statement, and considered that the charge was uncertain and indefinite to such a degree as to be misleading. With this view the present writer ventures to agree.

⁴As, where it sets forth the omission of the defendant to light properly a place in a sawmill where his servants are required to work in close proximity to unguarded machinery, and alleges that at a small cost the machinery might have been guarded, as was customary in that part of the country. *Jensen v. Hudson Sawmill Co.* (1897) 98 Wis. 73, 73 N. W. 434. Or where it alleges facts showing that, if a prevailing custom had been followed in the management of the business, the injury would not have occurred. *Joliet Steel Co. v. Shields* (1893) 146 Ill. 603, 34 N. E. 1108 (partially filled mold not laid on its side, as was usual in such a case, at the end of the day's work, thereby leading one who was repairing a track close to it to suppose it was empty and would stand without support). In *Anderson v. Illinois C. R. Co.* (1899) 109 Iowa, 524, 80 N. W. 561, the case was held to be for the jury, where the declaration set forth that crowbars and pinch bars had been furnished as implements with which to handle piles, and averred that cant hooks would have been the proper appliances, and were generally used.

in the cases so far cited, viz., that the servant cannot recover unless he not only proves that the master did not conform to usage, but that ordinary care and prudence required that the suggested precautions should be taken.⁵

But it would seem that this principle cannot be consistently adopted by any court which regards conformity to usage as a circumstance which, as matter of law, negatives culpability. The logical situation is precisely the converse, in this respect, of that commented upon in § 57, *post*. For this reason the two decisions cited are, it is submitted, erroneous so far as regards the particular jurisdictions from which they emanate. See §§ 44, 50, *ante*.

53. What kind of usage is competent as evidence to be introduced on the question of due care.—*a. Competency considered with reference to the similarity of the circumstances.*—For the purpose of a comparison of usages, it is not necessary that the establishment which is adduced by the servant as furnishing the proper standard of safety and suitability should be precisely similar to that of the defendant. A reasonable similarity is sufficient.¹ But evidence of usage should be rejected unless there is a fairly close parallelism between the conditions to which the evidence relates, and those which existed at the time and place with which the action is concerned.²

b. The number of employers following or not following the usage.—To justify a court in declaring, as matter of law, that the master was not negligent, for the reason that he conformed to common usage, it is not necessary that the usage shown should be a uni-

⁵ *Huhn v. Missouri P. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937 (question of negligence in case of injuries caused by an unblocked guard rail cannot be resolved alone upon evidence showing how many roads block guard rails); *Sincere v. Union Compress & Ware-House Co.* (1897; Tex. Civ. App.) 40 S. W. 326 (custom alleged was that owners of cotton compresses in the vicinity employed men to perform certain functions in connection with the unloading of the bales).

¹ Expert testimony as to the manner of belts in a mill of a different character from the one in which the accident occurred is competent, since there is no such essential difference between the conditions to which belts are exposed in different kinds of factories as to render such testimony entirely irrelevant. *Metgar v. National & P. Worsted Mills* (1901) 22 R. I. 347, 47 Atl. 1092.

² In an action by an employee injured by a saw, evidence of a custom in factories to screen saws to protect those operating them, but not showing that such screens were used on machines similar to the one by which the employee was injured, or that they were designed to protect employees engaged in the same work as the plaintiff, viz., carrying materials to and fro, is insufficient to sustain a claim that such devices were in common use within the meaning of the rule. *Journeaux v. E. H. Stafford Co.* (1899) 122 Mich. 396, 81 N. W. 259. In an action based upon the theory that an employer is bound to protect men engaged in digging a trench by stationing a watchman to prevent volunteers from helping to push street cars across such trench, evidence of precaution usually taken at other places and under different circumstances is rightly excluded. *Craven v. Mayers* (1896) 165 Mass. 271, 42 N. E. 1131.

versal one.³ But it is improper to take as a standard the usage of a few out of a large number of employers whose business is presumably conducted on the same lines.⁴

If it is a question of the master's duty to introduce a particular kind of appliance, the fact that a relatively large number of employers, as compared with the whole number, abstain from using that appliance, is a sufficient reason for declaring him to be, as matter of law, free from negligence. It is not necessary to show such abstinence on the part of an absolute majority of the employers.⁵ Still less can culpability be inferred from the fact that a single member of the class of employers to which he belongs had adopted the instrumentality or method which, as the plaintiff asserts, ought to have been adopted.⁶

³ In *Georgia P. R. Co. v. Propst* (1887) 83 Ala. 518, 3 So. 764, the fact that drawheads used were such as were employed on "many" well-conducted roads was held to repel all imputation of negligence, even though it did not appear that they were used on the majority of such roads. *S. P. in Richmond & D. R. Co. v. Jones* (1890) 92 Ala. 218, 9 So. 276. The course pursued by "most persons" was mentioned as the standard in *McGill v. Bowman* (1890) 18 So. Sess. Cas. 4th series, 206.

⁴ In *Louisville & N. R. Co. v. Jones* (1901; Ala.) 30 So. 586, where the question was whether the ratchet jacks for holding up the body of a derailed car were suitable appliances, it was held that charges which proposed, as an absolute test of their fitness, the usage of eight companies, were invasive of the province of the jury, and were properly refused. In another case a charge which proposed as a standard test of duty the usage of five railway companies was also held to be erroneous for the same reason. *Richmond & D. R. Co. v. Weems* (1892) 97 Ala. 270, 12 So. 186. In *Apati v. Delaware, L. & W. R. Co.* (1901) 64 App. Div. 515, 72 N. Y. Supp. 322, it was held that the mere fact that some railway companies use a saw, instead of a hammer and chisel, to cut rails, did not justify the trial court in submitting to the jury the question whether the defendant was negligent in using a hammer and chisel, there being no evidence to show whether the saw was used on account of its greater economy and efficiency, or on account of its greater safety.

⁵ In *Breig v. Chicago & W. M. R. Co.* (1893) 98 Mich. 222, 57 N. W. 118, evidence that one manufactory in making emery wheels had adopted the method of filling them with copper wire was held insufficient to show that the master was negligent in not using a wheel so filled. In a case where an employee was injured while loading car wheels on a flat car, it was error to permit plaintiff to prove the manner in which such wheels were loaded by another railroad company, though the skid used in such work was borrowed from such other railroad. *Southern R. Co. v.*

87 Ala. 708, 4 L. R. A. 710, 6 So. 277. In *Chicago & G. W. R. Co. v. Armstrong* (1895) 62 Ill. App. 228, evidence was offered that hand-holds on railway cars were usually placed crosswise, instead of lengthwise, as on the defendant's cars. It was held that, where the question is whether a certain recognized device for securing the safety of the servant shall be arranged in one way rather than another, the fact that the majority of masters in the same business arrange it in a different manner from the defendant is not conclusive against him, if there is evidence that this arrangement had been abandoned as dangerous by many prudent persons. See also *Kilpatrick v. Choctaw, O. & G. R. Co.* (1901; Ind. Terr.) 54 S. W. 560 (direction of verdict for defendant held proper, where the larger number of witnesses testify that the unblocked frog is not more dangerous than the blocked frog, and is most largely used by railroads, and that some roads using the blocked frog have changed to the unblocked).

⁶ In *Breig v. Chicago & W. M. R. Co.* (1893) 98 Mich. 222, 57 N. W. 118, evidence that one manufactory in making emery wheels had adopted the method of filling them with copper wire was held insufficient to show that the master was negligent in not using a wheel so filled. In a case where an employee was injured while loading car wheels on a flat car, it was error to permit plaintiff to prove the manner in which such wheels were loaded by another railroad company, though the skid used in such work was borrowed from such other railroad. *Southern R. Co. v.*

A usage may be general in the legal sense, although, owing to the fact that the arrangements which caused the injury are very rarely met with, the number of employers whose methods are available for the purposes of comparison is very limited.⁷

c. The territorial extent of the usage.—Ordinarily a usage is appealed to as one which prevails over the whole of the country to which the plaintiff and defendant belong. But evidence of a usage covering any well-defined local area, whether a state, a district of a state, a group of states, or a single city, is always admissible, provided there are reasonably adequate grounds for treating that area as a distinct entity for this purpose.⁸ Such evidence has even been deemed conclusive in the master's favor.⁹

d. The practice of the defendant himself.—(Compare § 16*a*, ante.)—The fact that a certain instrumentality has always been in use by the defendant himself, as well as by other employers, is some-

Manzy (1900) 98 Va. 692, 37 S. E. 285. Here the special contention was that, inasmuch as the defendant borrowed the skids from the other company, it was its duty to get all the appliances used by the latter, and not take a part thereof.

⁷ In *Titus v. Bradford, B. & K. R. Co.* (1890) 136 Pa. 618, 20 Atl. 517, the defendant's nonculpability was asserted for the reason that it had adopted the same method of loading standard-gauge cars on its own narrow-gauge trucks as had been adopted by two other narrow-gauge roads.

⁸ In *Benson v. New York, N. H. & H. R. Co.* (1901; R. L.) 49 Atl. 689, it was held that, in an action by a brakeman for injuries received on a car of peculiar construction, an instruction that, if cars constructed in the manner in which the car occasioning the injury was constructed were in common use by well-managed railroads, the plaintiff assumed the risk, was properly refused, as it expressed no limitation as to the place where such cars were in common use, but that it was improper to reject evidence that cars constructed like that which caused the injury were in common use in New England. In a California case it was held that, where an experienced stevedore who had long been employed as such at a certain port was injured by the falling of lumber which was being lowered through a hatchway to the hold of a vessel where he was stowing it away, and the issue

was whether there was a sufficient warning, and whether he had assumed the risk of the way in which it was lowered, evidence was admissible which tended to show what was customary among stevedores at that port in handling such lumber, and what the respective duties were of the workmen engaged in the work,—especially of the hatchman and others engaged in lowering the lumber. *Hennessey v. Bingham* (1899) 125 Cal. 627, 58 Pac. 200. In *Smizel v. Odanah Iron Co.* (1898) 116 Mich. 149, 74 N. W. 488, the usage of a mining district was taken as a standard.

⁹ In *Prybyski v. Northwestern Coal R. Co.* (1898) 98 Wis. 413, 74 N. W. 117, the usage to which this effect was attributed was that of the ports on the Great Lakes. Proof of a usage commonly prevailing in a district of Pennsylvania in which numerous coal mines were worked was treated as conclusive in the master's favor in *Lehigh & W. R. Coal Co. v. Hayes* (1889) 128 Pa. 294, 5 L. R. A. 441, 18 Atl. 387. In *Shecher v. Chesapeake & O. R. Co.* (1885) 81 Va. 188, 50 Am. Rep. 654, the court seems to rely on the usage of railway companies in Virginia alone, as regards the width of covered bridges. But in such a matter, involving an industry supposed to be conducted on practically the same lines all over the country, it seems very questionable whether the custom in such a limited region as a single state should be deemed conclusive.

times mentioned in cases where common usage has been held to negative negligence.¹⁰ But the immunity of the master in such cases is, of course, not predicated upon this circumstance, except in so far as it may tend to prove the servant's knowledge of the risk. Unless such knowledge is established, the servant does not assume the risk attending the work as conducted in accordance with his employer's individual methods.¹¹

On the other hand, the fact that the defendant himself has put a certain device into partial use is not sufficient to establish its suitability and show that he is negligent in so far as he adheres to the old system.¹²

¹⁰ *Osborne v. Knox & L. R. Co.* (1877) 68 Me. 49, 28 Am. Rep. 16; *Bellerille Stone Co. v. Comben* (1898) 61 N. J. L. 353, 39 Atl. 641, Affirmed in 62 N. J. L. 449, 45 Atl. 1090. *gan* (1886) 118 Ill. 41, 7 N. E. 55. In *Fuller v. New York, N. H. & H. R. Co.* (1900) 175 Mass. 424, 50 N. E. 574, one of the elements which was held insufficient to show negligence was that the suggested arrangement had in rare instances been used by the defendant.

¹¹ *Bergquist v. Chandler Iron Co.* (1892) 49 Minn. 511, 52 N. W. 136.

¹² *Chicago, R. I. & P. R. Co. v. Loncr-*

CHAPTER VII.

THEORY THAT THE SERVANT'S KNOWLEDGE OR IGNORANCE OF THE RISKS INVOLVED IN THE EMPLOYMENT DETERMINES THE EXISTENCE OR ABSENCE OF CULPABILITY ON THE MASTER'S PART.

A. THEORY STATED AND EXEMPLIFIED.

54. General principles.
55. No negligence predicable where servant appreciates the risks to which he is exposed.
56. Rationale of the doctrine.
57. Abnormal as well as normal risks deemed to be within the scope of this doctrine.
58. Negligence predicable, where servant is exposed to risks of which he is actually and excusably ignorant.
59. Such a situation sometimes treated as a species of deception.
60. Master no longer liable after he has given the servant notice of the existence of a risk previously unknown to the latter.

B. THEORY DISCUSSED AND CRITICISED.

61. Extent of the immunity which the master secures by the theory.
62. Ultimate basis of theory is economic rather than juristic.
63. Suggested exception in cases of a temporary forgetfulness of a known danger.
64. Theory inconsistent with a true conception of public policy.
65. Servant not really a voluntary agent.
66. Alternative theory suggested as being the correct one.

A. THEORY STATED AND EXEMPLIFIED.

General principles.— Under the theory which is commonly entertained as to the nature of a master's liability, he is viewed as a person charged by his contract with a definite and absolute obligation to see that the instrumentalities and methods adopted by him satisfy a certain assumed standard of safety, so far as that can be achieved by the exercise of ordinary care; and the nonperformance of that obligation is regarded as creating, in favor of any servant who is injured thereby, a complete right of action which can be defeated only by proof of circumstances which let in one or other of the specific defenses based upon the servant's knowledge of the risks to which the master's breach of contract exposed him. The essential effect of this conception is that the servant's knowledge of the risks to be encountered

tered merely introduces into the situation an independent factor which raises, either for the court or the jury, according to the circumstances in evidence and the doctrine prevailing in the particular jurisdiction where the accident occurs, the question whether the servant is not precluded by his own conduct from enforcing the inchoate right of action which he acquired by the master's breach of contract. But many eminent authorities prefer to treat the master's duty from a different standpoint.

This alternative theory may be regarded as a special application of the general principle that "there is no absolute or intrinsic negligence; it is always relative to some circumstance of time, place, or person."¹ The inference drawn from this principle in the present connection will be that the servant's knowledge or ignorance of the risk, instead of being a factor to be separately considered, as a more or less conclusive defense, after the master's negligence has been established, constitutes the essential element upon which the existence or absence of his culpability depends. The doctrine founded on this inference may be stated in the two following propositions, the constituents of which are nearly, but not quite, correlative and complementary: (1) As regards a servant who fully understands the perils to which an instrumentality exposes him, it is not negligence to furnish or continue to use that instrumentality, however defective and dangerous it may be. (2) As regards a servant who is actually and excusably ignorant of the risks to which an instrumentality exposes him, it is negligence to furnish or continue to use that instrumentality, irrespective of whether it is suitable or unsuitable, safe or unsafe, in good or in bad repair. The authorities for these two propositions will be separately considered.

55. No negligence predicable where servant appreciates the risks to which he is exposed.— That the servant's knowledge of the risk conclusively negatives the inference that the master was under any duty to protect him has often been asserted in explicit terms.¹ This last

¹ *Bramwell, B., in Degg v. Midland R. Co.* (1857) 1 Hurlst. & N. 773, 781, 26 L. J. Exch. N. S. 171, 3 Jur. N. S. 395. servant did voluntarily undertake the risk from which he suffered, there could, as a matter of course, be no negligence imputable to the master. *Smith v. Baker* [1891] A. C. 325, 352, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 600, 40 Week. Rep. 392, per *Ld.* "There was no danger which in view of the plaintiff's knowledge and capacity, must not have been well understood by and apparent to him, and there was, therefore, no negligence on the part of the defendant in exposing

passage is quoted merely as an example of a formal enunciation of the doctrine, not as embodying the accepted rule in Missouri, where, as we shall see in a later chapter (xviii.), the current of authority runs in favor of the view that the only defense open to the master is that the servant was negligent, and that his knowledge of the risk is not conclusive against him.

This view of the relations of the master and his servants involves the consequence that the mere omission of the master to take certain suggested precautions does not, as a matter of law, make him liable for an injury occasioned by the want of such precautions, where the servant has consented to work in a position in which he is exposed to peril from this source. Under such circumstances he still has the burden of proving that there is some additional reason for holding

him to it." *Goodnow v. Walpole Emery Mills* (1888) 146 Mass. 261, 15 N. E. 576. "Employers have a right to decide how their work shall be performed, and may employ men to work with dangerous implements, and in unsafe places, without incurring liability for injuries sustained by workmen who knew, or ought to have known, the hazards of the service which they have chosen to enter." *McTierty v. Southern New England Tel. & C. Co.* (1897) 69 Conn. 635, 643, 38 Atl. 359. "Where . . . the sole act of negligence relied on is participated in, and voluntarily consented to, by the person injured, with full knowledge of the peril, the question of the master's liability does not arise." *Hammont v. Chicago & G. T. R. Co.* (1890) 83 Mich. 334, 47 N. W. 965. "There is no breach of duty in employing a servant, subject to the ordinary risks of the employment, if the servant himself is aware of the risks and consents to encounter them. When . . . the employee is aware . . . of the risks to which he exposes himself in the service, and consents to encounter them, his employment, subject to the risks, cannot be treated as a breach of duty." *McGinnis v. Canada Southern Bridge Co.* (1882) 49 Mich. 466, 13 N. W. 819. "It can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employee had full knowledge and comprehension, can be regarded as making out a case of liability within the [general] rule laid down." *Marsh v. Chickering* (1886) 101 N. Y. 396, 5 N. E. 56. "The duty which the employer is under is materially affected by the element of [the servant's] knowledge, and, unless a duty is shown, of course there can be no actionable negligence, since a duty lies at the foundation of every right of action grounded on the negligence of a defendant." *Louisville, N. A. & C. R. Co. v. Sandford* (1889) 117 Ind. 267, 10 N. E. 770. In *Becker v. Baumgartner* (1892) 5 Ind. App. 556, 32 N. E. 786, it was argued that the negation of contributory negligence upon the part of the plaintiff rendered the complaint invulnerable against a demurrer, but the court said: "The infirmity does not consist of the contributory fault of appellee, but of the failure to make a case of actionable negligence against appellant. It is not, accurately speaking, contributory negligence for an employee knowingly to work with defective machinery and appliances; for there he assumes the increased risk, and such assumption becomes part of the terms of his contract. Negligence consists in the omission of a duty, and where there is a defect in the machinery or appliances, under such circumstances that the employee, by the terms of his engagement, assumes the enhanced dangers, the employer is under no obligation to remedy the defect. He owes no duty to remove the danger. Consequently, his failure to do so will not constitute negligence. This principle was expressly declared in *Lake Shore & M. S. R. Co. v. Stupak* (1886) 108 Ind. 1, 8 N. E. 630." "Culpable negligence on the part of one person as toward another always involves a breach of duty on the part of the former as towards the latter. Where there is no breach of duty, there can be no culpable negligence; and it is only

The memoranda appended to the citations in the subjoined note will indicate with sufficient clearness the classes of risks which are covered by these principles. It should be remarked, however, that, in many of the cases mentioned, the elements explained in the two preceding chapters are also referred to, and constitute additional and independent grounds for denying the right of the servant to recover.

the question whether the plaintiff knew the instrumentality to be insecure is not put in issue by a mere traverse of negligence. Such a plea, it was held, will not warrant the direction of a verdict for the defendant upon a finding that the materials used for the instrumentality were unsound, and that the workman who constructed it was incompetent, but that the defendant was not aware of that unsoundness and incompetency. *Skerritt v. Scallan* (1877) Ir. Rep. 11 C. L. 389.

^b *Railways.*—*West v. Rouse & P. Co.* (1898) 20 C. C. A. 219, 56 (1) 8, App. 323, 85 Fed. 392 (uncovered culverts); *McGinnis v. Canada Southern Bridge Co.* (1882) 49 Mich. 466, 13 N. W. 819 (unblocked frogs); *Illinois C. R. Co. v. Campbell* (1897) 170 Ill. 163, 49 N. E. 314 (complaint alleging that the servant was injured by an unblocked frog; held to state no cause of action); *Walker v. Atlanta & W. P. R. Co.* (1898) 103 Ga. 820, 30 S. E. 503 (frog projecting several inches above the track); *Gleason v. New York & N. E. R. Co.* (1893) 150 Mass. 68, 34 N. E. 79 (brakeman's foot caught in space left between planking on track); *Batterson v. Chicago & G. T. R. Co.* (1884) 53 Mich. 125, 18 N. W. 584 (side track so poorly ballasted as to afford an insecure footing to a brakeman); *Nugent v. Brooklyn Union Elec. R. Co.* (1901) 64 App. Div. 351, 72 N. Y. Supp. 67 (platform 24 feet wide, without a guard rail, along the tracks of an elevated railroad company, over which its employees were compelled to pass, the court remarking that the railway company could lawfully maintain such a platform, notwithstanding the risks incident to its use, there being nothing latent, hidden, or concealed, and nothing which was not as apparent to the servant as to the master); *Hack v. Pennsylvania R. Co.* (1887; Pa.) 9 Cent. Rep. 786, 11 Atl. 459 (cars in a train drawn by two engines parted, owing to the increased strains put on the couplings); *Narramore v. Cleveland, C. C. & St. L. R. Co.* (1899) 48 L. R. A. 70, 37 C. C. A. 501, 96 Fed. 301 (unblocked frog); *Chesapeake & O. R. Co. v. Brannan* (1899) 38 C. C. A. 307, 96 Fed. 713 (switchman handling defective cars at inspecting station); *Hodges v. Kimball* (1900) 44 C. C. A. 103, 104 Fed. 745 (bumpers so placed that they did not meet, the result being that there was nothing to prevent the cars from coming together, to the injury of servants whose duty it was to couple them); *Chicago, B. & Q. R. Co. v. Curtis* (1897) 51 Neb. 412, 71 N. W. 42 (foreign cars with double deadwoods); *Myers v. Chicago, St. P. & O. R. Co.* (1899) 37 C. C. A. 137, 95 Fed. 406 (low overhead bridge, servants notified by belltapes and verbal warning, Caldwell, J., dissented). No actionable negligence is alleged by a declaration which shows that an engine driver was killed by his head coming into collision with the stone work of a bridge, while he was leaning out of his engine, but also shows that the bridge had been built many years before, and that the trainmen were well acquainted with it. *McGhee v. North British R. Co.* (1887) 14 Sc. Sess. Cas. 4th ser. 499. To same effect, *Coombs v. Fitchburg R. Co.* (1887) 156 Mass. 200, 30 N. E. 1140, and cases cited (servant injured while passing a flying switch with the switch in close proximity to an abutment); *Lorejoy v. Boston & L. R. Corp.* (1878) 125 Mass. 79, 98 Am. Rep. 206 (servant struck against signal post close to track); *Fitchburg R. Co.* (1893) 158 Mass. 238, 33 N. E. 510 (brakeman struck by projecting awning); *Thorn v. Old Colony R. Co.* (1894) 161 Mass. 353, 37 N. E. 300 (engineer came into collision with post put up as a temporary support for a bridge); *Gibson v. Erie R. Co.* (1873) 63 N. Y. 450, 20 Am. Rep. 552 (brakeman struck by projecting roof); *De Forest v. Jewett* (1882) 88 N. Y. 264 (brakeman caught his foot in one of several small ditches which constituted a normal part of the drainage system of defendant's yard). As regards the last two cases, however,

56. Rationale of the doctrine.—(Compare § 36, *ante*.) The authorities are all agreed that the master's non-liability, as predicated under the theory which is now being discussed, is based, as a matter of ultimate analysis, upon the implied consent of the servant to undertake the known risk. In a special point of view, this consent may be referred either to the conception that such a case falls within the scope of the broad principle embodied in the maxim, *Volenti non fit injuria*, or to the conception that the servant's acceptance of or continuance in the employment, with knowledge of the risk, conclusively negatives the existence of any implied contract on the master's part to supply safer instrumentalities. The judicial statements in which the former conception is relied upon will be collected and discussed in the chapter which deals with the meaning and effect of the maxim. (xx.). The second conception is clearly set forth in the following extract from the opinion in a leading Massachusetts case:

"The implied contract to have the machinery in such a safe and proper condition as not to expose the servant to unnecessary risk is the foundation of the master's liability. If the servant, being fully capable of choosing and contracting for himself, and with full notice of the risk which he assumes, chooses to undertake a hazardous employment, to put himself in a dangerous position, or to work with defective or unsuitable tools, machinery, or appliances, no such implied contract arises."¹

It may be remarked that the precise position of the New York courts with regard to a situation of this sort is not at all clearly defined, and that there seems to be much wavering between the theory that the servant's knowledge negatives, *ab initio*, the existence of negligence, and the theory that his possession of such knowledge puts him in the position of one who loses his right of action for the reason that he had accepted the risk, or was himself negligent. See §§ 69, 70, *post*.

Other industrial concerns.—*Reynour v. Maddox* (1851) 16 Q. B. 326, 20 L. J. Q. B. N. S. 327, 15 Jur. 723 (unguarded and unlighted hole in the floor of a theater); *Thomas v. Quartermaine* (1887) 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 553, 51 J. P. 516, 18 Q. B. Div. 685 (uncovered cooling vat not protected by a railing); *Lemoine v. Aldrich* (1900) 177 Mass. 89, 58 N. E. 178 (revolving shaft stretching across a doc way, 4 feet above the floor); *Illinois Steel Co. v. Puschke* (1893) 51 Ill. App. 456 (no

breach of the duty to furnish a safe place of work is shown, where the injury was caused by a red-hot rail carried along by machinery); *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506 (unfenced machinery); *Schroeder v. Michigan Car Co.* (1885) 56 Mich. 132, 22 N. W. 220 (same facts); *Sanborn v. Atchison, T. & S. F. R. Co.* (1886) 35 Kan. 202, 10 Pac. 860 (same facts); *Quedthofer v. Ernating* (1899) 23 Ind. App. 188, 55 N. E. 113 (uncovered knives of a wood-cutting machine); *Junior v. Missouri Electric Light & P. Co.* (1895) 127 Mo. 79, 20 S. W. 988 (uncovered wires charged with electricity; servant was an experienced lineman).

¹*Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506. Another explicit statement, of the same tenor, is the following: "In the very nature of things, men must sometimes work in dangerous places and with dangerous instruments or machinery, and in all such cases they may rightfully engage to do so, and be employed to do

The theory may, therefore, be regarded as representing one of the two alternative ideas with reference to which the dividing line may be drawn between abnormal risks which are, and abnormal risks which are not, assumed by the servant.

On the one hand, it may be said that the servant's knowledge of a particular risk of that description so affects the essential quality of the act which created the risk that this act is transferred from the category of those which import negligence to the category of those which are not culpable. In this point of view the servant's inability to recover is obviously deduced from the fundamental principle that he is chargeable with an assumption of every risk that is incident to the employment after the master has performed all his legal obligations. See § 3, *ante*.

On the other hand, the position may be taken that the quality of the master's act undergoes no change, and that, for the purpose of the inquiry, this act remains, from first to last, within the category of those which import negligence. The servant's knowledge will then operate as a bar to his suit, for the reason that it is deemed to warrant, as a matter of law, the inference that he has waived that right to an indemnity, which *prima facie* accrued to him when the risk finally eventuated in the actual injury.²

so, and, when rightfully employed to do so, neither the employer nor the employee can properly be charged with culpable negligence as toward the other. Where the employer and the employee are equally competent to judge of the risks and hazards, and both have equal knowledge of the surroundings, the employer cannot be culpably negligent as towards the employee, although the work may be dangerous or hazardous, and although it might be made safer by the employer, if he should choose to do so. In some cases it is very difficult to determine which of two ways of doing a thing is the better and the safer way (and it is claimed by the defendant that this is one of such cases), and in such cases witnesses could easily be found who would testify on either side, and that either way was a safer and a better way than the other. Now, in such cases an employer should certainly have the privilege of adopting the way or the plan which might seem best to him; and if, after adopting a plan, he should inform his employee as to which of the plans he had adopted, or if the employee should obtain knowledge as to

which of the plans had been adopted, without being expressly so informed, it could hardly be said that the employer was guilty of any culpable negligence as towards his employee, although it might be that the plan not adopted was the safer and the better plan. Indeed, in such a case the employer and the employee might be in full and complete agreement and concordance that the plan adopted was the safer and the better plan, and in such a case neither should be charged with culpable negligence as toward the other. In such a case it should be assumed that the employee was hired and paid for taking the risk, and that he voluntarily assumed the risk." *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582.

By accepting the employment, or continuing in it without any promise of change on the part of the master, he "dispenses with the performance of the duty," upon the part of the master, to exercise reasonable care. *Wood v. Heiges* (1896) 83 Md. 257, 34 Atl. 872. See also the cases cited in the chapter on *Assumption of Risks* (XVII.).

That judges have not always fully apprehended the significance of the difference between these conceptions, or, at all events, have not always borne it in mind, is apparent from the fact that the language employed often leaves it somewhat uncertain whether the position intended to be taken is that the master was not guilty of any breach of duty, or that, although he may have been guilty of such a breach, the servant had accepted the resulting risks.³

The theory which predicates an entire absence of duty as regards a servant who knows the conditions and appreciates the resulting risks is, in some noticeable respects, less favorable to the servant than that which starts from the notion of certain absolute duties. Under the latter theory, his knowledge of the risk only operates as a bar to the action when the master distinctly relies upon the plea that there was an implied agreement to assume that risk, and does not, in all cases

³ In *Smith v. Baker* [1891] A. C. 325, knowledge and assumption of the risk, 336, 60 L. J. Q. B. N. S. 683, 65 L. T. N. In *Henderson v. Crooms* (1889) 31 Ill. S. 467, 55 J. P. 660, 40 Week. Rep. 392, App. 75, the court held that the plaintiff which caused the injury, said that he assumed the risks of a certain open cattle guard, but concluded by saying that "the facts did not establish negligence on the part of the company." The last clause in the following statement seems also to be somewhat illogically connected with the rest of the sentence: "There is no doubt that an employee, in accepting service with a knowledge of the character and position of machinery, the dangers of which are apparent, and from which he might be liable to receive injury, assumes the risks incident to the employment, and he cannot call on the defendant to make alterations to secure greater safety." *Hickey v. Taaffe* (1887) 105 N. Y. 26, 12 N. E. 286. A similar wavering between two conceptions is sometimes traceable in the cases in which the servant's contributory negligence has defeated his action. Thus, in *Stuber v. McEnter* (1892) 47 N. Y. S. R. 294, 19 N. Y. Supp. 900, the court remarked that the performance of the work in question "was delegated to the servant, who by this circumstance was put on his caution as to danger," and that he "could not attribute to the master the consequences of a hazard apparent to the eye." But the actual ground of the decision was that the servant was guilty of contributory negligence in failing to take proper precautions for his own safety.

See also *Schaible v. Lake Shore & M. S. R. Co.* (1893) 97 Mich. 318, 21 L. R. A. 660, 56 N. W. 565, where it was held not to be negligence, as matter of law, to shunt cars by kicking them backward, unattended by a brakeman; but the charge of the trial judge was pronounced erroneous because it ignored the element of the servant's

and as a matter of law, preclude recovery where the defense put forward is that the servant was himself guilty of contributory negligence, or that the circumstances were such as to let in the principle of the maxim, *Volenti non fit injuria*. See chapters XVII.—XX., *post*. It follows, therefore, that the effect of making the servant's knowledge or ignorance of the risk the sole criterion of culpability or nonculpability is virtually to place the servant in the same position as he would be if, under the doctrine of absolute duties, it should be held, either that these two latter defenses cannot be considered at all, as between a master and a servant, or that they are inapplicable, as a matter of law, whenever the servant's knowledge of the risk is conceded or proved. In some jurisdictions the latter of these alternatives represents the doctrine actually accepted; but in others the contributory negligence of the servant and the applicability of the maxim are viewed as being primarily questions of fact for the jury, even after his knowledge of the risk has been proved (see chapters XVII.—XX., *post*); and he would be distinctly prejudiced if the theory now under discussion were adopted and regularly enforced.

57. Abnormal as well as normal risks deemed to be within the scope of this doctrine.—In most of the cases in which this doctrine has been laid down, the risks under discussion have been of a more or less normal and permanent character. But it is clear, both upon principle and authority, that it is equally applicable where the injury was due to conditions of an abnormal or transitory nature.¹

¹*Feely v. Pearson Cordage Co.* (1894) 161 Mass. 426, 37 N. E. 368 (master not bound to cover a well containing hot water, or to keep the floor near it dry); *Murphy v. American Rubber Co.* (1893) 159 Mass. 266, 34 N. E. 268 (same facts); *Cerrillos Coal R. Co. v. Deserant* (1897) 9 N. M. 49, 49 Pac. 807 (presence of dangerous gas in the rooms of a mine, such rooms being marked by a danger signal); *Becker v. Baumgartner* (1892) 5 Ind. App. 576, 32 N. E. 786 (servant injured by a flying fragment of a stick, entangled in the frayed edges of a rapidly moving belt, and broken while it was being used, in default of any other appliance, for shifting the belt). It is not negligence to call on a servant to perform some extra-hazardous service, like that of extinguishing a fire caused by the carelessness of other employees. *Burke v. Parker* (1895) 107 Mich. 88, 64 N. W. 1065. The court said: "This is not a case of insecure place or defective appliances, nor is it one where a servant was ordered into another branch of the ordinary service, in which there was increased hazard. The dangers ordinarily incident to a fire are obvious to persons of mature years. Employers and employees are equally conscious of such danger, and, ordinarily, equally skilled in the means employed to extinguish a fire. The work of extinguishment is usually attended with danger, and explosions are not uncommon. The law recognizes a fire as one of the perils which excuses acts otherwise illegal. An entry upon another's premises to save goods which are in peril is not a trespass, and a man's castle may be torn down to prevent the spreading of the fire. If it be negligence to call upon his employees to assist in such an emergency, it would be impossible to do a work which the exigency demands should be done. Suppose that a human life had been in peril, and the employer had called upon his employees to assist

For the purposes of trial practice there is, under ordinary circumstances, this important distinction between the two classes of cases, *viz.*, that the servant's knowledge of the risk must always be established by specific evidence where the risk is abnormal, but will frequently be presumed where the risk is normal.² It would seem, how-

in the rescue; could it be said that he did so at his peril? Can the act, under such circumstances, be said to have been a wrongful act?"

An employer is not liable for injury to an employee, caused by the fall of ensilage 10 feet deep, resulting from the latter's undermining the same, although the former directed the work to be done by undermining, instead of taking from the top. *Welch v. Brainard* (1895) 108 Mich. 38, 65 N. W. 667. The court said: "Every adult of ordinary experience must be held to know that ensilage, or any similar article, is to be expected to fall under such circumstances; and a farmer who hires a laborer to do farm work has a right to suppose he knows and understands the law of gravitation. The defendant is said to have directed the plaintiff to remove his ensilage in this way, and that is urged as a reason for enforcing the plaintiff's claim. An employer does not necessarily become an insurer because he requests his employee to incur danger in his service. It is only when he conceals his knowledge of, or, at least, fails to make known, a latent danger. But, if it were otherwise, we discover no testimony that shows that defendant asked the plaintiff to undermine this ensilage to a dangerous extent. He merely directed him to take it from the bottom. We may properly take judicial notice that when earth is to be removed, or stone quarried, it is a common and economical method to undermine it, causing it to loosen and fall by its weight, thus facilitating its removal; and when good judgment is used, accidents rarely happen. Employer and employee understand that this practice is attended with more or less danger, and the latter assumes the risk, as one incident to the employment, when he consents to do such work in the face of an apparent danger." Where a railroad company is in the habit of receiving from other railroads cars loaded with timber which projects over the ends of the cars so as to make it dangerous for anyone except a careful, skilful, and prudent person to attempt

to couple the cars together, it is not negligence for the railroad company to order and permit such a person who has been in the employ of the railroad company doing that kind of business for about five months, to attempt to make such a coupling, where the attempt is to be made in broad daylight, although it may be raining at the time. *Atchison, T. & S. F. R. Co. v. Plunkett* (1881) 25 Kan. 188. Instantaneously stopping a work train, without warning to a section hand standing on the platform of a caboose, is not negligence rendering the company liable for injuries to the section hand from being thrown from the platform, where he knew that the train was to be moved forward a car's length. *Union P. R. Co. v. Doyle* (1897) 50 Neb. 555, 70 N. W. 43. An employee who, in compliance with the master's orders, proceeds to make an incision in a steel beam by "chipping," instead of "blocking," as he has been doing, assumes the risk of injury from chips of steel striking him in the eye, where he fully understands the additional risk involved. *Smith v. Wilmington & W. R. Co.* (1901) 129 N. C. 173, 39 S. E. 805.

"The distinguishing principle between these two classes of cases is that, in the one the defects are visible and apparent, and the dangers therefrom are presumed to be known and assumed, while in the other the danger is not seen, and no such presumption arises. The condition of the switches and frogs, the degree of the curvature of the track, are all fixed conditions which are visible to the eye. The experienced employee knows that he is to serve the railroad company with its road and cars in the condition in which he sees them, and he knows the danger that may attend such service. But he does not necessarily know, and cannot be expected to meet, dangers which arise from changes in those conditions, however apparent may be the causes which produce them. He is not presumed to know that the rains and floods will have covered the track with earth and sand, at a place where common pru-

ever, that this distinction is largely obliterated in those instances where the injury was caused by what the courts denominate "simple appliances." The language used in the decisions as to such injuries seems to amount to an unqualified declaration that the servant's appreciation of the risk is always presumed, as a matter of law, from the mere fact that the instrumentality was one which belonged to this category.³

But it seems difficult to avoid the conclusion that there must be an implied exception to the rule thus enunciated, where the defect is latent, in the sense of being undiscoverable by any examination which the servant is bound to make. See chapter XXI., *post*. Nor is the presumption of the plaintiff's knowledge available to charge him, as a matter of law, with an acceptance of the risk, where the injury was caused by a defective tool which was used by a fellow servant, and which the plaintiff himself had never inspected.⁴

The servant's inability to recover for injuries caused by simple appliances is sometimes referred to the conception that the master is not bound to anticipate accidents of this description. See § 143, *post*.

dence would require that provision be made against the occurrence of such an obstruction. He is not required to assume that ice and snow will be allowed negligently to accumulate upon the track and switches, or that other obstructions will be placed on or about the same, so as to render the track unsafe, or his work more dangerous than it otherwise would be." *Oregon Short Line & U. N. R. Co. v. Tracy* (1895) 14 C. C. A. 199, 29 U. S. App. 529, 66 Fed. 931 (collision caused by the fact that a car in front could not be seen on account of the bushes allowed to overgrow the track). The court contrasted *Kohn v. McNulta* (1893) 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298 (double deadwoods); *Southern P. Co. v. Seley* (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530 (unblocked frog); *Tuttle v. Detroit, G. H. & M. R. Co.* (1887) 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166 (very sharp curve), with *Babcock v. Old Colony R. Co.* (1890) 150 Mass. 467, 23 N. E. 325 (plaintiff, while mounting an engine, struck against a pile of ties 18 inches from the track); *Eames v. Texas & N. O. R. Co.* (1885) 63 Tex. 660 (train struck cattle which could not be seen by reason of the bushes overgrowing the right of way); *Hulchan v. Green Bay, W. & St. P. R. Co.* (1887) 68 Wis. 520, 32 N. W. 529 (brakeman struck his foot against a piece of wood); *McClarny v. Chicago, M. & St. P. R. Co.* (1891) 80 Wis. 277, 49 N. W. 963 (accumulation of ice and snow on a track); *Union P. R. Co. v. O'Brien* (1892) 1 C. C. A. 354, 4 U. S. App. 221, 49 Fed. 538 (train derailed by sand and gravel washed over the track). *Marsh v. Chickering* (1886) 101 N. Y. 396, 5 N. E. 56 (defective ladder); *Burlington & C. R. Co. v. Liche* (1892) 17 Colo. 280, 29 Pac. 175 (gardener not guilty of actionable negligence in furnishing a simple appliance, like a defective hoe or shovel, to an employee; *arguendo*); *Tisch v. Hirsch* (1898) 34 App. Div. 623, 53 N. Y. Supp. 926, former appeal, 32 App. Div. 635, 52 N. Y. Supp. 1076 (end of a bar, designed for a barrier across the opening of an elevator shaft, which is fastened to the side of the shaft, allowed to become so loose as to permit the other end to pass outside the hasp designed for it, when the employee attempted to lower the bar across the opening); *Olson v. Doherty Lumber Co.* (1899) 102 Wis. 264, 78 N. W. 572 (hook furnished to one engaged in clearing blockades at a slab, saw was dull and straight, instead of curved, and slipped on a slab, thus allowing the servant to fall). *Daly v. Lee* (1899) 39 App. Div. 188, 57 N. Y. Supp. 293 (head of beetle flew off the handle).

58. Negligence predicable, where servant is exposed to risks of which he is actually and excusably ignorant.—The second branch of this theory is that a master is deemed to be legally culpable if he employs a person to do work which involves dangers of which the employee has no knowledge, either actual or constructive. "If the employer knowingly make use of defective and unsafe machinery, when an injury is done to a servant, ignorant of its condition, and in the exercise of ordinary care, he should compensate the person thus injured through his neglect."¹ That is to say, a master is not liable to his servant simply "because he uses a dangerous machine, but is liable if he employed a servant to use it in ignorance of the danger."² The implied contract of a master is that he will not expose the employee to danger which is not obvious, or of which the latter has no knowledge or adequate comprehension, and which is not reasonably and fairly incident to, and within the ordinary risks of, the service which he has undertaken.³ It is negligent, therefore, to subject a servant to a risk not ordinarily incident to the employment, unless the extraordinary hazard be obvious to him, or he be apprised of it in some manner.⁴

For the purposes of the present discussion it will be sufficient to point out that the cases in which the servant has been held entitled to recover, on the ground that his ignorance of the risk was excusable, may be, broadly speaking, divided into two classes: (1) Those into

¹ *Buzzell v. Laconia Mfg. Co.* (1861) 48 Me. 113, 77 Am. Dec. 212.

² *Gilbert v. Guild* (1887) 144 Mass. 601, 12 N. E. 368.

³ *Jennay Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 566, 18 N. E. 30.

⁴ *Bonnet v. Galveston, H. & S. A. R. Co.* (1895) 89 Tex. 72, 33 S. W. 334. One of the obligations of a master is that, as far as he can, by reasonable care, he shall avoid exposing his servant to extraordinary risks which could not have been reasonably anticipated at the time of the contract of service. *Wunder v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143. "The chief sphere of the duty [of employers to provide for the safety of their workmen] is in the permanent or recurring conditions of the machinery the place where the workman is employed, so far as it is under the employer's control, where the danger is not obvious or necessarily incident to the business." *Kanz v. Page* (1897) 168 Mass. 217, 46 N. E. 620. "If the service required to be performed is dangerous, or rendered so by reason of the

master's failure to provide a place where the servant may do his work with safety, but which, by the exercise of due care and reasonable expense on the part of the master, might have been made safe, his omission would be a breach of duty, and render him liable for any injury arising therefrom." *Roth v. Northern Pacific Lumbering Co.* (1889) 18 Or. 205, 22 Pac. 842. "A master's negligence may consist in subjecting the servant to the dangers of unsafe buildings or machinery, or to other perils, on his own premises, which the servant neither knew of, nor had reason to anticipate or to provide against, when he entered the employment." *Diamond State Iron Co. v. Giles* (1887) 7 Houst. (Del.) 556, 11 Atl. 189. Compare the statement that a master is bound to provide his servant with tools and appliances which are free from secret defects, and is liable for injuries to the servant from his failure to do so. *O'Donnell v. Sargent* (1897) 69 Conn. 476, 38 Atl. 216. See also the cases cited in the following section.

which his inexperience or want of skill does not enter as an element, the decision being put upon the general principle that a servant has a right to rely on the master for the proper performance of his duty as to providing reasonably safe tools, without inquiry on his part;⁵ and

⁵ *Crocker v. Pusey & J. Co.* (1900) 3 Penn. (Del.) pt. 1, p. 1, 50 Atl. 61. An ice company is liable for injuries to its employee, while engaged in his duty in pushing ice along a slide to an ice house, from the fall of the slide because of insufficiently fastened braces and its poor construction, where the servant does not know the actual condition of the supporting trestle, and has not had an opportunity to examine it. *Fink v. Des Moines Ice Co.* (1892) 84 Iowa, 321, 51 N. W. 155. A railroad company is chargeable with negligence in using cars having bumpers so badly worn and rotten that, when brought together to be coupled, there are but a few inches of space between them, unless it has brought home to its employees actual notice of their defects, and the danger to be incurred in handling them. *Chesapeake & O. R. Co. v. Lash* (1896; Va.) 24 S. E. 385. A railway company which continues to use a few cars of a discarded pattern, the special defects of which are of such a nature that there is nothing to indicate to a brakeman that they are different from other cars, is not, as a matter of law, in the exercise of due care. *Palmer v. Denver & R. G. E. Co.* (1882) 3 McCrary, 635, 12 Fed. 392 (demurrer of defendant overruled). It is negligence to maintain a "tell-tale" so low that it is dangerous to brakemen on cars of more than ordinary height, and therefore, not a manifest risk. *Darling v. New York, P. & B. R. Co.* (1892) 17 R. I. 708, 16 L. R. A. 643, 24 Atl. 462. The condition of brush by the side of a railroad track is not a fixed one, so as to make the danger arising to a railroad employee from the obstruction of a view of the track by such brush, one obvious and assumed as a condition of his employment. *Oregon Short Line & U. N. R. Co. v. Tracy* (1895) 14 C. C. A. 199, 29 U. S. App. 529, 66 Fed. 931. It is inexcusable negligence on the part of a railroad company to use, especially in the nighttime, for shifting purposes in its yard, an engine unprovided with any safeguards or protection to the person who attempts to couple it to a car, and upon which he is required to stand on one foot, with his lantern on his arm and both hands engaged. *Smith v. Buffalo, R. & P. R. Co.* (1893) 72 Hun. 545, 25 N. Y. Supp. 638. It is negligence for a contractor to maintain an unguarded well, of which the servant is not aware, near the route which a servant would naturally take in passing through a field by night. *Indiana Pipe Line & Ref. Co. v. Neusbaum* (1899) 21 Ind. App. 361, 52 N. E. 471. Evidence tending to show that the danger of using a machine was increased by the express order of the master directing the removal of a shoe, and that plaintiff had no knowledge of this act of the master, nor any information whether such a shoe was an essential part of the proper construction of the machine, is sufficient to take the case to the jury. *Plefka v. Knapp-Stout Lumber Co.* (1897) 72 Mo. App. 309. In *Tendrup v. John Stephenson Co.* (1889) 51 Hun. 462, 3 N. Y. Supp. 882, Affirmed (1890) 121 N. Y. 681, 24 N. E. 1097, it was held that a master who orders a staircase to be moved and so placed as to be insecure for anyone who steps upon it is liable for injuries received by a servant who is not aware of the changed conditions. In the supreme court, Bartlett, J., dissented, considering that the accident was, upon the evidence, due to the negligence of the plaintiff's fellow servant who, after moving the staircase, had left the spot for a few minutes without taking precautions to warn persons who might wish to use it, as to the latent peril. The servant's ignorance was also an element in the following decisions, by which recovery was allowed: *Hamilton v. Des Moines Valley R. Co.* (1872) 36 Iowa, 32 (cars loaded with lumber, which projected over the ends); *Spelman v. Fisher Iron Co.* (1870) 56 Barb. 151 (blasting powder, liable to explode when tampered); *Patton v. Central Iowa R. Co.* (1887) 73 Iowa, 306, 35 N. W. 149 (unfenced track); *Mirick v. Morton* (1901) 62 Kan. 870, 64 Pac. 609 (part of apparatus changed without the knowledge of the servant); *Savannah & S. R. R. Co. v. Pughslley* (1901) 113 Ga. 1012, 39 S. E. 473 (defective tool); *Wheeler v. Watson Mfg. Co.* (1883) 135 Mass. 294 (unfenced machinery); *Tennessee*

(2) those in which the servant's want of sufficient experience to enable him to appreciate the risk is a material factor."

Other cases illustrating, though not primarily dependent upon, the doctrine that it is negligence to require a servant to encounter risks not understood by him, will be found in the chapter (xxv.) dealing with injuries received outside the scope of the work originally contracted for.

The general question, What risks are deemed to be constructively known to the servant? is treated in a later portion of the work (chapter xxi.).

59. Such a situation sometimes treated as a species of deception.—(Compare § 236, *post.*)—In many of the cases in which the doctrine stated in the preceding section has been recognized expressions are met which appear to commit the courts to the theory that a master

Coal, I. & R. Co. v. Currier (1901) 47 C. C. A. 161, 108 Fed. 19; *New Orleans & N. E. R. Co. v. Clements* (1900) 40 C. C. A. 465, 100 Fed. 415. In *Phelps v. Chicago & W. M. R. Co.* (1900) 122 Mich. 178, 84 N. W. 66, the court abandoned the position taken at the first hearing ([1899] 122 Mich. 171, 81 N. W. 101), and, on the ground that a brakeman was not familiar with the surroundings and had had no opportunity to make himself acquainted with them, held that he was entitled to recover for injuries caused by a fish chute, so close to the main track that there was no room for his body between it and the side of a car. A distinction was taken between the duty of the company as regards such structures when adjacent to the main track, and when abutting on a side track, the view of the court being that in the latter case they are a common arrangement, reasonably necessary for the purposes of the company's business, and that all trainmen are therefore affected with knowledge that they may be encountered in that situation (see opinion on first hearing); while in the former case the elements which thus charge a servant with notice are wanting. This wire-drawn differentiation is a most instructive example of the shifts to which judges are occasionally put when some particularly hard case tempts them to disregard a line of precedents, and diverge, for a brief space, into the paths of common sense.

*As regards an inexperienced brakeman, it is negligence to use two kinds of hand brakes, differing only in size, where one kind is inherently dangerous in the hands of one who does not understand its properties. *Louisville & N. R. Co. v. Binion* (1894) 107 Ala. 645, 18 So. 75. The act of an employee intrusted with the management of a machine, in putting a boy without experience at work at a business and on a machine which a man of ordinary sagacity would know to be perilous, is wrongful. *Buckley v. Gutta Percha & Rubber Mfg. Co.* (1886) 41 Hun. 450, Reversed in (1889) 113 N. Y. 540, 21 N. E. 717; but only on the ground that the evidence showed the injury to be merely accidental, and not due to the want of instruction. The risks attendant upon the use of an unusual, untested, and exceedingly dangerous blasting powder which cannot be tamped without inevitable explosion are extraordinary as regards a laborer who is unacquainted with its qualities. *Spreeman v. Fisher Iron Co.* (1870) 56 Barb. 151. To same effect, see *Cartter v. Cotter* (1891) 88 Ga. 286, 14 S. E. 476 (absence of brake on a windlass led to the handles being jerked from the workman's grasp, and, as it revolved, it struck him). This principle will enable a servant to recover for injuries due to unguarded machinery, if he does not understand the particular danger which caused the accident. *Wheeler v. Wason Mfg. Co.* (1883) 135 Mass. 294; *Grizzle v. Frost* (1863) 3 Fost. & F. 622 (minor servant). Contrast the cases as to unfenced machinery cited in § 55, *ante*.

who exposes a servant to an unknown danger is guilty, not merely of negligence, but also of bad faith, or even a quasi fraud.¹ A form of statement which is frequently employed to express this conception is, that a master must answer for injuries caused by the existence of abnormally dangerous conditions, which are in the nature of a trap, by which word is meant a condition of an instrumentality which is apt to imperil a person doing work with it or near it "without the caution which knowledge of such condition would enable him to exercise."²

¹"It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when, in fact, the master knows or ought to know that it is not so." *Paterson v. Wallace* (1854) 1 Macq. H. L. Cas. 748, per Lord Cranworth, C. "The master's liability arises from the fact that he subjects his servant to dangers which, in good faith, he ought to provide against." *Pittsburgh & C. R. Co. v. Sentmeyer* (1879) 92 Pa. 276, 37 Am. Rep. 684. If the extraordinary risks of the service are not explained, such risks, or "those which result from methods of carrying on the business, calculated to mislead the servant to his peril," are not assumed by the servant as risks of his employment. *Bethlehem Iron Co. v. Weiss* (1900) 40 C. C. A. 270, 100 Fed. 45. "Undoubtedly, a servant has a right to repose confidence in the prudence and caution of his employer, and to rely upon his not putting him in charge of implements which, from improper construction or other cause, are so dangerous that a prudent man would not make use of them. If the servant is injured in consequence of this confidence being abused, he ought to be remunerated." *Ft. Wayne, J. & S. R. Co. v. Gildersleeve* (1876) 33 Mich. 133. In this case, Cooley, J., concluded his argument with the statement that in the use of the appliance objected to, no confidence which was reposed in the prudence and caution of the employer had been betrayed, as the difficulties connected with handling it were fully known and understood by the servant, and he voluntarily continued to encounter the risks. "The employer must always act in good faith towards his employee, and see, as far as he reasonably can, that the employee does not take any unknown risks or hazards." *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582. "There are certain things incumbent on

the master upon which the servant is entitled to rely, and if the master fails in any of these things, and the servant is thereby led into false security, the master must be responsible." *Cook v. Bell* (1857) 20 Sc. Sess. Cas. 2d series, 137, per Lord Curriehill. A similar point of view is indicated by the statements,—that a master must not "use any art to conceal dangers" (*Berne v. Ganton Gas Coal Co.* [1885] 27 W. Va. 285, 55 Am. Rep. 304); that liability for injuries, caused by the servant's obeying an order to incur a danger, arises only when the master conceals his knowledge of, or, at least, fails to make known, a latent danger (*Welch v. Brainard*, [1895] 108 Mich. 38, 65 N. W. 667); and that all the servant is entitled to require, where he consents to use a certain machine, is that he shall not be deceived as to the degree of danger. *Wander v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143.

²This definition is suggested by the language of the court in *Fredenburg v. Northern C. R. Co.* (1889) 114 N. Y. 582, 584, 21 N. E. 1049, where the maintenance of a cattle guard at a place where cars had to be constantly uncoupled to be put on weighing scales was held to be negligence, as to a servant recently hired. The same term is used in the following cases, in which the master's liability was affirmed: *Bird v. Long Island R. Co.* (1896) 11 App. Div. 134, 42 N. Y. Supp. 888 (plank of crossing, loose and so worn at the edge that a brakeman, stepping on the track to couple cars, was liable to have his foot caught); *Mohr v. Lehigh Valley R. Co.* (1900) 55 App. Div. 176, 66 N. Y. Supp. 899 (adjacent tracks curving irregularly, so that they come very close together for some distance, such fact not being noticeable to observers, unless their attention has been particularly called thereto); *Martin v. Levagood* (1891) 47 Kan. 36, 27 Pac. 122 (owners of a threshing ma-

This conception is also exemplified under the converse aspect in those passages in which the servant's familiarity with his environment and the peril to which he was exposed is declared to preclude the inference that he was in any way entrapped or deceived or misled.³

chine are liable for personal injuries to a workman, who, without knowledge that certain wheels and cogs usually covered are uncovered, attempts to oil the machine, and has his hand caught in such cogs); *Chicago, R. I. & P. R. Co. v. Clark* (1882) 11 Ill. App. 104 (held proper to submit to jury the question whether a railway company is negligent in maintaining a platform in such a position with regard to a track that a servant is in peril of being caught unawares between it and moving cars). In *Spaulding v. Forbes Lithograph Mfg. Co.* (1898) 171 Mass. 271, 50 N. E. 543, it was held that a seat, consisting of a plank laid upon two uprights, but not nailed down, and projecting so far over one of the supports that it was liable to tip up when the weight of a person was thrown upon it, constituted "as clear a case of a trap as could be imagined," in regard to a servant who had no reason to suppose that the plank was not fastened, and was directed to feed a revolving cylinder in such a posture that his weight was thrown upon the end of the board at the moment that the cylinder mask opened. The phrase "mantrap" is used in *Vorhees v. Lake Shore & M. S. R. Co.* (1899) 193 Pa. 115, 44 Atl. 335. See also *Bolch v. Smith* (1862) 7 Hurlst. & N. 736, 31 L. J. Exch. N. S. 201, 8 Jur. N. S. 197, 10 Week. Rep. 387, *per* Wilde, B., *arguendo* (covering of hole insufficient, but apparently sufficient); *Perham v. Portland Electric Co.* (1898) 33 Or. 451, 40 L. R. A. 799, 53 Pac. 14 (insulation of electric wires was apparently perfect, but in reality defective). See also the case cited in the note to 46 L. R. A. page 33, subds. III. b; VI. a. 2; VI. c. 6, recognizing the right of servants not in the employ of the defendant, to maintain an action for injuries resulting from risks which come under this description.

³ In a leading English case, where a servant failed to recover, Chief Justice Cockburn remarked that "no deception was practised on the plaintiff as to the degree of danger to which he would be exposed," and stated the general rule, with reference to this point of view, in

the following words: "If the danger is concealed from him [the servant] and an accident happens before he becomes aware of it, or if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and, from the want of such precautions, an accident happens to him before he has become aware of their absence, he may hold the employer liable." *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521. In a Canadian case the court, in holding the plaintiff to be unable to recover for injuries caused by an unguarded machine, declared that there was "no attempt at concealment," although the foreman had told him that some persons had suffered in working the machine, but that he would be all right. This was said to be a very natural expression when the plaintiff was known to be acquainted with similar machinery. *Rudd v. Bell* (1887) 13 Ont. Rep. 47, 55. An entry in a car inspector's book, indicating that a car had been placed upon the repair track to have a sideboard put in, and not for the repair of the coupling attachment, does not afford any ground for holding the company liable, on the ground that he was misled, for an injury to an employee caused by the defective coupling, where he did not see the book until after the accident. *Brown v. Chicago, R. I. & P. R. Co.* (1898) 59 Kan. 70, 52 Pac. 65. Similar phraseology is found in *Finnell v. Delaware, L. & W. R. Co.* (1892) 129 N. Y. 669, 29 N. E. 825 (unballasted side track); *Brossman v. Lehigh Valley R. Co.* (1886) 113 Pa. 491, 57 Am. Rep. 479, 6 Atl. 226 (low overhead bridge); *Hajus v. Syracuse, B. & N. Y. R. Co.* (1886) 103 N. Y. 312, 57 Am. Rep. 723, 8 N. E. 529 (defective engine); *Goodes v. Boston & A. R. Co.* (1894) 162 Mass. 287, 38 N. E. 500 (switch close to a track is not a trap or hidden defect as to a brakeman acquainted with his work); *Atchison, T. & S. F. R. Co. v. Plunkett* (1881) 25 Kan. 188 (brakeman injured by lumber projecting over end of car); *The Maharajah* (1889) 40 Fed. 786.

Language of this sort, however, is obviously not intended to be taken too literally, for it is now well settled that an action sounding in fraud cannot be maintained without proving the wrongful act to have been designedly and purposely done, and that proof of such design and purpose is not a prerequisite to recovery where the gravamen of the complaint is negligence.⁴ That it would be preferable, under these circumstances, to avoid using forms of expression which tend to obscure the fundamental difference between these two distinct kinds of torts seems to be scarcely open to question.⁵

According to one case a master may, with impunity, maintain "mantrap," where the instrumentality in question is an ordinary one, and of first-class construction.⁶ But unless the word is here used in a very loose sense, implying merely a very dangerous thing, this ruling is plainly inconsistent with the general principle developed in this chapter, and with the rationale and qualifications of the doctrine by which a master is allowed to carry on his business in his own manner. See §§ 35, 39-41, *ante*.

80. Master no longer liable after he has given the servant notice of the existence of a risk previously unknown to the latter.— (Compare the cases cited in chapter xvi., *post*, on the master's duty to instruct young and inexperienced servants.)—It is obvious that, either under the theory discussed in this chapter, or under the theory of extraordinary risks created by the breach of certain absolute duties, and the assumption of those risks, as a separate fact, inferred from the servant's continuance of work with a knowledge of their existence, the effect of informing him that the employment involves exposure to some particular risk which, if it should actually have eventuated in disaster while he was ignorant thereof, would have constituted a cause of action, is to transfer that risk to the category of those for which the master cannot be made responsible.¹ In other words, where a

⁴ See 2 Bevin, Neg. pp. 1624 *et seq.*; Shearm. & Redf. Neg. § 20.

⁵ In a well known English case it was remarked, by Brett, M. R., that "to lay a trap means, in ordinary language, to do something with an intention." *Heaven v. Pender* (1883) L. R. 11 Q. B. Div. 503, 52 L. J. Q. B. N. S. 702, 49 L. T. N. S. 357, 47 J. P. 709. In *Newark Electric Light & P. Co. v. Garden* (1896) 37 L. R. A. 725, 23 C. C. A. 649, 39 U. S. App. 416, 78 Fed. 74, the court limited the use of the word "trap" to cases where there is a "purpose to ensnare."

⁶ *Stewart v. Newport News & M. Valley Co.* (1890) 80 Va. 988, 11 S. E. 885 (cited with approval in *Richmond & D. R. Co. v. Risdon* [1891] 87 Va. 335, 12 S. E. 786) (coal chute near track). ¹ *Wander v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Ann. Rep. 143; *Nugent v. Kauffman Milling Co.* (1895) 131 Mo. 241, 33 S. W. 428; *Roth v. Northern Pacific Lumbering Co.* (1889) 18 Or. 205, 22 Pac. 842; *Murphy v. Wash. R. Co.* (1893) 115 Mo. 111, 21 S. W. 862; *Bethlehem Iron Co. v. W.* (1900) 40 C. C. A. 270, 100 Fed. 471; *Northern C. R. Co. v. Husson* (1882)

master hires a servant to do something which will expose him to abnormal dangers, all that can be required of the master is that he shall see that the servant is informed with respect to all the dangers and hazards incident to the work; and when this is done the servant will assume all the risks and hazards of his employment.² The statement of an employee at the time of the contract of employment, that he is accustomed to the work, excuses the employer from explaining to him peculiar dangers ordinarily incident to such work; but it does not qualify the obligation of the master to furnish reasonably safe appliances, or excuse him from liability for any neglect so to do.³ For a further discussion of this subject, see the chapter which deals with the master's duty to instruct and warn his servant (xvi.).

B. THEORY DISCUSSED AND CRITICIZED

61. *Extent of the immunity which the master secures by the theory.*—It is manifest that the effect, both of the theory developed in the foregoing sections and also of the particular principle of the doctrine of absolute duties to which, in its practical application, that theory is equivalent (see § 55, *ante*), is to extend the master's liberty of action in respect to the quality of his instrumentalities and to go far beyond the limits fixed by the principles discussed in the preceding chapters. If negligence is not predicable of the maintenance of extraordinary risks which the servant appreciates, or if, requiring such maintenance to imply negligence, the servant's knowledge charges him, as a matter of law, with their assumption, the consequence is inevitable that, as to any servant who understands the nature and the risks arising therefrom, a master may, without being held with legal culpability, carry on his business with instrumentalities

101 Pa. 1, 47 Am. Rep. 690 (where not only was the danger obvious, but the servant had received a special warning on the very day of the accident); *Schultz v. Bear Creek Ref. Co.* (1897) 180 Pa. 272, 36 Atl. 739.
² *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582. That the obligation of the master is, in the alternative, either to provide reasonably safe appliances, or to notify the servant of the danger, was also recognized in

Smith v. Baker [1891] A. C. 513, 60 L. J. Q. B. N. S. 683, 45 T. L. R. 467, 55 J. P. 660, 40 Week. Rep. 22; *Johnson v. St. Paul, M. & W. P. Co.* (1890) 43 Minn. 53, 44 N. W. 884; *Myers v. Chicago, St. P. M. & N. W. R. Co.* (1899) 37 C. C. A. 137, 95 Fed. 406 (dissenting Caldwell, J.); *The Saratoga* (1898) 87 Fed. 349.
³ *Steen v. St. Paul & D. R. Co.* (1887) 37 Minn. 310, 34 N. W. 113.

that are defective and in bad repair, and by methods which are abnormally dangerous. This conclusion the courts have not been at all backward in drawing. So far as common-law principles are concerned, there is no reason why an employer who has shipped a crew upon a "coffin ship," which fulfils its natural destiny by going to the bottom and drowning all hands, should not escape liability, if only the men were aware of the actual condition of the funeral craft which they were hired to navigate.

62. Ultimate basis of theory is economic rather than juristic.—

In the last analysis, this conclusion must rest upon the hypothesis that the fear of losing remunerative work does not deprive of its voluntary quality the action of a servant who enters or continues in an employment with a knowledge that it involves extraordinary hazards. To obtain an adequate support for this hypothesis, it is necessary to accept the most extreme doctrines of the *laissez faire* school of sociologists. The nature of the relation between those doctrines and the conclusion stated above will be more readily understood if we advert to the fact that it was first announced, in all its repulsive nakedness, by the late Lord Bramwell, one of the strictest of the sect of those economic Pharisees whose Gamaliels were such writers as Ricardo and John Stuart Mill. It is not too much to say that the opinion delivered by him in *Dyren v. Leach*,¹ has contributed more largely than any other judicial utterance to establish the principle of assumption of risks, in the rigorous and unmerciful form in which we now have it. The judgment that the master was not liable in that case mirrors, most instructively, the views of a generation which was only induced, with the greatest difficulty, to enact such humanitarian legislation as the truck acts and the factory acts. The length to which the decision goes will be better understood when we point out that the appliance which caused the injury had been deliberately substituted for one of the safer type, generally used, and for no other reason than that it was less expensive. Indeed, the report shows very clearly that the master had been guilty of the most cynically reckless neglect of his duties. Upon this state of facts we find Lord (then Baron) Bramwell discoursing as follows:

"There is nothing legally wrongful in the use by an employer of

¹ (1857) 26 L. J. Exch. N. S. 221. [1858] 3 Hurlst. & N. 258, 259, 27 L. J. Exch. N. S. 325). Considering the far-reaching effects of this ruling, the fact that the so-called "authorized reporters" omitted all mention of this case "because no point of law was decided by it" (see note to *Williams v. Clough* as one of the most amusing instances on record, of the inability of such reporters to estimate the comparative importance of decisions.

works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman so to carry on his works as to expose his workmen to peril of their lives, but it does not create a right of action for an injury which it may occasion, when, as in this case, the workman has known all the facts, and is as well acquainted as the master with the nature of the machinery, and voluntarily uses it."²

The note sounded in this passage has been echoed and re-echoed *ad nauseam* through all the countries in which the common law is administered. The following passage from a case which has been so constantly cited that it may fairly be regarded as a fountain of law on this subject will suffice to show how closely the American judges have followed in the footsteps of their English brethren:

"Every manufacturer has a right to choose the machinery to be used in his business, and to conduct that business in the manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances and run his mill with old or new machinery, just as he may ride in an old or new carriage, navigate an old or new vessel, or occupy an old or new house, as he pleases. The employee, having knowledge of the circumstances and entering his service for the stipulated reward, cannot complain of the peculiar tastes and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service."³

How effective a bulwark for the master this theory has proved to be is only too notorious to students of this branch of law. Behind it, that "inhumanity" which, as several judges have conceded, may be predicated of the conduct of employers who are at the same time free from legal liability, has found a secure shelter.⁴ That the standard of

² In *Smith v. Baker* [1891] A. C. 325. Another pertinent passage is the following, from a recent judgment rendered by a court which has always construed the doctrine of assumption of risks very strongly in favor of the employer: "Obvious imperfections in methods or machinery, existing at the time of the employment, cannot be made the basis of a liability in favor of an employee who suffers an injury in the course of his employment, for the reason that the employer has a right to have and use imperfect methods and tools, and to ask others to enter his employ to aid him in such use, and in so doing does not undertake to insure the employee." *Ragon v. Toledo, A. A. & N. M. R. Co.* (1893) 97 Mich. 265, 50 N. W. 612.

³ *Hayden v. Smithville Mfg. Co.* (1861) 29 Conn. 548. Compare the language used by the supreme court of Massachusetts, to the effect that it is the legal right of every person to carry on a business which is dangerous, either in itself, or in his manner of conducting it if it is not unlawful, and interferes with no rights of other persons. *Combs v. New Bedford Cordage Co.* (1869) 162 Mass. 572, 3 Am. Rep. 506.

⁴ In addition to the remarks of Lord

duty which it fixes for employers is often preposterously low is apparent from the decisions cited in the present chapter, as well as from numbers of others which are collected in that chapter which deals more particularly with the doctrine of assumption of risks as a distinct defense where negligence is established (xvii.).

63. Suggested exception in cases of a temporary forgetfulness of a known danger.—The harshness of the general principle might be somewhat relieved if the servant were allowed to maintain an action in cases of this type, where the accident occurred by reason of a temporary forgetfulness of the conditions which caused it, and this forgetfulness was excusable under the circumstances. This point of view is, however, only possible where the right of recovery is made to turn exclusively upon the question whether the servant was in the exercise of due care.¹ A doctrine which imputes to the servant an acceptance of every risk which is known and understood necessarily implies that he takes the situation, as a whole, for better or worse. It must be quite immaterial, therefore, whether the particular peril which eventually produced the injury was or was not present to his thoughts at the critical moment, and whether he ought or ought not

Bramwell, already referred to, the following cases may be referred to as showing that the courts fully recognize, but are in no wise influenced by, the fact that the doctrine of assumption of risks will, in many instances, divorce law from morality. In *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521, Cockburn, Ch. J., observed, in the course of his opinion: "Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible." In a very recent Virginia case it was declared not to be negligent to adopt an "inhuman method" of doing work, if the dangers are obvious and the servant is "foolish enough" to consent to do the work in that manner. *Robinson v. Dinimny* (1898) 96 Va. 41, 30 S. E. 442 (removing debris from an old shaft, by excavating from a passage which entered it at the bottom). In *Derby v. Kentucky C. R. Co.* (1887) 9 Ky. L. Rep. 153, 4 S. W. 303, it was admitted that "consideration for humanity should certainly prompt" a railway company to construct its overhead bridges at such a height above the track that an employee standing upon

any car used on the road could pass in safety under them." But the court which expressed this just sentiment has rendered some decisions which are essentially, if not in the letter, inconsistent with it. See § 30a, b, *ante*. In *Bridges v. Tennessee Coal, I. & R. Co.* (1895) 109 Ala. 287, 19 So. 495, the court declined to break in upon the rigid rule, although the evidence showed that the controlling inducement to continue working was the employee's desire to serve the defendant, and save it from inconvenience in an emergency.

¹ See *West v. Southern P. Co.* (1898) 29 C. C. A. 219, 56 U. S. App. 323, 85 Fed. 392; *Wallace v. Central Vermont R. Co.* (1893) 138 N. Y. 302, 33 N. E. 1069, and the Kentucky cases cited in § 30a, b, *ante*. The question whether, as a matter of public policy, the standard of diligence required of the master should not be raised, in view of the certainty that it is unjust to expect that servants, invited to take part in a complicated business, will constantly keep in mind the numerous perils which meet them from hour to hour, is a wholly different matter, which we will return to later on. See § 65, *post*.

to have remembered its existence. See chapter XVIII., *post*, regarding the relation between the defenses of assumption of risks and contributory negligence. Accordingly, in cases where the former of these defenses is relied upon, we find the courts holding, with the most perfectly logical barbarity, that the servant's position is not in the least strengthened by the fact that, owing to the suddenness of the emergency, or his close attention to the work in hand, he conducted himself like a person to whom the conditions were unknown.²

64. Theory inconsistent with a true conception of public policy.—

That the Rhadamanthine doctrine which prevents the servant from obtaining compensation in such cases is repugnant to the unsophisticated mind of the average layman is well known to every lawyer. It has, as is abundantly demonstrated by the persistency with which juries disregard it, been introduced into our jurisprudence in the

² *Baylor v. Delaware, L. & W. R. Co.* (1878) 40 N. J. L. 23, 29 Am. Rep. 208; *Baltimore & O. R. Co. v. Stricker* (1878) 51 Md. 47, 34 Am. Rep. 291; *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710, 6 So. 277; *Hagston v. Chicago, St. P. M. & O. R. Co.* (1891) 47 Minn. 486, 50 N. W. 531. The practical effect of this rule evidently is, that a servant is required, at his peril, to exercise in some cases of this class,—notably, those involving the perils produced by low overhead bridges on railways,—a degree of skill and vigilance which is equal to, if not greater than, that which, as we learn from Mark Twain's delightful book, "Life on the Mississippi," was possessed by an expert pilot, who, when his hour of duty arrived, was expected, even on the darkest night and in the most tempestuous weather, to comprehend, at a glance, the exact position of the boat without any instruction from his predecessor. The analogy may be thought rather frivolous for a grave legal treatise. But this is not the only instance in which the central doctrine of this branch of jurisprudence has, when rigidly and ruthlessly applied, led up to results so monstrous that the commentator is tempted to abandon serious arguments for a brief space, and resort to a kind of criticism which finds its justification in the unanswerable question of the Roman satirist:

Ridentem dicere verum

Quid retat!

A recent decision, in which the harsh consequences to which the doctrine of assumed risks sometimes leads are very

strikingly exemplified, is *Rohan v. Metropolitan Street R. Co.* (1901) 59 App. Div. 250, 69 N. Y. Supp. 570, where the plaintiff fell through a space at the end of a bridge in a boiler room, while he was making his way along the bridge to shut off steam which was escaping after an explosion. The unfortunate servant, it will be noticed, was here hurriedly feeling his way along the bridge, through a room darkened by the vapor of the escaping steam, and, in the confusion caused by the explosion, naturally thought more about doing his duty than about conditions which, under ordinary circumstances, would not have been a source of any danger.

See further, as to this class of cases, § 29, *ante*, and §§ 69, 70, 281, *post*.

That the fact of the servant's having, at the time of the accident, forgotten for the moment the existence of a previously known risk is a wholly irrelevant consideration, where the defense relied upon is an assumption of that risk, seems to have been lost sight of in a late Rhode Island case, in which the court, in denying recovery on the ground that the injury was caused by an obvious risk, which was presumably appreciated and assumed by the plaintiff, emphasized the fact that there was no exigency or unusual circumstances demanding his exclusive attention. In all the cases mentioned as recognizing this implied exception to the general rule, the actual defense put forward was contributory negligence. *Dissano v. New England Steam Brick Co.* (1898) 20 R. I. 452, 40 Atl. 7.

very teeth of public opinion. This popular disapproval is usually looked upon merely as one of the manifestations of that bitter feeling which the tyrannical use of capital, and more especially capital as wielded by corporations, has engendered in our times among the classes upon which this unscrupulous exercise of the power of the purse has weighed most heavily. If this explanation be correct the administrators of the law, bound, as they are, to be no respecter of persons, have simply done their duty in ignoring a sentiment emanating from such a source. But legal rules are defensible only in so far as they correspond with principles of abstract justice, and there is always room for at least a suspicion that this correspondence does not exist in the case of any rule which jurors lose no opportunity of evading. It is worth while, therefore, seriously to consider whether, after all, there is not, at the bottom of this general hostility, something of which jurisprudence may, without being untrue to itself, take notice,—whether, in short, this hostility is not based upon conceptions which are thoroughly and essentially juridical, struggling for expression in an irregular, and often times illogical, manner. We think that an investigation of the subject will disclose some weighty reasons for taking the position that the *simplicitas laicorum* has, in this instance, obtained a clearer insight into the true rationale of the situation than the trained intellects of the judges.

The rule which leaves a master at liberty to carry on his business with any instrumentalities which he may think proper to use, provided the servants who will have to handle or be near them in the course of their work, fully understand the situation and appreciate the risks, is conceded to be an exception to the general principle that “no man may, in conducting his business, unnecessarily disregard the rights of others, whether employees or strangers.”¹ A salutary principle like this, which constitutes the very foundation stone of private rights, is not lightly to be broken in upon, and the grounds upon which any exception to it claims recognition should be closely scrutinized. Can it fairly be said that the reasons for thus putting employers in a class by themselves are stronger than those which would subject them to the same responsibility as other persons?

The doctrine which thus segregates employers has been referred by the courts to several considerations, to one or other of which greater prominence has been assigned according to special circumstances which happened to be under review. But, for practical purposes, it

¹ *Hayden v. Smithville Mfg. Co.*
(1861) 29 Conn. 548.

must stand or fall according to the truth or falsehood of two theories, which, although distinct, are yet, in some measure, interdependent. The hypothesis underlying one of these is that, on the whole, it is best for the commonwealth at large that every man should be suffered to manage his property—whether that property be represented by capital, or by a capacity for performing certain duties—in any manner which does not involve a breach of some positive law. The hypothesis underlying the other is that, in those civilized communities with which alone our jurisdiction is concerned, employer and employed contract with each other upon an equal footing, and are, therefore, properly treated as voluntary agents in respect to the inception, continuance, and termination of their relations. Compare § 55, *ante*.

The essential meaning of the former of these theories is that the courts, by virtue of the general power which they exercise, of conferring from time to time a legal sanction upon rules of conduct which have no other foundation than public policy, have decreed that cases involving the liability of an employer to an injured servant shall be determined upon the assumption that what is commonly known as "paternal government" is ordinarily deleterious to those whom it is intended to benefit, and therefore justifiable only in cases where it is absolutely essential for the purpose of obviating some greater evil. In the case of the contract of employment, the existence of this prerequisite of a clear necessity is supposed to be clearly negatived, for the reason that matters will regulate themselves satisfactorily through the mere operation of the feeling of self-interest both in the master and in the servant. The master, we are told, will be fully alive to the fact that, in these days of keen competition, the business man who uses poor and defective appliances will be unable to hold his ground against those who avail themselves of all the improvements which the progress of invention places within their reach, and keep both their plant and their staff in a high state of efficiency. The servant, it is said, will realize that the same conditions which conduce to the prosperity of the master must also conduce to his own comfort and safety, and will, therefore, shun any service in which those conditions are not obtainable.²

²As a type of the numerous cases in which this line of argument is exemplified, we may refer to *Michigan C. R. Co. v. Smithson* (1881) 45 Mich. 212, 7 N. W. 791, where Judge Cooley, in discoursing on the text that, "in the main, the state must leave every man to manage his own business in his own way" made the following remarks: "Any form of car a railroad company may select for use must be one that, with care, can be coupled safely, or the company could not afford to operate its road by means of them. With needless exposure of its men to danger by the use of unsuitable cars, the company

The only flaw in the beautifully simple theory thus outlined is, that it reposes upon a supposititious state of facts which is notoriously opposed to the teachings of experience. On the one hand, although there are numerous capitalists who comprehend that it is, in the long run, for their advantage to procure the best instrumentalities and to keep them in good order, there are quite as many, if not more, who either do not comprehend this, or, what amounts to the same thing in the present connection, are constantly acting as though they did not comprehend it. The result is, that a large proportion of the available capital of the civilized world is expended upon instrumentalities so imperfect that their use will carry the business of the employer, more or less rapidly, to ruin, and, in the meantime, create for the employees much avoidable danger of a more or less serious character.³ It is rather a startling position to take, that public policy requires judges to take under their protection a doctrine which not only operates as a license to the master to employ his money unwisely, either because he is simply an incapable manager, or because his greed for temporary profits diverts him from the course which he knows to be the right one, but also leaves him free to imperil, by his unwisdom, the lives and limbs of his servants. How far a court, in fixing the degree of care which a master is bound to exercise in respect to his servants, is entitled to consider the circumstance that a system of business which is profitable to the master,—for any considerable length of time, at least,—will not, ordinarily, involve any unnecessary danger for the servant, is a question to which it is not easy to give a definite reply. But surely, if expediency is to be imported at all into the question, and the courts are to take a hand in promoting the industrial efficiency of the nation, a theory countenancing an employment of capital which operates as a constant menace to the personal safety of those whom the capitalist invites to take service under him is rather a sorry one to favor. It does not, by any means, follow that, because judicial action, with a view to improving the plant of an employer, would be unjustifiable, if it were taken solely on the ground that his financial prosperity would thereby be promoted, the courts should abstain from declaring that such mismanagement shall be at his own risk, so far as it may unnecessarily endanger the lives and limbs of the employees.

would inevitably subject itself to public odium and disfavor, casualties to property would be increased, and, if it could succeed in manning its road with laborers, it must pay them wages increased by the risks of danger."

³ Compare the criticism at the close of § 47, *ante*, upon the doctrine that the master's exercise of due care should be treated as an irrebuttable presumption whenever he is shown to have conformed to common usage.

The new sociology, which, in this respect, is merely a revival, under a different form, of that which prevailed before the apostles of *laissez faire* commenced their mission, is laying more and more stress upon the principle that the duties of capital are correlative rights, and the legislatures, acting in full harmony with the views of the profoundest thinkers of our day, are holding the possessors of capital to an ever more and more strict accountability for the proper discharge of those duties. It would certainly be quite in harmony with the ideas which pervade this sociology, to affirm that an employer is derelict in respect to his obligations, if that part of the accumulated wealth of the community, in the enjoyment of which he is secured by the governmental machinery, is used by him in such a way as to tempt his fellow citizens to expose themselves to dangers which are at once avoidable and likely to cause serious bodily harm. The result of such injuries as are commonly received by those engaged in modern industrial occupations is frequently the loss, partial or complete, of the only means which they have of supporting themselves and their families. It is surely not unreasonable to argue that any employer who thinks fit to conduct his business in such a way that it will, in the long run, inevitably entail the maiming or death of a certain number of citizens, and, consequently, the diminution of the public resources and the increase of the public burdens, ought to be, at least, required to bear all responsibility for such accidents as may occur. Even if the results of the uncontrolled play of self-interest had been satisfactory, in the sense assumed by the courts, the state is fairly entitled to say that any methods of business, through which the use of capital becomes a temptation to citizens to expose themselves to any perils greater than those which are necessarily inherent in each employment, even where the appliances are kept up to a proper standard of efficiency, should be treated as a breach of social duty, in such a sense that the judiciary ought to accord them no active encouragement. Much more should this view of public policy be decisive when the presumptions indulged by the courts are utterly at variance with facts. It may be conceded that competition between employers, and the natural preference of employees for concerns which are properly managed, will often create conditions of safety as nearly ideal as can reasonably be expected. But the residuum of cases in which these causes fail to operate is so large that the most elementary principles of a scientific induction are violated if they are made the foundation of a general rule.⁴

⁴ It is surprising to find how little importance has been attributed to this obvious aspect of the matter by the courts which have, for the last seventy years,

65. Servant not really a voluntary agent.—So far, therefore, as public policy is a factor in the question, the true conception of the situation seems rather to be that the state has a right to see that the bodily and mental faculties of its citizens shall not be impaired unnecessarily. The true force of this consideration will be more clearly understood from an examination of the second of the theories to which the employer's liberty of action is referred, *viz.*, that, as he and the servant are on an equal footing, the latter, in regard to anything which he does with a full appreciation of the risks involved, is to be treated as a voluntary agent, not subject to any coercive influence which will save him from being chargeable with the consequences either of contributory negligence or of an assumption of the risks of his position.

The essential weakness of this theory is that it commits the courts to the anomalous position that actual constraint is something different from legal constraint. Upon the average man it is certain that the fear of the disagreeable, and, it may be, frightful, consequences which will almost certainly ensue from the failure to obtain work or from the loss of a position, must always operate as a very strong coercive influence, indeed. To speak of one whom that fear drives into or detains in a dangerous employment as being a voluntary agent is a mere trifling with words. The courts which, under the inspiration of the tenets of *laissez faire* economists, declare that the only coercion of which the law can take notice in the case of an adult of full age and ordinary intelligence is physical coercion¹ are not only guilty of a flagrant *petitio principii*, but also stand sponsors for a view which is

been developing the doctrine of assumption of risks. The extreme rarity of such remarks as the following renders them doubly precious: "The state has an interest in the lives of her citizens, and will not [in view of the actual decisions of the courts, the learned judge ought rather to have said should not] permit an employer needlessly to imperil the lives of his employees. The very highest consideration of public policy demands an enforcement of this rule." *Ayers v. Chicago, St. P. M. & O. R. Co.* (1899) 37 C. C. A. 137, 95 Fed. 406, per Caldwell, J. "The state has great interest in the protection of its members, and this of the most utilitarian character. In the case of a maimed employee, he and his family are likely to become a public charge: the same is true of the family of an employee killed. The community would seem to have as much interest in the protection of the life and limbs of a member of it, as in the question whether he should pay 8 per cent or 6 per cent interest. Yet, by no means which human wit can devise, can he make a valid contract to pay more than 6 per cent in this state." *Stinson v. New York Rubber Co.* (1894) 80 Hun. 417, 30 N. Y. Supp. 339. "The operation of railroad trains is essentially highly dangerous, and it is a duty of railroad companies, too plain for discussion, to use all reasonable skill to mitigate, tolerating nothing to aggravate, the necessary danger. This is not merely a private duty to individuals concerned, but a public duty to the state, concerned in the welfare of its citizens." *Dorsey v. Phillips & C. Constr. Co.* (1877) 42 Wis. 583.

¹See, especially, the opinions delivered by Lord Bramwell,—decidedly the chief of the judicial exponents of *laissez faire* ideas,—in *Membern v. Great Western R. Co.* (1889) L. R. 14 App.

at variance both with science and common sense. The real position, of course, is that his "poverty, and not his will, consents." It is simply amazing that, in these rationalizing days, when every dogma is being subjected to a searching analysis, any considerable body of educated men should continue to determine the rights of citizens on the assumption that physical compulsion may be predicated of an act which a servant does because he fears the suffering produced by the stroke of the whip or a bludgeon, and not of an act which a servant does because he fears the suffering produced by inanition. If it were not for the intensely serious nature of the subject, one would be disposed to say that a doctrine which pretends to differentiate between the bodily pain caused by a blow, and by starvation, partakes largely of the ludicrous. The bald absurdity of decisions based upon this distinction cannot be disguised by vouching in aid the maxim, *Volenti*

Cas. 179, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 38 Week. Rep. 145, 54 J. P. 244, and *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392. (Extracts are given in the subsequent chapter which deal with the maxim, *Volenti non fit injuria*.) The following passage will give us a typical exposition of this view, as it is applied by American courts: "Morally, to coerce a servant to an employment, the risks of which he did not wish to encounter, by threatening, otherwise, to deprive him of an employment he can readily and safely perform, may sometimes be harsh; but, when one has assumed an employment, if an additional and more dangerous duty is added to his original labor, he may accept or refuse it. If he has an executory contract for the original service, he may refuse the additional and more dangerous service, and, if for that reason he is discharged, he may avail himself of his remedy on his contract. If he has no such contract, and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks." *Levin v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115. The "average man," however, is not altogether unrepresented on the bench, as passages like the following show: "The doctrine . . . in its effects is cruel and oppressive towards the employees, who are thus compelled to choose between employment with dangers known to them, and idleness with safety. The necessities of nature—bread and rent—will compel them to take even dangerous employment rather than idleness with want. Employers thus hold a whip over their employees, forcing them to perform services attended by danger arising from the negligent acts of the employers themselves." *Patton v. Central Iowa R. Co.* (1887) 73 Iowa, 306, 35 N. W. 149, per Beck, J. "The necessities of laboring men are often very great. The necessity of providing food for themselves and families may drive them to accept employment at the peril of their lives. But an employer does not obtain a license to kill his employees with impunity, by proclaiming his purpose to subject them to unnecessary and needless perils,—to perils that a reasonably prudent man, having a due regard for human life, would remove. Common humanity demands this." *Myers v. Chicago, St. P. & M. R. Co.* (1899) 37 C. C. A. 137, 95 Fed. 406, per Caldwell, J. But it should be observed that the judges who thus "deviated into common sense" were here expressing their individual opinions on the matter, the other members of the courts taking the ordinary view of the situation. In this connection we may also refer to the remarks of Lord Esher, and Lindley, L. J., in *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 657, 661, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, disclaiming the theory that a servant who continues to use a defective instrumentality because he fears to lose his situation is *volens*.

non fit injuria, for the ultimate question to be settled is whether, as a matter of fact, the servant, confronted with the alternative of throwing up remunerative work or of encountering some abnormal peril, is really *volens*; and the determination of this question necessarily involves an investigation into the actual relations of the master and servant, and the true character of the influences to which the servant is subjected.

96. Alternative theory suggested as being the correct one.—It would seem, then, that neither of the theories to which the right of an employer to conduct his business with abnormally dangerous appliances is referred will bear close examination. The only support of one is an hypothesis which represents a false and discredited view of public policy. The only support of the other is an hypothesis which ascribes to the word "voluntary" a meaning which is at variance with the most obvious facts.

A correct view of the situation, it is submitted, cannot be arrived at, unless we wholly eliminate from the question the element of a freedom of will which has no existence, except in the imagination of a certain school of economists, and resort to first principles, for the purpose of ascertaining what standard of diligence is demanded from the employer by those large considerations of public policy upon which, in the last analysis, the whole law of negligence may be said to rest. If we view the subject from this standpoint, all the difficulties of the subject will vanish. All that is necessary is to construe, in a manner appropriate to the relations of the parties to the contract of service, the principle that no person has a right to keep his property in such a condition that persons who, with his consent, are brought into close relations with it, will be likely to receive injury, even though they may exercise all the care which it is justifiable to expect from them under the circumstances. If the degree of care which the servant must exercise in order to escape injury is greater than that which, considering the exigencies of the work, and other matters which are likely to divert his attention and produce a temporary forgetfulness of a known danger, it is reasonable to demand from men of average prudence and average powers of observation, then it may be fairly maintained that the master ought to bear the responsibility of any accident which may occur, quite irrespective of the question whether the servant was or was not aware of the nature and extent of the danger. The acceptance of this principle would not involve any very startling changes in the law as we now have it. It would merely require us to fix the standard of care incumbent on the master, with a

view to the consideration that, as the implied agreement of the servant is merely that he will use ordinary diligence in the discharge of his functions, it is a breach of duty in the master to keep his instrumentalities in such a condition that ordinary diligence will not always save the servant from injury. A rule formulated upon this basis would not make the master an insurer, nor would it necessarily render him liable simply for the reason that his appliances were old and imperfect. It would merely make his liability dependent upon whether he had or had not acted unreasonably, and, therefore, negligently, in holding out inducements to do work which, at certain conjunctures not unlikely to arise, could not be performed safely without the exercise of a degree of care which no fair-minded, considerate person would demand from a servant. Such a rule would not impose any burden upon the employer which a just and sensible man would be unwilling to bear, and would effectually prevent that cruel abuse of the doctrine of assumption of risks, which has done so much to embitter the feeling with which capitalists are regarded by the working classes.¹

¹The appropriateness of the test of *VTL. A. post.* See, especially, those liability which the writer has here proposed as the one to which all other considerations should be subordinated is recognized, virtually, if not explicitly, in many of the cases cited in chapter VI. A, *post.* See, especially, those in which courts have sustained the servant's right to recover for injuries caused by dangerous objects alongside of or above railway tracks (§§ 70, 71); by unguarded machinery (§§ 76, 77).

CHAPTER VIII.

LIABILITY OF EMPLOYERS FOR INJURIES CAUSED BY VARIOUS INSTRUMENTALITIES.

66a. Introductory.

A. INJURIES CAUSED BY CONDITIONS OF A NORMAL OR PERMANENT CHARACTER.

67. Railway tracks: generally.

68. Conditions of the permanent way which affect the safe operation of trains.

- a.* Location of tracks.
- b.* Bridges.
- c.* Channels for the discharge of surplus water.
- d.* Switches and sidings.

69. Track considered as a footway for servants.

- a.* Location.
- b.* Roadbed and ties considered as a footway.
- c.* Frogs and guard rails.
- d.* Side tracks and yards.

70. Objects alongside and dangerously near the track.

- a.* Conditions held to import negligence.
- b.* Conditions held not to import negligence.
- c.* Convenience or necessity as justifying elements.
- d.* Employer's liability as affected by the probability of the accident which actually occurred.

71. Objects dangerous to employees on the tops of cars.

- a.* Conditions held to import negligence.
- b.* Conditions held not to import negligence.
- c.* Convenience or necessity as justifying elements.

72. Want of fencing of railway tracks.

73. Coupling appliances of railway cars and locomotives.

74. Other parts or appurtenances of railway cars and locomotives.

75. Elevators.

76. Unguarded machinery: generally.

- a.* Conditions not reasonably safe.
- b.* Liability tested by the servant's knowledge or ignorance of the conditions.
- c.* Liability negatived on the ground that a master may carry on his business in his own way.
- d.* Conformity or nonconformity to usage.
- e.* The probability or improbability of injury resulting from the machinery in question.

77. Revolving shafts.

78. Employer's liability for injuries caused by various other mechanical appliances.

79. Structures.

80. Unguarded openings in floors, open hatchways, etc.

81. Substances generating explosive gases.

82. Substances giving off poisonous fumes.

83. Appliances for giving servants warning of danger.

B. INJURIES CAUSED BY CONDITIONS OF AN A. NORMAL, TRANSITORY, OR SPORADIC CHARACTER.

84. Conditions of railway tracks and appurtenances by which the safe operation of trains is affected.

85. Track considered as a footway for servants.

a. Track and roadbed itself.

b. Casual obstructions on or near the track.

86. Objects dangerous to employees in moving trains or cars.

a. On the track.

b. Alongside the track.

c. Above the track.

87. Railway fences.

88. Rolling stock on railways.

89. Vehicles other than those used on railways.

90. Appliances designed to support or lift heavy objects.

91. Elevators.

92. Vessels subjected to the pressure of steam.

93. Miscellaneous appliances.

94. Imperfect attachment of parts of apparatus.

95. Abnormal movements of machinery.

96. Changes in the parts of machines.

97. Structures.

98. Injuries caused by falling rocks, earth slides, etc.

99. — by other heavy substances.

100. Unguarded openings.

100a. Surface of paths, floors, etc.

101. Conditions exposing a servant to risk of injury from fire.

102. — from currents of electricity.

103. — from explosions.

104. — from dangerous fluids.

105. Defective lighting.

106. Unseaworthy ships.

107. Inadequate ventilation.

108. Inadequate protection against severe cold.

66a.—Introductory.—In the foregoing chapters the cases have been grouped under headings designed to exhibit the scope and effect of the general principles upon which they turn. This method of classification, however, is quite inadequate to bring out fully the extraordinary conflict of opinion which exists between the courts with regard to the responsibility of employers for injuries received under circum-

stances essentially identical. This defect it is proposed to supply in the following sections by arranging the decisions with reference to the specific instrumentalities which were the subject of discussion. The chaotic condition into which, as this summary shows, the law has fallen, as a result of the evolution of doctrine which has been going on simultaneously in a large number of independent jurisdictions, is most colorable, when it is considered that all those jurisdictions constitute parts of what is, socially and economically, a single country, and that the employers who are the defendants in nine tenths of the actions of this description are railway companies whose business often extends over several different states.

The cases with which we have to deal may be divided, broadly speaking, into two main categories: (1) Those in which the instrumentality which caused the injury was in its normal condition, the gravamen of the action being that it was negligent to use that kind of instrumentality; and (2) those in which the circumstances were abnormal and the servant seeks to recover on that ground. As a general rule, the dividing line between these classes is easy to define; but at certain points they fade almost imperceptibly into each other, and it is often far from easy to determine whether a given case should be assigned to one or to the other. The inconveniences which may arise from this source of difficulty have been, as far as possible, obviated by abundant cross-references between the various sections in the two subtitles of the chapter.

A. INJURIES CAUSED BY CONDITIONS OF A NORMAL OR PERMANENT CHARACTER.

67. Railway tracks; generally.—The general rule is that any person who maintains a railway as a part of his plant is bound to exercise ordinary care, to the end that it shall be so constructed and maintained as to be reasonably safe as a place of work.¹ For the purposes of this

¹ *Fifield v. Northern R. Co.* (1860) 42 N. H. 225; *Babcock v. Old Colony R. Co.* (1890) 150 Mass. 467, 23 N. E. 325; *Gorham v. Kansas City & S. R. Co.* (1893) 113 Mo. 408, 20 S. W. 1060; *Little Rock & Ft. S. R. Co. v. Voss* (1892; Ark.) 18 S. W. 172; *Chicago & N. W. R. Co. v. Delancy* (1896) 68 Ill. App. 307, Affirmed in (1897) 169 Ill. 581, 48 N. E. 476; *Fnapp v. Sioux City & P. R. Co.* (1887) 71 Iowa, 41, 32 N. W. 18; *Rosenbaum v. St. Paul & D. R. Co.* (1888) 38 Minn. 173, 36 N. W. 447; *Wilkie v. Raleigh & C. F. R. Co.* (1900) 127 N. C. 203, 37 S. E. 204; *Taylor, B. & H. R. Co. v. Taylor* (1890) 79 Tex. 104, 14 S. W. 918, and the cases cited in §§ 68, 69, *post*. A complaint framed on the theory that a railroad company had caused injury to a fireman by failing to perform its duty in constructing and maintaining a safe roadbed is not demurrable. *Chicago & N. W. R. Co. v. Swett* (1867) 45 Ill. 197, 92 Am. Dec. 206.

rule it is immaterial whether the employer is, as is usually the case, a company engaged in transportation as a common carrier, or a company or individual operating a railway as an accessory to some other business,—as, a coal company,² or a lumber manufacturer who owns and conducts a railroad running from his mill to the timber.³ It is also clear that the employer is equally liable whether he constructed the track through his own agents or acquired it after its completion by another party.⁴

68. Conditions of the permanent way which affect the safe operation of trains.—*a. Location of tracks.*—Some decisions treat the location of the track, with regard to its curves and gradients, as being a purely engineering question which a railway company is entitled to settle for itself under the general principle explained in chapter v., *ante*.¹

Others proceed upon the theory that a jury is warranted in finding a railway company guilty of negligence, where it has located its track with curves so sharp as to create an imminent risk of derailments.² The inference of negligence may be strengthened by evidence showing that the curve in question was peculiarly dangerous, owing to its position with relation to the gradients.³ It may also be a question for the jury in some instances whether a siding is properly located with regard to the adjacent structures.⁴

¹ *Hamilton v. Rich Hill Coal Min. Co.* (1891) 108 Mo. 364, 18 S. W. 977.

² *Bauman v. White* (1895) 110 Cal. 23, 42 Pac. 470. But a logging railroad is not expected or required to be laid with the same care and security as is demanded in the construction of railway tracks in use by common carriers. *Lynn v. Antrim Lumber Co.* (1901) 105 La. 451, 29 So. 874. See general principle explained in § 26, *ante*.

³ *St. Louis & S. F. R. Co. v. Weaver* (1886) 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408.

⁴ *Patton v. Central Iowa Co.* (1887) 73 Iowa, 306, 35 N. W. 149. A curve prevented engineer from seeing cattle on the track until the train was so close to them that it could not be stopped in time to avoid the obstruction. A company cannot be found negligent for the reason that it locates a siding on a curve and a grade (*International & G. N. R. Co. v. Johnson* [1900] 23 Tex. Civ. App. 160, 55 S. W. 772), nor for the reason that on a very heavy grade it does not connect the lower end of the siding with the main track, thus rendering it necessary, whenever the cars are to be taken down

the grade, either to propel them out of the siding by a push pole, or to run them down in front of the engine (*Watts v. Hart* [1893] 7 Wash. 178, 34 Pac. 423, 771). In *Twitchell v. Grand Trunk R. Co.* (1889) 39 Fed. 419, it was held error to submit to the jury the question whether a siding is properly constructed. For other cases to the same effect, see next section, *subd. a*.

⁵ *St. Louis Bridge Co. v. Fellows* (1893) 52 Ill. App. 504.

⁶ As, where it was at the foot of a very steep grade, and no guard rail was provided to prevent derailment (*Patton v. Southern R. Co.* [1897] 27 C. C. A. 287, 42 U. S. App. 567, 82 Fed. 979); or where a gradient which cannot be ascended without accelerating the speed of the trains before it is reached follows a double curve so sharp that the speed so required to take the train up the gradient is apt to cause a derailment (*Galveston, H. & S. A. R. Co. v. Ford* [1898; Tex. Civ. App.] 46 S. W. 77). This case is strangely inconsistent with the decision of the same court cited in note 1, *supra*.

⁷ As, where the evidence is that a

b. Bridges.—Negligence is predicable of the construction of bridges which are of insufficient strength to withstand the floods in the watercourses which they span,⁵ or are not strong enough to support the rolling stock.⁶ See also subd. *d*, *infra*.

c. Channels for the discharge of surplus water.—It is negligence to build a track without providing channels of sufficient size to prevent the accumulation of water at places where it will endanger the security of the railroad.⁷

railroad company unnecessarily placed a switch just beyond a water tank, so that the danger signal thereon could not be seen till a train was within 60 feet of it, leaving insufficient time to stop the train. *Young v. Syracuse, B. & N. Y. R. Co.* (1899) 45 App. Div. 296, 61 N. Y. Supp. 202. The switch in this case was misplaced by a stranger.

⁵*Terre Haute & I. R. Co. v. Fowler* (1900) 154 Ind. 682, 48 L. R. A. 531, 56 N. E. 228.

⁶*Paulmier v. Erie R. Co.* (1870) 34 N. J. L. 151.

⁷*Brickman v. South Carolina R. Co.* (1876) 8 S. C. N. S. 173. Recovery is allowed where the result of the defective arrangements for the drainage is either that a portion of the track is washed out. (*McQueen v. Central Branch Union P. R. Co.* [1883] 30 Kan. 689, 1 Pac. 139; *Crouse v. Chicago & N. W. R. Co.* [1899] 104 Wis. 473, 80 N. W. 752; *Bonner v. Wingate* [1890] 78 Tex. 333, 14 S. W. 790); or sinks (*Binn v. Richmond & D. R. Co.* [1892] 88 Va. 891, 14 S. E. 701; *Stoher v. St. Louis, I. M. & S. R. Co.* [1891] 105 Mo. 192, 16 S. W. 591); or becomes too soft to sustain the weight of trains. *Louisville & N. R. Co. v. Kemper* (1899) 153 Ind. 618, 53 N. E. 931. In carrying out this obligation the company must exercise, in mountainous countries, a degree of care proportioned to the increased risks to which the flow of water in such regions exposes the line. Those increased risks are not assumed by the railway employees. In *Union P. R. Co. v. O'Brien* (1892) 1 U. C. A. 354, 4 U. S. App. 221, 49 Fed. 538, Affirmed (1896) 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618, the court said: "It is doubtless true, as urged in argument, that persons employed upon lines of railway which are constructed at the foot of mountain ranges are necessarily subjected to greater dangers than those employed upon railways passing

through a prairie country, for the reason that there is greater liability to obstructions being thrown upon the track in the one case than in the other; and it is unquestionably true that one who engages as an engineer or other train hand upon a line running at the foot of a mountain range assumes the increased risk due to this fact. In neither case, however, does the employee assume the risks and dangers that are caused by negligence on the part of the railway company. What will be required of a company in the exercise of ordinary care in constructing its track will vary with circumstances. A mode of construction which might be entirely safe in the case of a line running through a level country might be wholly unsafe if applied to a line running along a mountain range. The employee has a right to expect that a company operating a line, which by reason of its location is subject to certain hazards, will construct the road bed and track with due reference to such hazards. If the company has used due care in the construction of its line, having regard to its surroundings, and yet, by reason of its proximity to mountains, rivers, or other natural objects, there exist dangers from land-slides or overflows or other like casualties, a person entering into the service of the company assumes the risks caused thereby; or, to state the proposition in another form, he assumes the dangers incident to his employment upon a railway track properly and carefully constructed and maintained along a mountain range, but he does not assume the risks caused by the faulty construction and maintenance of a roadbed and track, even though the liability to accidents, by reason of the imperfect roadbed and track, may be increased because the same is built in proximity to a mountain range." In a later part of the opinion the contention of counsel that the case of *Tuttle v. Detroit, U. H. & M.*

d. Switches and sidings.—(See also subd. *a*, *infra*, and § 84, *post*.)—It has been laid down that a railway company is not under any duty to make its side tracks as even as its main track.⁸ But there is also authority for the doctrine that a side track ought at least to be so constructed that the cars will run with reasonable smoothness.⁹ Cases showing a similar conflict of opinion with regard to the obligatory quality of sidings, considered as places upon which employees walk, are collected in the next section, subd. *b*. The switch rails must, at all events, be strong enough to support the rolling stock used on the line.¹⁰

By one court it has been held that a jury may find a railway company negligent, where stop blocks were not provided at the end of a siding which did not run out again onto the main track.¹¹ By others it has been denied that a jury can be allowed to decide whether such a safeguard shall be employed. This conclusion is supported either by the argument that such a question is one which must be determined by engineering considerations merely,¹² or is deduced from the princi-

R. Co. (1887) 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166, was conclusive against the right of the plaintiff to have the case submitted to the jury was thus disposed of: "In one sense it is a question of engineering skill to determine how a roadbed and track shall be constructed, and if the conclusion of the engineer in charge thereof is final, and cannot be challenged before a court and jury by one who has suffered injury by reason of defects in the roadbed and track, then it is useless to say that a railway company is bound to exercise due care in the construction of its roadbed, for it could always be prepared to prove that the road was built in accordance with the directions of its engineer. The difference between the kind of knowledge called into action in determining the sharpness of a curve that is needed in running a railway line at a given point, and that exercised in determining whether the exigencies of a given situation require that some escape or outlet should be furnished for water liable to come down a natural water way intersecting the line of railway, is so great that it renders the rule applicable to the one case, inapplicable to the other. The training and knowledge of an engineer is not needed to enable one to understand the action of water in rushing down a gully, or similar water way, nor to know, if an obstruction like

a solid railway roadbed is built across a water way down which any considerable amount of water may be expected to pass, that, unless an outlet is given to it, it must of necessity collect against the roadbed, and, perchance, overflow it. Such facts are matters of common knowledge, gathered from the experience and observation of everyday life, and hence a jury is entirely competent to pass upon an issue involving considerations of that nature."

⁸ *Michigan C. R. Co. v. Austin* (1879) 40 Mich. 247 (brakeman was jolted off; held not entitled to recover). Compare *O'Neal v. Chicago & I. Coal R. Co.* (1892) 132 Ind. 110, 31 N. E. 669, a case in which a similar conclusion was arrived at, though not upon the same grounds.

⁹ *Trinity & S. R. Co. v. Lane* (1891) 79 Tex. 643, 15 S. W. 477, 16 S. W. 18 (brakeman thrown from car by jolt due to rough track).

¹⁰ *Clapp v. Minneapolis & St. L. R. Co.* (1886) 36 Minn. 6, 29 N. W. 340.

¹¹ A log not bolted down, but tied with a chain in the middle, is not an adequate stop block at the end of a railroad track on an elevated wooden wharf on which coal cars were run to be unloaded. *Norfolk & W. R. Co. v. Gilman* (1891) 88 Va. 239, 13 S. E. 475.

¹² *Chicago & E. I. R. Co. v. Driscoll* (1898) 176 Ill. 330, 52 N. E. 921, Reversing (1897) 70 Ill. App. 91.

ple that an employer is not bound to provide the best and safest appliances.¹³ See chapter v., *ante*. So, also, it has been held that a jury cannot properly infer negligence, simply for the reason that a company uses a stub switch in place of a split switch.¹⁴ See chapter v., *ante*.

A company may be found liable if, on a completed line, it fails to provide a switch with lights, to show whether it is open or closed,¹⁵ or to provide a proper apparatus for turning a switch,¹⁶ or if it uses a switch without a target,¹⁷ or one without locks or other devices which will prevent it from being tampered with by strangers.¹⁸

The obligations of a company with respect to a temporary siding are merely that it should be kept in good condition for the purposes for which it is required. No negligence is inferable from the fact that such a siding is unevenly graded and unballasted.¹⁹

Where the siding is a part of a new road under construction, it is not necessary that the switch stand should have either a lock or a target.²⁰

69. Track considered as a footway for servants.— (See also § 85, *post*.) — *a. Location.* — The refusal of the courts to allow juries to consider the question whether the location of tracks was negligent has sometimes been put upon the ground that, as to permanent conditions which are visible, a master is at liberty to arrange his plant as he thinks proper.¹ See chapter v., *ante*. But evidence going to

¹³ *Hewitt v. Flint & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 659.

¹⁴ *Grattis v. Kansas City, P. & G. R. Co.* (1900) Mo. 380, 48 L. R. A. 399, 55 S.

¹⁵ *Chicago R. Co. v. House* (1898) 172 50 N. E. 151. Affirming (189) 11 Ill. App. 147.

¹⁶ *Donald v. Brand* (1862) 24 Sc. Sess. Cas. 2d series, 295.

¹⁷ *East Tennessee, V. & G. R. Co. v. Gurley* (1883) 12 Lea. 46.

¹⁸ *Coleman v. Wilmington, C. & A. R. Co.* (1886) 25 S. C. 446, 60 Am. Rep. 516; *Birmingham R. & Electric Co. v. Allen* (1892) 99 Ala. 359, 20 L. R. A. 457, 13 So. 8; *Rombough v. Balch* (1900) 27 Ont. App. Rep. 32.

¹⁹ *Rosenbaum v. Paul & D. R. Co.* (1888) 38 Minn. 36 N. W. 447.

²⁰ *Bennett v. Long Island R. Co.* (1900) 163 N. Y. 1, 57 N. E. 79.

¹ As, where the tracks in a yard are located on a very sharp curve. *Tuttle v. Detroit, G. H. & M. R. Co.* (1887) 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166. As, where the tracks lead-

ing out of the car shed of a street railway company were placed so close to gether and so curved in opposite directions that cars came together. *Goldthwait v. Haverhill & G. Street R. Co.* (1894) 160 Mass. 554, 36 N. E. 486. Where no more appears than the simple, isolated fact that an ash pit and water plug were so located, relatively to each other, that a locomotive could take water and be freed from its ashes at the same time, it is error to submit to the jury the question whether the yard was improperly constructed and unreasonably dangerous for an employee hired to shovel the ashes out of the pits. *Richel v. New York C. & H. R. Co.* (1892) 130 N. Y. 682, 29 N. E. 763. A railroad company is not liable for injuries to an experienced brakeman, who had been employed on the road for a year and was generally familiar with it, and who was struck by a box car standing on a side track used for the storage of cars, as he was climbing a ladder of a passing freight car, although the distance between the bod-

show the existence of a trap would doubtless be regarded in all jurisdictions as introducing an element which would render the liability of the master a question for the jury.²

The broad doctrine has also been laid down that culpability may be inferred where adjacent tracks are so close together that cars cannot pass on one of them without endangering the employees who are handling the cars on the other.³ But in the absence of some special feature like that just referred to, this decision would probably not be accepted as good law in all jurisdictions.

b. Roadbed and ties considered as a footway.—In Pennsylvania the broad rule has been enunciated that a railway company owes no duty to its employees to maintain a safe footway along its roadbed. But, so far, this doctrine seems to have been applied only in cases where the injury resulted from a want of ballasting.⁴ In the second case cited the rule was declared to be the same, whether the condition of the main track or of a siding was in question.

In New York, also, it has been declared in unqualified terms that railroad tracks are not ballasted for the purpose of making them safer for brakemen to walk upon, but for the purpose of making them safe and firm for the passage of trains.⁵ But the injury in the case enunciating the doctrine was received on a side track, and it remains to be seen whether this court will explicitly affirm the Pennsylvania doctrine, when the question of a possible difference in the extent of the obligations with reference to main tracks and side tracks is presented and discussed.

In other jurisdictions the expressions of opinion have been restricted to an assertion of the doctrine that the want of ballasting im-

ies of the cars was less than 24 feet, and between their eaves less than 2 feet, where the accident occurred in the daytime, and the cars did not differ in width, or otherwise, from ordinary box cars, and could have been seen by him if he had looked, and there was nothing unusual in the conditions existing at the time of the accident. *Vining v. New York & N. E. R. Co.* (1897) 167 Mass. 539, 46 N. E. 117.

² As, where adjacent tracks curve irregularly (*Mohr v. Lehigh Valley R. Co.* [1900] 55 App. Div. 176, 66 N. Y. Supp. 899); or where adjacent tracks are constructed about 18 inches closer together than is usual. *Vorhees v. Lake Shore & M. S. R. Co.* (1899) 193 Pa. 115, 44 Atl. 335.

³ *Pennsylvania Co. v. McCormack* (1891) 131 Ind. 250, 30 N. E. 27. The defendant admitted that it would have been responsible if the obstruction had been permanent, but the court said that it was its duty to anticipate the possibility that sooner or later cars might have to pass each other at each and every point on the two tracks. It was, therefore, no defense that the persons whose acts brought the cars into such dangerous proximity were coemployees of the person injured.

⁴ *Philadelphia & R. R. Co. v. Schertle* (1881) 95 Pa. 455; *Kerigan v. Pennsylvania R. Co.* (1899) 194 Pa. 98, 44 Atl. 1069.

⁵ *Finnell v. Delaware, L. & W. R. Co.* (1892) 129 N. Y. 669, 29 N. E. 825.

ports no negligence where the injury was received on a side track.⁶ The decisions to this effect proceed partly upon the theory that the conditions are known to the servants (chapter vii., *ante*), and that they will use such care as may be requisite to preserve their footing, and partly upon the theory that there is no obligation to make an instrumentality safe, except for the particular purpose for which it is supplied. See § 26, *ante*.

Several courts hold the action to be maintainable where a servant stumbles, or has his feet caught, owing to the fact that the spaces between the ties are not properly ballasted,—at all events, if the accident happens within the limits where switching is commonly done. Some cases proceed on the ground that the usage of most companies is to ballast their tracks.⁷ See chapter vi., *ante*. But the same conclusion has been reached in cases where this factor has been tacitly ignored, or explicitly denied to be of any significance.⁸

⁶ *Battersay v. Chicago & G. T. R. Co.*, 1884, 53 Mich. 127, 18 N. W. 584; *O'Donnell v. Duluth, S. S. & A. R. Co.*, (1891) 89 Mich. 174, 50 N. W. 801; *Pennsylvania Co. v. Hankey* (1879) 93 Ill. 580; *Atchison, T. & S. F. R. Co. v. Alsdurf* (1893) 47 Ill. App. 200 (but see the Illinois case cited in note 9, *infra*); *Ragon v. Toledo, A. A. & N. M. R. Co.* (1893) 97 Mich. 265, 56 N. W. 612, modifying effect of what was said in the first appeal (1892) 91 Mich. 379, 51 N. W. 1004, where the court had declined to accept the contention of defendant's counsel, that the company owed no duty to make its side tracks perfect, and held that a freight brakeman does not necessarily assume the risk of a dangerous hole in the roadbed of a side track, although it is his duty to exercise a higher degree of care at a strange place, or on a side track, than upon the main track. This case was followed in *Louisville & N. R. Co. v. Bourcock* (1899) 21 Ky. L. Rep. 383, 51 S. W. 580, rehearing denied in 21 Ky. L. Rep. 896, 53 S. W. 262, where the employee was injured on a side track at a small station, which, like other side tracks on the same road, was not surfaced up. In *Moeller v. Lake Shore & W. S. R. Co.* (1895) 105 Mich. 487, 63 N. W. 416, there was held to be a variance, where the allegation was that the plaintiff, while coupling cars, was injured by the defendant's negligence in not ballasting the track, and the evidence was that the injury was due to the plaintiff's putting his

arm between the deadwoods, where it would be caught when the cars met.

⁷ *Illinois C. R. Co. v. Sanders* (1897) 166 Ill. 270, 46 N. E. 799; *Preston v. Central R. & Bkg. R. Co.* (1890) 84 G. 588, 11 S. E. 143 (here the ties were also, too close together).

⁸ *St. Louis, I. M. & S. R. Co. v. Rollins* (1893) 57 Ark. 377, 21 S. W. 888 (here it appeared that the track was more dangerous than usual at the place of the accident, and that defendant had filled the spaces in some of its yards, but there do not seem to be differentiating facts); *San Antonio & A. P. R. Co. v. Bracking* (1899) Tex. Civ. App. 51 S. W. 537. In *Little Rock & M. P. Co. v. Maschen* (1893) 6 C. C. A. 225, 12 U. S. App. 514, 56 Fed. 1009, it seems to be assumed that it was negligent to leave a space at the end of the ties unfilled. The question discussed was whether the plaintiff had notice of the conditions. In *Illinois C. R. Co. v. Cobby* (1898) 174 Ill. 109, 50 N. E. 1011, it was laid down in general terms that a railway company is bound to see that its tracks, within switch yards and other places where switching is to be done, are ballasted up to a level with the bottom of the rails; though the specific ruling was merely that negligence might be inferred from evidence that the spaces between ties near a switch were not filled for a distance of 10 or 12 feet, where there was no necessity for leaving them unfilled. In *Lake Erie W. R. Co. v. Morrissey* (1898) 177 Ill. 376, 52 N. E. 299, it was also declared

Injuries due to dangerous conditions, other than those created by want of ballasting, have sometimes been denied to be actionable, but not on the general ground assigned by the Pennsylvania court.⁹

On the other hand, there are numerous other decisions which are directly and unequivocally inconsistent with the broad theory of that court, that the track need not be made safe as a footway.¹⁰

to be negligent to leave a side track without ballast. In both the cases last cited the contention that it was a common practice to omit the ballasting was rejected. Since, however, the want of ballasting creates an obvious risk, no less than the want of blocking in a frog, the Illinois court seems to be somewhat inconsistent in allowing a servant to recover for injuries caused by the former condition, and not for injuries caused by the latter. (See next subd. note 18.) The Illinois cases cited *post* seem also to conflict with *Pennsylvania Co. v. Hankey* (1879) 93 Ill. 580. Although the actual ruling there was merely as to the admissibility of evidence of a usage not to ballast side tracks, the reasoning of the court certainly justifies the inference that the want of ballasting was not regarded as negligence. And such seems to be the construction put upon the case in *Finell v. Delaware, L. & W. R. Co.* (1892) 129 N. Y. 669, 29 N. E. 825. Strange to say, it is not referred to, either in the two later decisions of the supreme court or in the decision of the appellate court cited in note 6, *supra*. In one case the company was held liable for injuries caused by an unballasted side track on a part of a road which had been completed, although, up to that time, it had been used only for construction purposes. *Gulf, C. & S. R. Co. v. Redeker* (1886) 67 Tex. 11, 13 S. W. 513.

In one case the court was of the opinion that train hands should be able to avoid open water ways. *Couch v. Charlotte, C. & A. R. Co.* (1884) 22 S. C. 557. See § 30a, note 6, *ante*. In another, it was denied to be negligent to leave a space between the planking on a crossing, inasmuch as the conditions thus created were visible. *Gleason v. New York & N. E. R. Co.* (1893) 159 Mass. 68, 34 N. E. 79. For the same reason recovery has been denied where a servant, while coupling cars, was injured through stepping into one of several ditches by which a yard was drained. *De Forest v. Jewett* (1882) 88 N. Y.

264. Distinguishing *Plank v. New York C. & H. R. R. Co.* (1873) 1 Thomp. & C. 319. Affirmed (1875) 60 N. Y. 607 (*infra*, note 10), on the ground that in the earlier case the servant had no knowledge of the conditions. In one case the risk of falling into a properly located cattle guard has been held to be an ordinary one. *Henderson v. Coons* (1889) 31 Ill. App. 75.

¹⁰ Negligence has been held to be imputable to the defendant under the following circumstances: Where ties are left projecting a foot further outside the rail than the regulation distance, the consequence being that an employee is injured in alighting from a train. *Whitcher v. Boston & M. R. Co.* (1899) 70 N. H. 242, 46 Atl. 740 (here long switch ties had been allowed to remain after switch rails had been removed). Where the space between a crossing plank and the rail next it is of such a width that brakemen and others are in danger of having their feet caught in it. *Louisville & N. R. Co. v. Johnson* (1897) 27 C. C. A. 367, 53 U. S. App. 381, 81 Fed. 679; *St. Louis & S. F. R. Co. v. Keller* (1900; Kan. App.) 62 Pac. 55. Where a signal wire in a yard is not covered. *Indiana, I. & L. R. Co. v. Bundy* (1899) 152 Ind. 590, 53 N. E. 175 (nonconformity with usage). Where a switch rod is not close enough to the ground to enable employees having occasion to pass over it, to do so safely, in the exercise of reasonable care. *Hannah v. Connecticut River R. Co.* (1891) 154 Mass. 529, 28 N. E. 682 (arrangement denied to be necessary, as matter of law). Where ditches, culverts, cattle guards, etc., in a yard, or at any point on the roadbed where employees are apt to go in switching and coupling cars, are left uncovered, and employee falls into them. *Plank v. New York C. & H. R. R. Co.* (1873) 1 Thomp. & C. 319. Affirmed (1875) 60 N. Y. 607; *Franklin v. Winona & St. P. R. Co.* (1887) 37 Minn. 409, 34 N. W. 898; *West v. Southern P. Co.* (1898) 29 C. C. A. 219, 56 U. S. App. 323, 85

It would doubtless be held everywhere that negligence may be inferred from the existence of an isolated hole between the ties, even in a side track. This would clearly constitute a pitfall, and let in the operation of the paramount principle discussed in §§ 58, 59, *ante*.¹¹

c. Frogs and guard rails.—The position taken in some jurisdictions seems to be that a jury may properly infer negligence from the mere fact that a frog or a guard rail was not blocked.¹² The obvious

Fed. 392; *Millen v. New York C. & H. R. R. Co.* (1897) 20 App. Div. 92, 46 N. Y. Supp. 748 (ditch 8 to 10 inches deep and 14 inches wide); *Hollenbeck v. Missouri P. R. Co.* (1897) 141 Mo. 97, 38 S. W. 723. Affirmed in banc in 141 Mo. 113, 41 S. W. 887 (ditch from 4 to 6 inches deep); *Hennesev v. Chicago & N. W. R. Co.* (1898) 99 Wis. 109, 74 N. W. 554 (open ditch 10 inches wide and 8 deep); *Davidson v. Southern P. R. Co.* (1890) 44 Fed. 476 (ditch extending across the track); *Peoria, D. & E. R. Co. v. Puckett* (1892) 42 Ill. App. 642 (here the fact that the position of a cattle guard was unnecessary was emphasized); *Fredenburg v. Northern C. R. Co.* (1889) 114 N. Y. 582, 21 N. E. 1049 (here an open cattle guard was treated as a trap); *Galveston, H. & S. A. R. Co. v. Slinkard* (1897) 17 Tex. Civ. App. 585, 44 S. W. 35 (non-conformity with usage to cover cattle guards within yard limits). A cattle guard erected in accordance with a statute must be one which will not endanger employees engaged in coupling cars. *Ford v. Chicago, R. I. & P. R. Co.* (1894) 91 Iowa, 179, 24 L. R. A. 657, 59 N. W. 5, second appeal (1898) 106 Iowa, 85, 75 N. W. 650. Reversing on rehearing (1897) 71 N. W. 332 (cattle guard, at a place where cars had frequently to be coupled, held not to be properly constructed, where it was built of ties laid across the track over a trench 3 feet deep).

In an action for injuries, caused by stumbling over a ground switch, it is error to instruct a jury that it is the legal duty of a railway company to furnish a suitably lighted yard. It is for the jury to say whether it was necessary, under the circumstances, to have the yard lighted, in order that it might be reasonably safe. *Galveston, H. & S. A. R. Co. v. English* (1900; Tex. Civ. App.) 59 S. W. 626.

¹¹ So conceded in *Ragon v. Toledo, A. & N. M. R. Co.* (1893) 97 Mich. 265, 56 N. W. 612. See also *Northern P. R.*

Co. v. Tester (1894) 11 C. C. A. 332, 27 U. S. App. 316, 63 Fed. 527 (hole covered by slush and snow, when plaintiff stepped into it); *Missouri P. R. Co. v. Jones* (1889) 75 Tex. 151, 12 S. W. 972 (deep holes, made by throwing out dirt between ties). Compare facts in *Illinois C. R. Co. v. Cozby* (1898) 174 Ill. 109, 50 N. E. 1011.

¹² *Sherman v. Chicago, M. & St. P. R. Co.* (1885) 34 Minn. 259, 25 N. W. 593; *Trott v. Chicago, R. I. & P. R. Co.* (1901; Iowa) 86 N. W. 33; *Mayes v. Chicago, R. I. & P. R. Co.* (1884) 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *Hamilton v. Rich Hill Coal Min. Co.* (1891) 108 Mo. 364, 18 S. W. 977; *Missouri P. R. Co. v. Baxter* (1894) 42 Neb. 793, 60 N. W. 1044; *O'Neill v. Chicago, R. I. & P. R. Co.* (1901; Neb.) 86 N. W. 1098; *Holum v. Chicago, M. & St. P. R. Co.* (1891) 80 Wis. 299, 50 N. W. 99. A case which tends to support the same view is *Union P. R. Co. v. James* (1896) 163 U. S. 485, 41 L. ed. 236, 16 Sup. Ct. Rep. 1109, but the actual rulings were on points of procedure. And the case of *Southern P. Co. v. Seley* (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530, note 17, *infra*, seems to commit the supreme court to the theory that evidence merely of the want of blocking is not enough to establish culpability. In *International & G. N. R. Co. v. Bell* (1889) 75 Tex. 50, 12 S. W. 321, the court reversed a judgment for a brakeman, based on a finding that the company was negligent as regards the manner in which the guard rail was laid with respect to the track rail, but the reversal was merely on the ground that the instructions had imposed too high a degree of diligence on the company, and it is not apparent from the report what precise precautions it was contended that the company should have adopted. In a case where the unblocked frog was a part of a turnout laid down for a temporary purpose near a switching yard, it was held that evidence of a general order issued by

complement of the doctrine is that a court cannot say, as a matter of law, that culpability is imputable where nothing more appears than that there was a want of blocking.¹³

Another view is that the servant, in order to make good his right to recover, must do more than merely establish the want of blocking. That is to say, he has the burden of proving that frogs, etc., are not reasonably safe for the purposes which they are designed to subserve,¹⁴ and must also show that, on the whole, the use of the block would be prudent, in that it would guard against dangers in one direction, without the introduction of new perils in another.¹⁵ See § 38, *ante*. He cannot recover merely upon evidence that an increase of safety is obtained by using blocks.¹⁶ See § 35, *ante*.

In many of the cases the circumstance with reference to which the question of reasonable safety has been considered has been the common usage of railway companies. In order to estimate the doctrinal significance of these decisions, the theory held by the courts which ren-

the defendant to block all frogs was competent, but not conclusive, evidence of negligence in leaving the frog in question without any blocking. *Coates v. Burlington, C. R. & N. R. Co.* (1883) 62 Iowa, 486, 1 N. W. 760. The following vigorous argument by Lewis, J., in his dissenting opinion in *Richmond & D. R. Co. v. Risdon* (1891) 87 Va. 335, 12 S. E. 786, is worth quoting: "That the frogs were dangerous is not disputed. But it is contended that they were of the standard pattern, and that that fact of itself repels the imputation of negligence. From this view I dissent. If a standard frog, unguarded, and situated, as this one was, in a place where there are many tracks, and where cars are shifted at all hours of the day and night, is not reasonably safe, then the company, in allowing it to remain unguarded, was guilty of negligence, and the jury rightly so found. Nor, upon this point, are we left to inference. The expert evidence for the plaintiff is conclusive that the dangerous condition of the frogs could easily have been guarded against by the device of 'filling' them with cinders, which simple and inexpensive method renders them safe to those whose duties call them upon the track, and at the same time does not interfere with their ordinary use. The witness Perry, who for a number of years was in the employ of the defendant company as roadmaster, testifies that at terminal points, or in yards where much shifting is done, the frogs ought always to be filled, as a protection to switchmen; and this is so well understood, he says, that the laws of some states expressly require it to be done. And why should they not be filled? Why should the servant be exposed to unnecessary risks that can so easily be guarded against? Is the rule that the master must exercise reasonable or ordinary care a meaningless phrase,—a mere jingle of words? I think not."

¹³ *Missouri P. R. Co. v. Lewis* (1888) 24 Neb. 848, 2 L. R. A. 67, 40 N. W. 401.

¹⁴ *Spencer v. New York C. & H. R. R. Co.* (1893) 67 Hun, 196, 22 N. Y. Supp. 100; *Chicago, R. I. & P. R. Co. v. Longorgan* (1886) 118 Ill. 41, 7 N. E. 55.

¹⁵ *McGinnis v. Canada Southern Bridge Co.* (1882) 49 Mich. 466, 13 N. W. 819.

¹⁶ *Chicago, R. I. & P. R. Co. v. Longorgan* (1886) 118 Ill. 41, 7 N. E. 55; *Huhn v. Missouri P. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937; *Chicago, B. & Q. R. Co. v. Smith* (1885) 18 Ill. App. 119; *Lake Shore & M. S. R. Co. v. McCormick* (1881) 74 Ind. 440 (want of blocking here declared to be an ordinary risk). It is not negligence to use a piece of wood 1 inch thicker, 6 inches wider, and 1 foot longer than the pieces customarily used for the purpose of blocking guard rails. *Morris v. Duluth, S. S. & A. R. Co.* (1901) 47 C. C. A. 661, 108 Fed. 747.

dered them must be taken into account. In some jurisdictions, as shown in chapter VI., *ante*, proof that it is the common usage of railway companies not to block frogs or guard rails will prevent recovery, as matter of law.¹⁷ In others, such evidence is merely treated as an element, proper for the consideration of the jury.¹⁸

"A special finding that the frogs of the defendant company were the same as those used by the principal roads in the country was one of those upon which the plaintiff's right to recover was denied in *Lake Shore & M. S. R. Co. v. McCormick* (1881) 74 Ind. 440. To the same effect, see *Richmond & D. R. Co. v. R. Co.* (1891) 87 Va. 335, 12 S. E. 786, declaring that to maintain unblocked frogs of a standard pattern is not negligence; and *Smith v. St. Louis, K. & V. R. Co.* (1878) 69 Mo. 32, 33 Am. Rep. 484, holding a railroad company not liable for injuries caused by a guard rail of a pattern in general use, though a safe one might have been constructed. (But see the Missouri case cited in the next note.) A court will not pronounce a railway company negligent, where no proof is given that blocked frogs are a device in general use on other roads (*Spencer v. New York C. & H. R. R. Co.* [1893] 67 Hun, 196, 22 N. Y. Supp. 100; *Banks v. Georgia R. & Bk. Co.* [1901] 112 Ga. 655, 37 S. E. 992); nor where the evidence is that some railway companies adopt and some reject that precaution (*McVail v. New York, L. E. & W. R. Co.* [1893] 71 Hun, 24, 24 N. Y. Supp. 616); nor where the larger number of witnesses testify that this arrangement is as safe as blocking (*Kilpatrick v. Choctaw R. Co.* [1901] Ind. Terr. 64 S. W. 560); nor where the utmost that is established by the plaintiff's evidence is that the device of blocking is still an experiment, and of doubtful practicability (*Chicago, R. & O. R. Co. v. Smith* [1885] 18 Ill. App. 119; *Chicago, R. I. & P. R. Co. v. Lowman* [1886] 118 Ill. 41, 7 N. E. 55). In the latter case the court said: "It must appear, before the defendant can be held liable, that the switch or turnout, as constructed and used, was not reasonably safe, or that it was not constructed with the usual care and skill. An employer is not required to change his machinery in order to apply or adopt every new invention. The fact that a few of the railroads of the country have adopted this new device, or that the defendant has used it on a part of its road, is not enough to establish its utility, and establish negligence in every other road that adheres to the old system. The old system of constructing switches must be condemned." It was accordingly held error to instruct the jury that the law requires a railroad company to use reasonable and ordinary care and diligence in providing and maintaining reasonably safe structures, tracks, side tracks, switches, turn-outs, etc., and if it fails to do so, and an injury happens in consequence thereof to an employee in the exercise of due and reasonable care, then the railroad company would be liable. The specific negligence charged in the declaration being the omission to use blocking, such an instruction would be understood by the jury as laying down the rule that the company was absolutely required to use blocks (Mulkey, Ch. J., and Shope and Magruder, J.J., dissent.) In *Southern P. Co. v. Schuy* (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530, it was held error to refuse the following instruction: "The jury are instructed that, if they find from the evidence that the railroad companies used both the blocked and the unblocked frog, and that it is questionable which is the safest or most suitable for the business of the roads, then the use of the unblocked frog is not negligence, and the jury are instructed not to impute the same as negligence to the defendant, and they should find for the defendant." The decision of the territorial court in this case is reported in (1890) 6 Utah, 319, 23 Pac. 751, where it was held negligence not to have blocking. *Bourgeois v. Grand Trunk R. Co.* (1891) Mont. L. R. 5 Super. Ct. 249, possibly depends on the same considerations as the above cited cases, but its rationale is not apparent from the very brief judgment.

In *Hahn v. Missouri P. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937, it was held that the question whether the company was negligent in maintaining a guard rail without blocking could not be resolved merely by showing how many roads used blocks. It was held in *Austin v. Chicago, R. I. & P. R. Co.* (1895) 93 Iowa, 236, 61 N. W. 849,

A conception sometimes relied upon has been that the risk created by the unblocked frog was obvious, and therefore assumed. In one case, this seems to stand as the specific and differentiating reason upon which recovery was denied.¹⁹ But most of the decisions in which phraseology indicative of the conception is employed emanate from courts of which at least a part would deny the master's liability, even apart from this consideration.²⁰

In the case of an inexperienced minor, it is the duty of a railway company to warn him as to the risks incident to unblocked frogs.²¹

Where a railway company has been in the habit of blocking its guard rails at some particular place, there is a special ground for charging it with negligence in failing to replace the blocking, when forced out by accident; but, even conceding there is a duty, under such circumstances, to see that the blocking is restored, it is plain that, upon general principles, the servant cannot recover for an injury caused by the want of the blocking, in the absence of evidence showing that it had been displaced so long that the company might, by the exercise of reasonable care, have discovered its absence.²²

Negligence cannot be inferred merely from the fact that the track would have been safer if a different kind of rail had been used for a guard rail.²³

d. Side tracks and yards.—(See also subd. *b*, *infra*.)—As sidings with their appurtenances of switches, turntables, etc., are essential to the operation of the main line of a railroad company, the duty of the master in regard to their construction and maintenance is the same as that which is incumbent on him with respect to the main line itself.²⁴

that an instruction was correct, which declared that a brakeman, who was injured through catching his foot in a space left unfilled between the ties on each side of the bars of a switch, was not precluded from recovering by proof that this arrangement was customary.

¹⁹ *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582.

²⁰ *Southern P. Co. v. Seley* (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *Appel v. Buffalo, N. Y. & P. R. Co.* (1888) 111 N. Y. 550, 19 N. E. 93; *Illinois C. R. Co. v. Campbell* (1897) 170 Ill. 163, 49 N. E. 314; *Ames v. Lake Shore & M. & S. R. Co.* (1893) 135 Ind. 363, 35 N. E. 117; *Sheets v. Chicago & I. Coal R. Co.* (1894) 139 Ind. 682, 39 N. E. 151; *McGinnis v. Canada Southern Bridge Co.* (1882) 49 Mich. 466, 13 N. W. 819; *Wabash R. Co. v. Ray* (1898) 152 Ind.

392, 51 N. E. 920 (unblocked frog); *Burham v. Concord & M. R. Co.* (1896) 68 N. H. 567, 14 Atl. 750; *Vaccaro v. Cleveland, C. C. & St. L. R. Co.* (1899) 48 L. R. A. 68, 37 C. C. A. 499, 96 Fed. 298.

²¹ *Davis v. St. Louis, I. M. & S. R. Co.* (1890) 53 Ark. 117, 7 L. R. A. 283, 13 S. W. 80; *S. C.* (1892) 55 Ark. 462, 18 S. W. 628 (action by father of servant).

²² *Haskins v. New York C. & H. R. R. Co.* (1894) 79 Hun. 159, 29 N. Y. Supp. 274. See chapter, *X*, *post*.

²³ *Smith v. St. Louis, K. C. & N. R. Co.* (1878) 69 Mo. 32, 33 Am. Rep. 484.

²⁴ *Elmer v. Locke* (1883) 135 Mass. 575, where a brakeman was held entitled to maintain an action for injuries occasioned by the fall of a trestlework, supporting a portion of a spur track, which was intended for use for an in-

70. Objects alongside and danger by near the track.—(See also § 86, *post*.)—*a. Conditions held to import negligence.*—One line of decisions proceeds upon the theory that a jury is warranted in finding a railway company to be guilty of negligence in maintaining structures or other fixed objects so near its track that employees are in danger of being struck by them, while performing duties which require them to place their persons outside of locomotives or cars.¹ The pos-

definite period of time. The court here distinguished the degrees of care required in the case of permanent and temporary structures. Where new engines are put into use, so much larger than those for which a turntable was originally constructed that, when they are being turned, they are liable to be struck by engines passing on an adjacent track, it is the duty of the company to make such corresponding changes in the track and turntable as will render the handling of the larger engines reasonably safe. *Lake Shore & M. S. R. Co. v. Fitzpatrick* (1877) 31 Ohio St. 479. The want of an ash pit on a short branch line does not import negligence. *Sidomridge v. Chesapeake & O. R. Co.* (1899) 46 W. Va. 569, 33 S. E. 293.

It is negligence not to provide a pit, over which to place engines while they are being cleaned. *South Florida R. Co. v. Weese* (1893) 32 Fla. 212, 13 So. 436. It is for the jury to say whether it was negligence to construct a split switch with the rails about 3 $\frac{3}{4}$ inches apart, so that they were likely to catch a brakeman's foot, the evidence being that they could have been set within 2 $\frac{1}{2}$ inches of each other. *Brooke v. Chicago, R. I. & P. R. Co.* (1890) 81 Iowa, 504, 47 N. W. 74.

On the other hand, it is not negligent to maintain a ground switch of the ordinary pattern, and so constructed that it may be worked, without danger from passing trains, by a servant standing midway between the rail which it shifts and the adjacent track. *Randall v. Baltimore R. Co.* (1883) 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322. Nor is it negligent to change a patent switch to a common switch at a place where the condition of the grades, etc., affords good reasons for believing the latter kind to be the safer. *Piper v. New York C. & H. R. R. Co.* (1874) 56 N. Y. 630. Where there is no uniform rule on the subject, the location of a switch stand on the same side of the main track as the siding into which the

trains are switched is not negligence. *Grattis v. Kansas City, P. & G. R. Co.* (1900) 153 Mo. 381, 48 L. R. A. 399, 108 S. W. 108. The want of a light on a switch has been denied to be negligence as to a switchman who has occasion to cross a track in a yard, the ground relied upon being the absence of any evidence of a general usage requiring such a safeguard. *Grant v. Union P. R. Co.* (1891) 45 Fed. 217. Contrast Illinois case cited in § 68 (d), *ante*.

¹*Bryce v. Chicago, M. & St. P. R. Co.* (1897) 103 Iowa, 665, 72 N. W. 780 (bolt in bridge truss caught brakeman's clothing, while he was proceeding, in compliance with the company's rules, to release the brakes); *Texas M. R. Co. v. Taylor* (1898; Tex. Civ. App. 44 S. W. 892 (1899) 53 S. W. 562 (fireman struck by side of bridge); *Robel v. Chicago, M. & St. P. R. Co.* (1886) 35 Minn. 84, 27 N. W. 505 (trestle of side track 14 inches from cars); *Fort Worth & D. C. R. Co. v. Graves* (1893; Tex. Civ. App. 1 S. W. 606) (brakeman knocked from the train by one of the stays of a bridge while he was climbing a ladder on the side of a box car, on a dark, cold morning, in response to the usual signal, and in the prudent discharge of his duty, as the train was passing over the bridge, the accident being due to the fact that the track was negligently placed nearer to that side of the bridge than to the other); *Pidcock v. Union P. R. Co.* (1888) 5 Utah, 612, 1 L. R. A. 131, 19 Pac. 191 (switch stand within 10 inches of passing cars); *Southern Kansas R. Co. v. Michaels* (1896) 57 Kan. 474, 46 Pac. 938 (an row of switch stand, when turned, was 9 inches from cars); *Bonner v. La Vie* (1891) 80 Tex. 117, 15 S. W. 803 (same facts); *Boss v. Northern P. R. Co.* (1891) 2 N. D. 128, 49 N. W. 655 (car get so close as sometimes to come into contact with passing trains); *Coff v. Chicago, St. P. M. & O. R. Co.* (1894) 87 Wis. 273, 58 N. W. 408 (switch

tion taken is that railway companies have no right to place structures, for any purpose, so near the track that the slightest indiscretion on the part of the employee will prove fatal.² From this point of view

stand 7½ inches from cars; considerably closer than other stands in the same yard); *Pennsylvania Co. v. Finney* (1896) 145 Ind. 551, 42 N. E. 816 (water plug); *Chicago & A. R. Co. v. Stevens* (1901) 189 Ill. 226, 59 N. E. 577, Affirming (1900) 91 Ill. App. 171, Affirmed (1901) 189 Ill. 226, 59 N. E. 577 (footboard outside coal shed); *Chicago, R. I. & P. R. Co. v. Clark* (1883) 108 Ill. 113 (platform 10 inches from outside of cars; actual ruling was that an instruction was erroneous which declared that the company was liable if the platform was dangerous, thus ignoring the question whether it was known to be dangerous); *Perigo v. Chicago, R. I. & P. R. Co.* (1879) 52 Iowa, 276, 3 N. W. 43 (platform dangerously close); *Kelcher v. Milwaukee & N. R. Co.* (1891) 80 Wis. 584, 50 N. W. 942 (coal shed near side track); *Illinois & St. L. R. Co. v. Whalen* (1886) 19 Ill. App. 116 (shed); *Chicago, R. I. & P. R. Co. v. Cleveland* (1900) 92 Ill. App. 308 (flag shanty); *Johnson v. St. Paul, M. & M. R. Co.* (1890) 43 Minn. 53, 44 N. W. 884 (signal post); *Arabella v. San Antonio & A. P. R. Co.* (1889; Tex.) 11 S. W. 913 (stake); *New York, C. & St. L. R. Co. v. Ostman* (1896) 146 Ind. 452, 45 N. E. 651, Reversing on rehearing (1895) 41 N. E. 1037 (cattle chute); *Dorsey v. Phillips & C. Constr. Co.* (1877) 42 Wis. 583 (cattle chute); *Allen v. Burlington, C. R. & N. R. Co.* (1882) 57 Iowa, 623, 11 N. W. 614 (1884) 64 Iowa, 94, 10 N. W. 807 (cattle chute); *Krist v. Chicago, G. W. R. Co.* (1899) 110 Iowa, 32, 81 N. W. 181 (cattle chute); *Phelps v. Chicago & W. M. R. Co.* (1899) 122 Mich. 171, 81 N. W. 101 (1900) 121 Mich. 178, 84 N. W. 66 (fish chute; see, as to this case, § 58, note 5, *ad finem*); *Murphy v. Wabash R. Co.* (1893) 115 Mo. 111, 21 S. W. 862 (cattle guard fence 18 inches from locomotive); *Houston & T. R. Co. v. Oram* (1878) 49 Tex. 341 (water tank closer than usual); *Hall v. Union P. R. Co.* (1883) 5 McCrary, 257, 16 Fed. 744 (telegraph pole 12 inches from locomotive); *Benthin v. New York C. & H. R. Co.* (1897) 24 App. Div. 303, 48 N. Y. Supp. 503 (telegraph pole 4 inches from passing locomotive. But see note 5, *infra*, as to New York rule); *Whipple v. New York, N. H. & H. R. Co.* (1896) 19 R. I. 587, 35 Atl. 305 (telegraph pole); *Crundall v. New York, N. H. & H. R. Co.* (1896) 19 R. I. 594, 35 Atl. 307 (telegraph pole near side track); *Chicago & I. R. Co. v. Russell* (1878) 91 Ill. 208, 33 Am. Rep. 54 (telegraph pole within 18 inches of cars); *Holfrick v. Ogden City R. Co.* (1891) 7 Utah, 180, 20 Pac. 295 (telegraph pole 12 to 18 inches from track); *East Tennessee, V. & G. R. Co. v. Head* (1893) 92 Ga. 723, 18 S. E. 976 (danger signal post); *Central Trust Co. v. East Tennessee, V. & G. R. Co.* (1895) 73 Fed. 661 (station limit board); *Illinois C. R. Co. v. Welch* (1869) 52 Ill. 183, 4 Am. Rep. 593 (projecting awning, outer edge of which was almost directly above the sides of the cars); *Salem Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141, 38 N. E. 411 (structure close to tram car line); *Woodell v. West Virginia Improv. Co.* (1893) 38 W. Va. 23, 17 S. E. 386 (projecting bough of tree); *Stackman v. Chicago & N. W. R. Co.* (1891) 80 Wis. 428, 50 N. W. 404 (bank injured a servant while pushing a car along the track; fact that road was in course of construction held to be immaterial here); *Georgia P. R. Co. v. Davis* (1891) 92 Ala. 300, 9 So. 252 (large rock). In *Walker v. Redington Lumber Co.* (1893) 86 Me. 191, 29 Atl. 979, a skidway 2½ feet from side of car was apparently regarded by bench and bar as a negligent arrangement; but the servant's action failed because he was struck by it when needlessly hanging down below the car to see whether the wheels were sliding after he had set the brakes. Where the evidence shows that it is the general custom of brakemen to pass up and down the sides of cars in motion, and jump off to open or close switches, a railway company is bound to locate its structures along the track with reference to this custom, at all places where it may reasonably anticipate that brakemen will have occasion to alight for this purpose. *Flanders v. Chicago, St. P. M. & O. R. Co.* (1892) 51 Minn. 193, 53 N. W. 544 (eaves of section house).

² *Chicago, B. & Q. R. Co. v. Gregory* (1871) 58 Ill. 272 (mail catcher). In

the test of the company's negligence will be, whether the structure or other object which caused the injury was dangerous or unsafe to persons operating its trains, when they were exercising what was, under the circumstances, ordinary care.⁴

The servant's excusable ignorance of the conditions and the resulting risks is adverted to in many of the cases in which the company has been held liable; ⁵ but, so far as regards the courts with which we have to deal in this subdivision, this element is merely corroborative in its significance, instead of being differentiating, as is the case in the jurisdictions dealt with in the next subdivision.

Two cases in which the action was held not to be maintainable, the only ground assigned for the decision being that the risk was patent, and therefore assumed, are somewhat difficult to classify.⁶ Obviously, such a reason is consistent either with the hypothesis that the court was applying the theory exemplified in the next subdivision, or with the hypothesis that it was intended to assert the doctrine that, although there was a breach of duty, the risk arising therefrom had been undertaken by the servant. In view of the other Texas decisions al-

Whipple v. New York, N. H. & H. R. Co. (1896) 19 R. L. 587, 35 Atl. 305, the court expressly rejected the doctrine referred to in the next subdivision, viz., that, as the danger of contact with structures of this kind is a matter of common knowledge, and as they are objects plainly visible, their presence is at once suggestive of danger; and that the risk of being hit by them is, therefore, an obvious danger, and one assumed by the plaintiff when he entered into the service.

⁴ *New York, C. & St. L. R. Co. v. Ostrman* (1896) 146 Ind. 452, 45 N. E. 651. In *Pennsylvania Co. v. Finney* (1895) 145 Ind. 551, 42 N. E. 816, a servant injured by a water plug was not allowed to recover, for the reason that there was no evidence to show that he had been careful. But the result would doubtless have been different in a state where the burden of proving contributory negligence lies on the defendant. The instructions to the jury, in a case of this kind, should express the notion that the defendant was negligent if the structure in question was dangerous to a person exercising ordinary care. *Gould v. Chicago, R. & O. R. Co.* (1885) 66 Iowa, 590, 24 N. W. 227 (disapproving of an unqualified instruction to the effect that, if the jury found that the water column which caused the injury was placed in such close proximity to the track as to be dangerous to the persons operating the trains, they would be justified in finding that defendants were guilty of negligence in its location).

⁵ *Bonner v. La Nove* (1891) 80 Tex. 417, 15 S. W. 803; *Boss v. Northern P. R. Co.* (1891) 2 N. D. 128, 49 N. W. 655 (proximity of switch stand showed a breach of company's own rules); *Chicago, R. I. & P. R. Co. v. Clark* (1882) 11 Ill. App. 104 (platform); *Houston & T. R. Co. v. Oram* (1898) 49 Tex. 311 (structure closer than usual); *Le Worth & D. C. R. Co. v. Graves* (1893) Tex. Civ. App. 21 S. W. 606 (structure closer than usual); *Coff v. Chicago, St. P. M. & O. R. Co.* (1894) 87 Wis. 273, 58 N. W. 408 (same facts); *International & G. N. R. Co. v. Stephens* (1899) 22 Tex. Civ. App. 220, 54 S. W. 1086 (crane, which was here 7 inches closer to the track than any other similar structure on the line).

⁶ *Gibson v. Erie R. Co.* (1875) 63 N. Y. 450, 20 Am. Rep. 552, *Reversing* (1875) 5 Hun. 31 (projecting roof of shed); *Missouri P. R. Co. v. Smoots* (1888) 71 Tex. 700, 9 S. W. 741, S. C. (1890) 78 Tex. 439, 14 S. W. 779 (tentle guard struck brakeman while endeavoring to repair a defective brake).

readily cited, the latter hypothesis seems certainly to be the correct one with respect to the second of the cases cited. That it is also the correct one in respect to the New York case might seem to be a reasonable deduction from some of the decisions of this court in the analogous instance of overhead bridges. See next section. On the other hand, the fact that the English decision in *Seymour v. Maddox*⁶ is cited with approval would rather point to the conclusion that, in the opinion of the court, there was not even a *prima facie* liability.

b. Conditions held not to import negligence.— In some of the cases in which the maintenance of structures of this description has been denied to be culpable, the controlling factor is the servant's presumed comprehension of the risks created by those structures. This circumstance is regarded as justifying one or other, or both, of two inferences, either of which is fatal to the right to maintain the action, *viz.*, that there is no duty to change the conditions from which known risks arise⁷ (see chapter VII., *ante*), or that the servant is able to protect himself, and if he did not do so, must have been himself guilty of negligence⁸ (see chapter IV., *ante*).

⁶ (1851) 16 Q. B. 326, 20 L. J. Q. B. N. S. 327, 15 Jur. 723.

⁷ *McGhie v. North British R. Co.* (1887) 14 Sc. Sess. Cas. 4th series, 499 (side of bridge); *Loring v. Boston & L. R. Corp.* (1878) 125 Mass. 79, 28 Am. Rep. 206 (engineer struck by a single post as he was leaning out of his cab to look for a signal); *Thain v. Old Colony R. Co.* (1892) 161 Mass. 353, 37 N. E. 309 (similar accident, the obstruction being a temporary post put up as a support for a trestle); *Fisk v. Fitchburg R. Co.* (1893) 158 Mass. 238, 34 N. E. 510 (brakeman getting down by a ladder on the side of the car—the only one on it—was struck by a projecting awning); *Hall v. Wakefield & S. Street R. Co.* (1901) 178 Mass. 98, 59 N. E. 668 (tree close to street rail way track); *Austin v. Boston & W. R. Co.* (1895) 164 Mass. 282, 41 N. E. 288 (brakeman proceeding to mount ladder to set brakes was struck by a gate post); *Bell v. New York, N. H. & H. R. Co.* (1897) 168 Mass. 443, 47 N. E. 118 (blackman, while descending a side ladder, was struck by a bridge pillar); *Graves v. Boston & A. R. Co.* (1894) 162 Mass. 287, 38 N. E. 500 (switch close to track not a trap as to a brake man engaged in coupling); *Cummins v. Fitchburg R. Co.* (1892) 156 Mass. 200, 30 N. E. 1140 (switchman, while turn-

ing a switch, stood between it and the track and was struck by the cars); *Kelly v. Baltimore R. Co.* (1887) Pa. 11 Atl. 659 (oil house clearing cars by some 8 inches). See also the cases cited in note 5, *supra*, and compare the similar decisions under that section of the Massachusetts employers' liability act which gives the servant a right to recover for injuries caused by "defect in the ways, etc." In *Thain v. Old Colony R. Co.* (1892) 161 Mass. 353, 37 N. E. 309, the Massachusetts court qualified its doctrine by the following remark: "We assume that the rule is not so strict in the case of employees whose duties may require them not to confine themselves within the same line at all times. . . . It may be that they ought not to be held to take the risk of things 4 feet off, in all cases." In view of the circumstances under which the injuries were received, in the cases cited above, it is difficult to assign any reasonable meaning to these words which is compatible with the conclusion that the servant was debarred from recovery.

⁸ *Sheeler v. Chesapeake & O. R. Co.* (1885) 81 Va. 188, 59 Am. Rep. 654; *Bellows v. Pennsylvania & N. Y. Canal & R. Co.* (1892) 157 Pa. 51, 27 Atl. 685 (bridge approached by curve, which communicated a swaying motion to the

The courts which take this position concede that the case is for the jury, where the servant may, upon the evidence, have been excusably ignorant of the risk.⁹

Other cases turn upon the general principle developed in chapter v., *ante*, which is supposed to justify the conclusion that a railway company must be allowed to use its own discretion as to the kind of bridges it will use, and when, and under what circumstances they will remove or replace them, and that it cannot be required to condemn a bridge which is without fault in its plan, or defect in its structure, while it is in good repair, and safe for the passage of trains, simply because some expert pronounces it not to be as good or convenient as some other kind.¹⁰

In several decisions, one of the controlling considerations relied upon has been that the maintenance of the dangerous object did not import negligence, for the reason that it was placed in a position which the common usage of other railway companies sanctioned.¹¹ See § 44, *ante*. But this circumstance would not be conclusive in all courts. See § 50, *ante*.

engine, thus reducing the distance between the side of the locomotive and the bridge, and making greater care necessary in entering it). This seems to be the actual rationale of two Georgia decisions, in which recovery was denied on the ground that the plaintiff was negligent in leaning out of a car at the time and place in question without keeping a proper lookout. *Atlanta & W. P. R. Co. v. Webb* (1878) 61 Ga. 586 (water tank); *Sundy v. Savannah Street R. Co.* (1895) 96 Ga. 819, 23 S. E. 841. The phraseology used in the latter case is, however, somewhat peculiar, *viz.*, that, although a street railway company is negligent in locating a post very near the track, it is not *relatively negligent* as to a motorman killed by colliding with such post while riding on the step of the front platform of such car, leaning outward and looking backward underneath the car, while under no necessity or duty to be in that position. In another Georgia case where the plaintiff failed to recover, *Wolf v. East Tennessee, V. & G. R. Co.* (1891) 88 Ga. 210, 14 S. E. 199 (mail crane), the precise grounds of the decision denying negligence are not mentioned.

⁹ As, where he was struck by a signal post closer than usual to the track (*Scanlon v. Boston & A. R. Co.* [1888] 147 Mass. 484, 18 N. E. 209); or by a

telegraph pole, the evidence showing that there was no other like obstruction along the road from which plaintiff might have been charged with notice of danger. *Potter v. Detroit, G. H. & W. R. Co.* (1899) 122 Mich. 179, 81 N. W. 80. (Judgment was reversed on rehearing [1900] 122 Mich. 205, 82 N. W. 245, but this ruling was not modified.) In *Wood v. Louisville & N. R. Co.* (1898) 88 Fed. 44, the court, in allowing the plaintiff to recover for an injury caused by a cattle chute, distinguished such a case from those of low bridges, etc., on the ground that it was not a structure, the danger of which was apparent.

¹⁰ *Illick v. Flint & P. M. R. Co.* (1888) 67 Mich. 632, 35 N. W. 708 (bridge 13 ft. 4 in. wide between the trestles; plaintiff injured while climbing up a car ladder). *Stewart v. Newport News & M. Valley Co.* (1890) 86 Va. 988, 11 S. E. 885 (cattle chute).

¹¹ *Sisco v. Lehigh & H. River R. Co.* (1895) 145 N. Y. 296, 41 N. E. 90 (mail crane); *Scidmore v. Milwaukee, L. S. & W. R. Co.* (1894) 89 Wis. 188, 61 N. W. 765 ("clearing post" between main and side tracks); *Sheeler v. Chesapeake & O. R. Co.* (1885) 81 Va. 188, 59 Am. Rep. 654 (side of railway bridge); *Pahlan v. Detroit, G. H. & W. R. Co.* (1899) 122 Mich. 232, 81 N. W.

c. Convenience or necessity as justifying elements.—The courts mentioned in subd. *a*, *supra*, naturally take the ground that railway companies, in erecting structures required for the transaction of their business as common carriers, are bound to consider the safety of their employees as well as their own convenience.¹² Under the doctrine adopted by the courts mentioned in subd. *b*, this element is plainly immaterial either one way or the other.

In the decisions of the first-mentioned group of courts, the fact that an unnecessary risk was created by the position of the structure in question is sometimes emphasized.¹³ And it seems clear that if there is any reasonable doubt as to a real and actual necessity for placing the structure in question in the position where it caused the injury, the negligence of the company must be primarily an issue for the jury, in all jurisdictions where the servant's knowledge of the conditions merely lets in the defenses of an assumption of the risk or contributory negligence, and is not a circumstance which, of itself, negatives a breach of duty.¹⁴ Compare § 23*a*, *ante*, and subd. *c* of the following section.

103 (coal bin); *Murray v. New York C. & H. R. R. Co.* (1900) 55 App. Div. 344, 66 N. Y. Supp. 856 (water plug); *Bell v. New York, N. H. & H. R. Co.* (1897) 168 Mass. 443, 47 N. E. 118 (no evidence that pillar of bridge was unusually close to the track). In *Wilson v. Louisville & N. R. Co.* (1887) 85 Ala. 269, 4 So. 701 (supply pipe of water tank), the case was held to be for the jury because the evidence of conformity to usage was not conclusive.

¹² *Murphy v. Wabash R. Co.* (1892) 115 Mo. 111, 21 S. W. 862 (suitability of structures for the purpose of the company's business not enough to excuse it); *Allen v. Burlington, C. R. & N. R. Co.* (1882) 57 Iowa, 623, 11 N. W. 614 (1884), 64 Iowa, 94, 19 N. W. 807 (approving the refusal of an instruction requested by defendant, that it "had the right to construct its cattle chute in such manner, and in such close proximity to the railroad track, as would best subserve its purpose in safely loading and unloading live stock"). In *Dorsey v. Phillips & C. Constr. Co.* (1877) 42 Wis. 583, the court, in upholding a verdict for a brakeman who had been struck by a cattle chute, said: "It may be that the cattle chute was constructed with a view to the exclusive use of cars having ladders on the ends only; in which case it might have in-

volved no special danger. In that view, it might have become dangerous by the use of cars having ladders on their sides only. The use of cars of the latter description, assuming the consequent danger of the cattle chute, made it an immediate duty to remove the cattle chute or change its structure. It may be that it was built with a view to the use of cars of both descriptions. In that case, its dangerous relation to the track was due to a paltry convenience, furnishing no color of legal excuse. A greater distance from the track might have made it more troublesome to load cattle from it, but would have insured operatives of the road from danger of life and limb. Human life is too precious in the eye of the law to be so lightly hazarded." Still less is there any ground for disturbing a verdict in favor of a trainman struck by a post which a station agent had erected for the convenience of his family. *Kearns v. Chicago, M. & St. P. R. Co.* (1885) 66 Iowa, 599, 24 N. W. 231.

¹³ *Kellcher v. Milwaukee & N. R. Co.* (1891) 80 Wis. 584, 50 N. W. 942; *Bonner v. La Nove* (1891) 80 Tex. 117, 15 S. W. 803; *Ross v. Northern P. R. Co.* (1891) 2 N. D. 128, 49 N. W. 655.

¹⁴ *Sweet v. Michigan C. R. Co.* (1891) 87 Mich. 559, 49 N. W. 882 (no excuse for laying a side track as close as 16

d. Employer's liability as affected by the probability of the accident which actually occurred.—Two of the courts mentioned in subd. *a*, *supra*, have admitted a qualification of the company's liability in cases where the particular conjunction of events which caused the injury was one so improbable, or of such rare occurrence, that the company is not bound to anticipate or provide for it.¹⁵ See §§ 112-146, *post*.

The same principle has also been applied in another state,¹⁶ in which the views held on the general question of the liability of a rail-

inches to a shed belonging to a factory); *Johnson v. St. Paul, M. & M. R. Co.* (1890) 43 Minn. 53, 44 N. W. 884 (case held to be for jury, as evidence of necessity was not conclusive). In *Nance v. Newport News & M. Valley Co.* (1891) 13 Ky. L. Rep. 554, 17 S. W. 570, where the plaintiff was allowed to retain a verdict in case of an injury caused by a beam projecting from the side of an old warehouse, the court distinguished between the danger created by objects like tunnels, bridges, etc., and by objects not necessary for the operation of the trains. In *Louisville & N. R. Co. v. Milliken* (1899) 21 Ky. L. Rep. 189, 51 S. W. 796, the case was held to be for the jury, only because the evidence tended to show that a "mail crane" was 8 inches closer than was required by the United States government. In *Sisco v. Lehigh & H. River R. Co.* (1895) 145 N. Y. 296, 41 N. E. 90, Reversing (1894) 75 Hun. 582, 27 N. Y. Supp. 671, one of the grounds on which it was held that there could be no recovery for an injury caused by a mail crane was that it did not appear to have been practicable to locate it at a greater distance from the track, and still have it answer the purpose for which it was erected. In *Brown v. New York C. & H. R. R. Co.* (1901; N. Y.) 60 N. E. 1107, Affirming (1899) 42 App. Div. 548, 59 N. Y. Supp. 672, a verdict for the plaintiff was upheld, where a locomotive fireman was killed by being struck by a mail crane while on the gangway of his engine, the evidence being that the crane was unnecessarily near the track, and might have been located a few inches further therefrom, and that decedent was in the line of his duty. The case last cited was distinguished on the ground that the change in the location in the present instance which would

have minimized the danger was entirely feasible and easy to make. The mere fact that a timber which struck and injured a railway brakeman while he was ascending the ladder on the side of a car was part of a temporary structure erected for the purpose of repairing a water tank will not relieve the company from liability, if the projecting timber which struck him was not necessary to the work of repair, or was left there so long before the injury that the company could, with due care, have discovered it, and had it removed. *Texas & P. R. Co. v. Hohn* (1892) 1 Tex. Civ. App. 36, 21 S. W. 942.

¹⁵ *McKee v. Chicago, R. I. & P. R. Co.* (1891) 83 Iowa, 616, 13 L. R. A. 817, 50 N. W. 209 (not negligence to locate wing fences of cattle guards, in view of such an improbable occurrence as that of a brakeman hanging out from the bottom of the car ladder to examine a brake); *Koontz v. Chicago, R. I. & P. R. Co.* (1884) 65 Iowa, 226, 54 Am. Rep. 5, 21 N. W. 577 (not the duty of a railway company to plank every bridge and cattle guard to prevent accidents to its employees, though it may anticipate that trains may be required to halt at other than the usual stopping places); *Flanders v. Chicago, St. P. M. & O. R. Co.* (1892) 51 Minn. 193, 53 N. W. 544 (for jury to say whether the company was bound to anticipate that brakemen would attempt to descend ladders at such a distance from a switch as a certain section house was erected).

¹⁶ *Davis v. Columbia & G. R. Co.* (1883) 21 S. C. 93 (mere fact that a water tank is erected closer than is necessary or usual does not establish negligence, as regards a brakeman who happened to be just mounting a car ladder after going to procure a lantern to replace one which had gone out).

way company for this particular sort of structure are probably the same as in the states just referred to, if such identity of opinion is an allowable inference from its declared adhesion to the doctrine that it is negligent to maintain a low overhead bridge. See next section.

71. Objects dangerous to employees on the tops of cars.—(See also § 86, *post.*)—In the main, the considerations relied upon as determining factors in the cases just discussed are controlling in the cases which involve the liability of railway companies for injuries caused by low overhead bridges, and other objects so placed as to imperil the safety of employees on the tops of cars. It will be found, therefore, that the boundaries between the decisions which affirm and those which deny liability for such injuries run, upon the whole, along the same doctrinal lines as we had occasion to trace in the preceding section. Some differences, however, in the footing on which the two classes of cases are dealt with have necessarily arisen from the fact that, in a large proportion of those which are now to be reviewed, the dangerous object was a bridge constructed to carry a highway over the track. This circumstance introduces into the problem a new element which can rarely, if ever, appear in cases of the other type, *viz.*, the interest which particular individuals or the public at large may have in the maintenance of such a bridge at a certain level. Usually, this element does not affect the determination of the problem. But sometimes it may be of decisive weight. See *subd. c, infra*.

a. Conditions held to import negligence.—The hypothesis underlying one group of decisions is that it is the duty of a railway company to see that structures and other objects above its track are elevated above it sufficiently to enable train hands to perform their work with reasonable safety.¹ Gauging the significance of the phrase "reasonable safety" by the standard of an employee who is assumed to exercise ordinary care (see chapter iv., *ante*), most of the courts which reason upon this basis have deduced a doctrine which is recognized explicitly in many of the cases cited below, and is not inconsistent with any of them,—*viz.*, that a jury is always warranted in finding a railway company culpably negligent whenever a dangerous object is not sufficiently elevated above its track to clear the heads of trainmen while they are standing or walking, in an erect posture, on the tops of freight cars.² Some other cases possibly embody the same

¹ *Baltimore & O. & C. R. Co. v. Rowan* (1885) 104 Ind. 88, 3 N. E. 627. Compare the phraseology used in *St. Louis, Ft. S. & W. R. Co. v. Irwin* (1887) 36 Kan. 701, 16 Pac. 146.

² *Louisville, N. A. & C. R. Co. v. Wright* (1888) 115 Ind. 394, 17 N. E. 584 (bridge 4 ft. 9 in. above the tops of cars). The court sustained its view by adverting to the fact that the brakes

view, but, owing to the grounds upon which the decisions actually turned, the precise position of the courts is not always clearly defined.³ It should be remarked, however, that the manner in which

were on the tops of the cars, and, to get to them, the brakemen were required to pass over the tops of the cars, not only in the daytime, but also in the nighttime, and often, doubtless, when the night was dark, rainy and foggy, and when it would be almost, if not quite, impossible for them to know of the proximity of such bridges when called to apply the brakes upon moving trains, even if they had knowledge that such bridges were maintained. The vigorous denunciation of structures of this type in *Shearm. & Redf. Neg.* § 197, was mentioned with approval. Other similar decisions as to overhead bridges are, *Pennsylvania Co. v. Sears* (1893) 136 Ind. 400, 34 N. E. 15, 36 N. E. 353; *Louisville & N. R. Co. v. Banks* (1894) 104 Ala. 508, 16 So. 547 (maintenance denied to be wilful negligence); *Cleveland, C. C. & St. L. R. Co. v. Walter* (1893) 147 Ill. 60, 35 N. E. 529; *Wells v. Burlington, C. R. & N. R. Co.* (1881) 56 Iowa, 520, 9 N. W. 364 (action failed here on the ground of an assumption of the risk); *St. Louis, Ft. S. & W. R. Co. v. Irwin* (1887) 37 Kan. 701, 16 Pac. 146; *Atchison, T. & S. F. R. Co. v. Lorr* (1896) 57 Kan. 36, 45 Pac. 59; *Atchison, T. & S. F. R. Co. v. Rowan* (1895) 55 Kan. 270, 39 Pac. 1010; *Cincinnati, N. O. & T. P. R. Co. v. Sampson* (1895) 97 Ky. 71, 30 S. W. 13; *Derby v. Kentucky C. R. Co.* (1887) 9 Ky. L. Rep. 153, 4 S. W. 303; *Louisville & N. R. Co. v. Cooley* (1899) 20 Ky. L. Rep. 1372, 49 S. W. 339; *Deritt v. Pacific R. Co.* (1872) 50 Mo. 302; *Rains v. St. Louis, I. M. & S. R. Co.* (1879) 71 Mo. 164, 36 Am. Rep. 459; *Hunter v. New York, O. & W. R. Co.* (1890) 32 N. Y. S. R. 713, 10 N. Y. Supp. 795; *Atlee v. South Carolina R. Co.* (1884) 21 S. C. 550 (non-suit rightly refused, where bridge was too low for a brakeman to pass under it, standing); *Texas & P. R. Co. v. Moore* (1894) 8 Tex. Civ. App. 289, 27 S. W. 962; *Northern P. R. Co. v. Mortenson* (1894) 11 C. C. A. 335, 27 U. S. App. 313, 63 Fed. 530. See also, to the same effect, *Clark v. St. Paul & N. C. R. Co.* (1881) 28 Minn. 128, 9 N. W. 581 (projecting roof); *Renne v. United States Leather Co.* (1900) 107 Wis. 305, 83 N. W. 473 (steam pipe less than 4 feet above a side track); *New York, N. H.*

& H. J. Co. v. O'Leary (1899) 35 C. C. A. 562, 93 Fed. 737 (guy of derrick stretched across track).

³ In *Williams v. Delaware, L. & W. R. Co.* (1889) 116 N. Y. 628, 22 N. E. 1117, *Reversing* (1886) 39 Hun, 430, the court seems to have assumed that the maintenance of the low bridge imported negligence, as one of the grounds on which the action failed was that the servant was himself negligent, the accident having occurred in broad daylight, when there was nothing to distract his attention. An inference of the same nature may be drawn from *Wallace v. Central Vermont R. Co.* (1893) 138 N. Y. 302, 33 N. E. 1069, where the case was held to be for the jury, on the ground that the evidence as to the plaintiff's negligence was not conclusive. But here the telltale was out of order, and it is not altogether clear, from the reasoning of the court, whether this was regarded as a differentiating circumstance, which made the maintenance of the low bridge a breach of duty, or whether such maintenance was considered to be, in itself, a negligent act. In the *Williams Case* a second ground was also assigned for the decision, viz., that the risk caused by the bridge was patent, and therefore assumed. This statement is of ambiguous significance in the present connection, as it would be appropriate to an application either of the theory discussed in chapter VII., or of the theory of a waiver of a breach of duty which would otherwise be actionable. But, in view of the stress laid on the contributory negligence of the plaintiff, the latter conception may fairly be taken to represent the standpoint of the court. In an earlier New York case, *Queen v. New York C. R. Co.* (1869) 1 Lans. 108, the action was held not to be maintainable, on the ground that the danger was a visible one, clearly incident to the employment. The language thus used seems to be an expression of the theory stated in the next subdivision of this section, but, as it is also susceptible of the same construction as that which we have attributed to the phraseology of the *Williams Case*, the two decisions are not necessarily inconsistent. In *Rock v. Retsoff Min. Co.* (1891) 40 N. Y. S. R. 556, 15

some of the courts have construed the obligation of the employes to exercise due care has, for practical purposes, greatly restricted the beneficial operation of this doctrine. See chapters IV., XIX.

If a bridge is of such a height that a servant on top of the trains cannot avoid danger, by bending or stooping, it is regarded as not only importing gross negligence, but as being *per se* a nuisance.⁴

In Illinois, while it is conceded that the upper timbers of bridges constructed to carry the trains themselves should be high enough to allow brakemen to pass, without danger, through the bridges,⁵ it is also held that this rule does not oblige the companies to construct these timbers at such a height that a train hand can pass under them in a standing posture.⁶

N. Y. Supp. 872, the court did not decide explicitly whether the maintenance of a low bridge was negligent, recovery being denied on the ground that the plaintiff was negligent in standing upright on an unusually high car, with his back towards the bridge. A decision of the supreme court which is clearly in the servant's favor has already been cited in note 2, *supra*. This summary of the effect of the cases shows that it would be desirable for the courts of this state to explain somewhat more clearly the position which they hold with regard to injuries of this sort.

In *Goff v. Norfolk & W. R. Co.* (1888) 36 Fed. 299, and *Williamson v. Newport News & M. Valley Co.* (1891) 34 W. Va. 657, 12 L. R. A. 297, 12 S. E. 824, the courts seemed to concede that the maintenance of a low bridge was negligence, but the decision turned on the contributory negligence of the plaintiff. In *Carbine v. Bennington & R. R. Co.* (1889) 61 Vt. 348, 17 Atl. 491, possibly the same view was taken, but the basis of the decision is that plaintiff knew of, and therefore accepted, the risk. In *Darling v. New York, P. & B. R. Co.* (1892) 17 R. I. 708, 16 L. R. A. 643, 24 Atl. 462, it was held that the maintenance of a dangerously low trestle was negligence as to a servant who did not know of the conditions. But, in view of the position taken in this state as to the culpability of a company in maintaining structures dangerously near a track (see note 1 to preceding section), it may reasonably be presumed that the servant's ignorance was not a differentiating factor, except in so far as it negatived assumption of the risk, or contributory negligence. In *Pt. Worth & R. G. R. Co. v. Kime*

(1899) 21 Tex. Civ. App. 271, 51 S. W. 558, affirmed in (1899) Tex. 54 S. W. 240, the gist of the negligence is stated to be that the defendant had not warned the servant of the danger, and in *Gulf, C. & S. F. R. Co. v. Knor* (1901) Tex. Civ. App. 61 S. W. 969, the actual scope of the decision is no more than that the maintenance of a low bridge without telltales is negligence. But, apparently, the elements thus adverted to are to be treated as merely corroborative evidence of negligence, and these decisions are not to be taken as modifying the effect of the earlier ruling in *Texas & P. R. Co. v. Moore* (1894) 8 Tex. Civ. App. 289, 27 S. W. 962. In *Hooper v. Columbia & G. R. Co.* (1884) 21 S. C. 541, the court doubted whether, in view of a change of regulations, requiring brakemen to be on the tops of cars, the maintenance of a low bridge ought not to be treated as negligence, but decided against the plaintiff on the ground of his assumption of the risk. But the doubt here expressed was soon afterwards resolved against the company. See *Atlee v. South Carolina R. Co.* (1884) 21 S. C. 550.

⁴ *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710, 6 So. 277.

⁵ *Cleveland, C. C. & St. L. R. Co. v. Walter* (1893) 147 Ill. 60, 35 N. E. 529; *Chicago & A. R. Co. v. Johnson* (1886) 116 Ill. 206, 4 N. E. 381 (approving an instruction that the roof of a truss bridge carrying the track should be high enough to enable servants to pass under it in safety).

⁶ *Chicago & A. R. Co. v. Johnson* (1886) 116 Ill. 206, 4 N. E. 381.

In some of the cases cited in this subdivision, the injury was due to the fact that the car on which the servant was standing was considerably higher than usual.⁷ Under the doctrine applied in the cases cited in the next subdivision, it is presumed that this circumstance would, at all events, be sufficient to require the submission of the case to the jury, and recovery would ultimately depend upon whether the servant knew of the unusual danger thus created.

b. Conditions held not to import negligence.—Other courts treat the servant's knowledge or ignorance of the conditions and the resulting risks as the differentiating factors by which the defendant's liability is determined. One inference drawn from evidence showing that he understood the risk to be encountered is simply that, under the general principles explained in chapter vii., *ante*, there is no negligence in maintaining the bridge, whatever may be its height.⁸ Viewed from another standpoint, the servant's comprehension of the danger is regarded as justifying the conclusion that an overhead bridge, so low that it will strike an employee standing on the top of a car, may be maintained without culpability for the reason that he can pass under it, by what is termed, in one case, the "simple and easy expedient of stooping or sitting down."⁹ The courts which be-

⁷ See *Darling v. New York, P. & B. R. Co.* (1892) 17 R. I. 708, 16 L. R. A. 643, 24 Atl. 462 (telltale so low as to be dangerous to men on unusually high cars); *Northern P. R. Co. v. Mortenson* (1894) 11 C. C. A. 335, 27 U. S. App. 313, 63 Fed. 530 (car was 2 ft. 6 in. higher than the average); *Southern R. Co. v. Dural* (1899) 21 Ky. L. Rep. 1153, 54 S. W. 741, affirming on rehearing 20 Ky. L. Rep. 1915, 50 S. W. 535 (car was about 2 feet higher than those of ordinary height. Bridge could just be touched by a man of average height, with the tips of his fingers, while standing on an ordinary car); *Derby v. Kentucky C. R. Co.* (1897) 9 Ky. L. Rep. 153, 4 S. W. 303.

⁸ *Myers v. Chicago, St. P. M. & O. R. Co.* (1899) 37 C. C. A. 137, 95 F. d. 406; *Allen v. Boston & M. R. Co.* (1897) 69 N. H. 271, 39 Atl. 978.

⁹ *Baltimore & O. R. Co. v. Stricker* (1878) 51 Md. 57, 34 Am. Rep. 291; *Baylor v. Delaware, L. & W. R. Co.* (1878) 40 N. J. L. 23, 29 Am. Rep. 208; *Chesapeake & O. R. Co. v. Hafner* (1894) 90 Va. 621, 19 S. E. 166 (1898) 96 Va. 528, 31 N. E. 899 (recovery denied, where a brakeman struck his head against a bridge only 28 inches above

the top of the car, although he was at his post in response to a signal just given by the engineer to apply the brakes). But, in an earlier Virginia case, the theory of the court seems to have been somewhat different, as it remarked, in sustaining a demurrer, that, though defendant might have been culpable for lowness of bridge, yet the plaintiff's negligence contributed to injury, and afterwards said that the risk of collision with such bridges was incident to the employment, the plaintiff being aware of their dangerous character. *Clark v. Richmond & D. R. Co.* (1884) 78 Va. 709, 49 Am. Rep. 394. In another case, *Beard v. Chesapeake & O. R. Co.* (1893) 90 Va. 351, 18 S. E. 559, the same court allowed a brakeman to recover for an injury caused by an overhead bridge, but the essence of the decision really is that the accident was proximately caused by defective brakes, which acted so slowly that he was carried with unexpected rapidity against the structure. In *Pittsburgh & C. R. Co. v. Seutmeyer* (1879) 92 Pa. 276, 37 Am. Rep. 684, the court, in holding it to be error to give an instruction to the effect that the defendant was bound to have all the bridges crossing its road of

long to this group concede that the maintenance of a low bridge is negligence as to a servant who is not aware of the danger.¹⁰

Sometimes the maintenance of such bridges is justified in part by the consideration that they are in common use,¹¹ or that such an arrangement is an allowable exercise of the right of the companies to carry on their business in their own way.¹²

c. Convenience or necessity as justifying elements.—In some of the cases cited under subd. *a*, note 2, *supra*, stress is laid by the courts on the fact that the construction of the bridge at the level in question was not necessary.¹³ What is to be regarded as a justifying necessity is discussed generally in § 23a, *ante*, where, also, the bearing of the fact that a bridge could or could not have been altered without much expense and inconvenience is dealt with. Compare also subd. *c* of the last section.

72. Want of fencing of railway tracks.—(See also § 87, *post*.)—The cases in which the common-law right of an employee to recover for injuries caused by the want of fences to keep out cattle has been discussed are singularly conflicting.

In a recent New York case the existence of a duty to build fences has been deduced as a corollary from the duty of the company to

such a height that, whether its employees were careful or negligent, no damage could result to them therefrom said: "What is the logical result of a doctrine such as this? Is it not that the company must not only guard its servants from probable, but also from possible, dangers, and that it must place no dependence on their care and skill, even in the matter of their own preservation and personal safety? That it must provide against their very negligence, and become an insurer of their limbs and lives? We need not say this will not do; that neither natural nor artificial persons can bear a burden such as this; neither ought they so to do. When men are hired, something must be predicated of their judgment and prudence, and hence, when the employer furnishes them with tools and appliances which, though not the best possible, may by ordinary care be used without danger, he has discharged his duty, and is not responsible for accidents."

Scutmerger (1879) 92 Pa. 276, 37 Am. Rep. 684.

¹⁰ *Bagley v. Delaware, L. & W. R. Co.* (1878) 40 N. J. L. 23, 29 Am. Rep. 208.

¹¹ *Brassman v. Lehigh Valley R. Co.* (1886) 113 Pa. 491, 57 Am. Rep. 479, 6 Atl. 226.

¹² *Clark v. St. Paul & S. C. R. Co.* (1881) 28 Minn. 128, 9 N. W. 581; *Renne v. United States Leather Co.* (1900) 107 Wis. 305, 83 N. W. 473. In Alabama the doctrine laid down is that a railway company is bound, if that is reasonably practicable, to place its overhead bridges at such an elevation that trains, with their customary employees, can pass under them unharmed; but that they may be built below the level of absolute safety, if engineering considerations render it impossible to obtain a greater elevation, or such an elevation would greatly incommode the public in the use of the bridge, or greatly and unduly increase the expense. The view taken is that, under these circumstances, one inconvenience must yield to another. *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710, 6 So. 277.

¹³ *Brassman v. Lehigh Valley R. Co.* (1886) 113 Pa. 491, 57 Am. Rep. 479, 6 Atl. 226; *Pittsburgh & C. R. Co. v.* Vol. I. M. & S.—13.

keep its line free from obstructions.¹ This doctrine has been adopted in Missouri.²

But other decisions are to a contrary effect.³ Three of these, however, antedate the New York case cited above, and one of them, as is pointed out in the note thereto, relies on the case there expressly overruled. The other two, although they were of later date than the New York case, do not refer to it, and are, therefore, only entitled to such weight as may be claimed for them, in view of the fact that the arguments there used were not considered by the courts. To the present writer, those arguments seem to be quite conclusive in favor of holding a company liable for its failure to provide against such an obvious source of danger as cattle straying on the line.

The right of an employee to take advantage of the breach of statutes requiring railway companies to fence their tracks is discussed in chapter XXXIV.

73. Coupling appliances of railway cars and locomotives.— (See also § 88, *post*.)—The cases dealing with injuries caused by coupling ap-

¹ *Donnegan v. Erhardt* (1890) 119 N. Y. 468, 7 L. R. A. 527, 23 N. E. 1051. The court said: "The track must be properly laid and the roadbed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be or come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon plain common-law principles, must be held responsible. Experience shows that animals may stray upon a railroad track, and that, if they do, there is danger that a train may come in collision with them and be wrecked. Adequate measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find, upon the facts of a case, that it was the duty of a railroad company to fence its tracks to guard against such danger." *Langlois v. Buffalo R. Co.* (1854) 19 Barb. 365, was overruled.

² *Dickson v. Omaha & St. L. R. Co.* (1894) 124 Mo. 140, 25 L. R. A. 320, 27 S. W. 470.

³ In a short opinion, Mr. Justice Brewer, while a circuit judge, laid it down that the common law in Colorado did not require a railway company to

fence its track for the benefit of employees. *Cowan v. Union P. R. Co.* (1888) 35 Fed. 43 (complaint relying on such an obligation, held demurrable). In *Wabash R. Co. v. Brown* (1879) 5 Ill. App. 590, it was held, on the authority of the *Langlois Case* (1854) 19 Barb. 365 (see note 1, *supra*), that there was no common-law duty to fence a track. In *Patton v. Central Iowa R. Co.* (1887) 73 Iowa, 306, 35 N. W. 149, also, the ground was taken that railway companies must be allowed to determine for themselves whether they will put up fences in all places where they might. The risks arising from the unfenced condition were said to be obvious, and therefore accepted by trainmen. In *Tillotson v. Texas & P. R. Co.* (1892) 44 La. Ann. 95, 10 So. 400, the court, in applying this doctrine, also held that the fact of the defendant's having fenced a part of its track did not impose upon it the duty of fencing the whole track, and that, in the absence of legislation requiring the entire fencing of the tracks, the company was left with the discretion of placing fencing where there was, in its judgment, danger. In *Ward v. Bonner* (1891) 80 Tex. 168, 15 S. W. 805, the risk of the collision of trains with cattle was held to be an ordinary one.

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pliances and other parts of railway cars furnish a most instructive illustration of the futility of expecting anything like unanimity in respect to the application of the general principle, not disputed by any court, that the law does not require that all the appliances of a certain kind used by an employer should be constructed after the same pattern, but merely that they should all be reasonably safe.

Numerous decisions, in asserting for the employer the privilege of selection which is secured to him by the former clause of this statement, have gone to such lengths that the qualification contained in the latter statement seems to have been, for practical purposes, altogether ignored. Thus, it has been held that negligence cannot be inferred from the mere fact that the drawbars, drawheads, or buffers were so short that the two cars to be connected came dangerously close together when they met;¹ nor from the mere fact that the couplings were so dissimilar that the cars could not be united without an unusual degree of peril.² It should be observed, however, that the serv-

¹ *Whitram v. Wisconsin & M. R. Co.* (1883) 58 Wis. 408, 17 N. W. 124 (not negligence to use an engine, the drawbar of which was too short to permit one of the cars to be safely coupled to or detached from it); *Brooks v. Northern P. R. Co.* (1891) 47 Fed. 687 (drawhead of engine so short as to leave an insufficient space for a brakeman, when the tender had to be attached to a car); *Way v. Illinois C. R. Co.* (1875) 40 Iowa, 341 (deadwoods of foreign cars came very close together when the drawbar failed to enter the drawhead).

² *Pennsylvania Co. v. Ebaugh* (1895) 144 Ind. 687, 43 N. E. 936; *McDonald v. Norfolk & W. R. Co.* (1897) 95 Va. 98, 27 S. E. 821 (two patterns in use); *Ellsbury v. New York, N. H. & H. R. Co.* (1898) 172 Mass. 130, 51 N. E. 415; *Ft. Wayne, J. & S. R. Co. v. Gildersleeve* (1876) 33 Mich. 133 (one car lower than the other); *Botsford v. Michigan C. R. Co.* (1876) 33 Mich. 256 (similar facts). The rule is the same, whether the dissimilar cars belong to the defendant, or to a connecting company. *Woodworth v. St. Paul, M. & M. R. Co.* (1883) 5 McCrary, 574, 18 Fed. 282; *Louisville & N. R. Co. v. Boland* (1892) 96 Ala. 626, 18 L. R. A. 260, 11 So. 667; *Baldwin v. Chicago, R. I. & P. R. Co.* (1879) 50 Iowa, 680 (double deadwoods on foreign cars, single on defendant's); *Kohn v. McNulta* (1892) 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298

(same facts); *Murphy v. Lake Shore & M. S. R. Co.* (1896) 67 Ill. App. 527. In *Norfolk & W. R. Co. v. Brown* (1895) 91 Va. 668, 22 S. E. 496, the court said: "To hold that a railroad company was negligent unless every car in a train was of the same height would, in our opinion, be requiring an extraordinary degree of care on its part. The effect of such a requirement would be to compel such company to have all its own cars changed to or made the same height, or to have only cars of the same height placed in the same train. It would also be required to have the railroad companies whose cars pass over its line make their cars of the same height, or put only those of the same height in the same train, or transfer all freight at its terminal points to other cars, or cease to do business with connecting lines. Such a rule would be impracticable, as well as expensive and burdensome to the railroad company." In *Pittsburgh & L. E. R. Co. v. Henly* (1891) 48 Ohio St. 608, 15 L. R. A. 384, 29 N. E. 575, the court said: "To require that railroad companies shall provide uniform couplings on all their cars would cripple every effort looking towards improvement. No change could be made, no new appliance tested and its utility determined, without incurring a liability no prudent company would care to assume. The occupation of one whose duty is to couple cars is, at best, highly hazardous, and it ac-

ant's excusable ignorance of the conditions introduces into cases of this type a new element, which will enable him sometimes to recover for an injury which would otherwise not be actionable.³ See chapter VII., *ante*.

Other decisions upholding the right of the employer to conduct his business in his own way may be justified on special grounds, applicable to the particular circumstances,—as, where the device in question was one of a merely temporary character,⁴ or where the danger created by the arrangements objected to were such as to be readily apparent to the servant from the very first moment that the cars came

in contact with a sound and enlightened servant. Such attempts as may be made to introduce devices designed to diminish this danger. But, were that not so, it nevertheless would be of little or no practical benefit to one engaged in coupling cars, to require a railroad company to have all its couplings uniform, so long as the exigencies of commerce require that cars of other railroads shall be transported over it, with couplings as varied as human ingenuity, and the taste and judgment of the managers of the railroads of the country, may choose to make them." In *Umbeck v. Lake Shore & M. N. R. Co.* (1882) 83 Ind. 191, it was not specifically determined whether the use of dissimilar couplings was negligence, the action being held not maintainable on the ground of an assumption of the risk. The same uncertainty exists as to the views of the court in *Vorfolk & W. R. Co. v. Emmert* (1887) 83 Va. 640, 3 S. E. 145, as the action failed on the ground that the plaintiff was negligent in not using a crooked coupling link.

Two courts have refused to hold the company negligent in using the ordinary style of drawbar, in combination with that termed the "Miller" coupling. *Toledo, W. & W. R. Co. v. Ashbury* (1877) 84 Ill. 429; *Thomas v. Missouri P. R. Co.* (1891) 109 Mo. 187, 18 S. W. 980. In the former case the court proceeded upon the ground that there was no evidence to show that the "Miller" coupling was more dangerous than the other. But the latter can only be regarded as an unqualified assertion of the company's right to use two different patterns, without regard to the servant's safety, for it is mentioned in the opinion that there was nothing to prevent the platform on the "Miller" car coming against the end of the other. Those

decisions, therefore, are essentially inconsistent with those cited in note 7 *infra*. In *Southern P. R. Co. v. R.* (1893) 9 C. C. A. 229, 13 U. S. App. 229, 60 Fed. 704, the court seems to have assumed that this combination of couplings was negligent, but the ground of the decision was that no proper pin was furnished with which to make the coupling.

In two cases it was even denied to be negligent to use a car, the drawbar of which had dropped below its normal level. *Breuer v. Flint & P. M. R. Co.* (1885) 56 Mich. 625, 23 N. W. 440; *Texas & P. R. Co. v. Rhodes* (1895) 18 C. C. A. 9, 30 U. S. App. 561, 71 Fed. 145. By this view is inconsistent with the generally accepted doctrine that a master is not entitled to carry on his business with instrumentalities which are specifically defective. See § 41, *ante*.

Russell v. Minneapolis & St. L. R. Co. (1884) 32 Minn. 230, 20 N. W. 147 ("Miller" and common coupling used together); *Hungerford v. Chicago & N. W. P. R. Co.* (1889) 41 Minn. 111, 43 N. W. 324 (goose-neck coupling in use on engine, and common coupling on freight car).

Negligence is not predicable from the fact that a rope was used, instead of a chain, to couple two of the cars in a wrecking train. *Tatler v. H.* (1887) 93 Mo. 79, 5 S. W. 810; *Muirhead v. Hannibal & St. J. R. Co.* (1890) 103 Mo. 251, 15 S. W. 530. Nor from the fact that what is known as the "three link coupling" was used as a substitute for a drawbar, in order that the car might be put in a condition to proceed to a station where it could be repaired. *Dunsmuir v. Chesapeake & O. R. Co.* (1887) 83 Va. 288, 2 S. E. 511.

within his range of vision, and it was, therefore, not unreasonable to assume that he could protect himself from injury by the exercise of ordinary care.⁵ See chapter IV.

It is not the duty of a company to equip its cars with deadwoods, so as to prevent the drawheads from coming into contact when the cars are being coupled.⁶ Some of the cases in which the courts have allowed the plaintiff to recover, on the ground that the standard of reasonable safety had not been attained, are, upon the facts presented, irreconcilable with many of those cited in the foregoing paragraphs.⁷

Under this head may be classed the cases in which the use of cars with double buffers has been denied to import negligence: *Kohn v. McNulta* (1893) 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298; *Northern P. R. Co. v. Blake* (1894) 11 C. C. A. 93, 27 U. S. App. 190, 63 Fed. 45; *Michigan C. R. Co. v. Smithson* (1881) 45 Mich. 212, 7 N. W. 791; *Hathaway v. Michigan C. R. Co.* (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634; *Indianaupia R. & W. R. Co. v. Flinnigan* (1875) 77 Ill. 365; *Pennsylvania Co. v. Ebaugh* (1895) 144 Ind. 687, 43 N. E. 936; *Du Sane v. Cincinnati, N. & M. R. Co.* (1892) 93 Mich. 646, 53 N. W. 825; *Chicago, B. & Q. R. Co. v. Curtis* (1897) 51 Neb. 442, 71 N. W. 42; *Toledo, W. & W. R. Co. v. Black* (1878) 88 Ill. 112; *Illinois C. R. Co. v. Harris* (1891) 53 Ill. App. 592; *Osburn v. Knorr & L. R. Co.* (1877) 68 Me. 49, 28 Am. Rep. 16. Upon the same ground, if at all, must be sustained the following decisions. That a chafing iron was used as a means of coupling an engine to a freight car. *Hutter v. Illinois C. R. Co.* (1892) 69 Miss. 642, 13 So. 827. That a locomotive tender was not furnished with an iron rail at the rear, to serve as a hand hold for brakemen. *Loche v. Chicago & W. H. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571. That a common passenger engine with a high tender and a "goose-neck" coupler was used, instead of the switch engine of the pattern usually adopted in large yards. *Fowler v. Chicago & N. W. R. Co.* (1884) 61 Wis. 159, 21 N. W. 40. (switchman here had been instructed in the use of the engine). That the couplers used were too weak to bear the strain put upon them by "double heading" the train. *Hark v. Pennsylvania R. Co.* (1887; Pa.) 9 Cent. Rep. 780, 11 Atl. 459 (contention of plaintiff was that, if two engines were used, one should have been a "pusher"). That a

hook was used as a means of attaching a traction cable alternately to each of two cars which were operated on an incline. *Barke v. Witherbee* (1885) 98 N. Y. 562.

⁵ *Hannigan v. Lehigh & H. River R. Co.* (1898) 157 N. Y. 244, 51 N. E. 992, Reversing (1895) 91 Hun. 300, 36 N. Y. Supp. 293, where it was also said that, even if it were to be assumed that the use of a car without deadwoods is negligent, the plaintiff could not recover on this ground for an injury caused by the drawheads coming together, since practically all the evidence in the case was to the effect that the function of deadwoods was not to prevent drawheads from coming together.

⁶ As, where two pieces of rolling stock, regularly coupled together, were so illy matched that they could not be safely operated. *Krauger v. Louisville, N. A. & C. R. Co.* (1886) 111 Ind. 51, 11 N. E. 957 (tender was 3 or 4 inches higher than deck of engine, and lost motion was thereby generated, rendering the tender liable to be detached from the engine). And where coupling appliances or other parts of the car were such as to render the work of coupling unusually dangerous. *Toledo, W. & W. R. Co. v. Fredericks* (1874) 71 Ill. 294 (drawbars too short); *Lawless v. Connecticut River R. Co.* (1883) 136 Mass. 1 (same facts); *Belair v. Chicago & N. W. R. Co.* (1876) 43 Iowa, 662 (same facts); *Donner v. Delaware & H. Canal Co.* (1895) 171 Pa. 581, 33 Atl. 415 (same facts); *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497 (spring of drawbar too short); *Chicago, R. I. & P. R. Co. v. Linnay* (1893) 7 C. C. A. 656, 19 U. S. App. 315, 59 Fed. 45 (short drawhead on foreign car). In *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698, it was laid down as a general rule, that when freight cars

Other cases in which the action was held to be maintainable, so obviously came within the principle that a master is not justified in exposing his servants to danger, from which they cannot protect themselves by ordinary care, that it is probable that no court would deny that the circumstances presented a case of *prima facie* liability. Cases answering this description are those in which the couplings of two cars were so constructed that they overlapped when they came together, thus exposing the person making the coupling to the danger of being crushed.* But the inchoate right of action thus conceded will, of course, be defeated if, as a matter of fact, it appears that the servant understood the risks involved² (see chapter XVII.), or that he was guilty of contributory negligence.¹⁹

are so defectively made, whether owing to a failure to attach bumpers at all, or to make them sufficiently long to protect a person standing between the cars when in motion, or in consequence of any other fault in construction, that the slightest indiscretion on the part of an operative may endanger his life, the company is liable for any injury resulting from such defects. In *Bennett v. Northern P. R. Co.* (1891) 2 N. D. 112, 13 L. R. A. 465, 49 N. W. 408, where a drawbar was so short as to leave only 10 inches between a car and locomotive when they came together, the usual space, according to the evidence, being from 24 to 30 inches, the court said: "To so diminish this usual standing room that an employee is almost sure to be caught, when in the discharge of his duties, between a heavy standing car and an engine whose momentum, because of its weight, is tremendous, however slow its speed, would seem to be some evidence of negligence. If the space is too narrow for the body, serious injury is almost inevitable in case the servant is caught. There is respectable authority for the proposition that these facts warrant a finding of negligence."

That a coupling, known as a stiff goose-neck, was not reasonably safe when used with freight cars seems to have been assumed in *Grannis v. Chicago, St. P. & K. C. R. Co.* (1890) 81 Iowa, 444, 46 N. W. 1067. In *Western & A. R. Co. v. Bishop* (1873) 50 Ga. 465, it was apparently regarded as negligent to use on a tender a hinged drawbar, which was too short, and liable to turn, when a coupling was made with a car. In *Chicago & A. R. Co. v.*

Monroe (1877) 85 Ill. 25, it was not directly decided whether the absence of an appliance to keep the coupling link from running back imported negligence, the servant being held to have assumed the risk, as an obvious one. In *Scott v. Chicago & M. L. & N. R. Co.* (1895) 167 Mich. 540, 65 N. W. 559, it seems to have been regarded as negligent to use a car with a drawbar which had to be raised and lowered in the saddle to adapt it to other drawheads of different heights. But recovery was denied on the ground that the risk was obvious and therefore assumed.

* *Lauchess v. Connecticut River R. Co.* (1883) 136 Mass. 1 (drawbar of locomotive too low); *Ellis v. New York & E. & W. R. Co.* (1884) 95 N. Y. 546; *Le Clair v. First Dir. of St. Paul & P. R. Co.* (1873) 20 Minn. 9, 641, 1; *Deane v. Brooklyn City R. Co.* (1891) 38 N. Y. S. R. 485, 14 N. Y. Supp. 639; *Norfolk & W. R. Co. v. Brown* (1875) 91 Va. 608, 22 S. E. 490; *Bennett v. Greenwich & J. R. Co.* (1895) 84 Hun. 216, 32 N. Y. Supp. 457; *Muldoon v. Illinois C. R. Co.* (1873) 36 Iowa, 462; *Lynn v. Antrim Lumber Co.* (1901) 105 Ia. 451, 29 So. 874; *Scott v. New York C. & H. R. Co.* (1895) 87 Hun. 612, 34 N. Y. Supp. 277 (coupling used, in the absence of a drawbar, to connect cars).

Upon this ground the plaintiff was denied recovery, where the couplings were so constructed that the cars came dangerously close together (*M. L. & N. R. Co. v. Williston* [1892] 48 Minn. 290, 51 N. W. 374 [drawbars on cars of logging train were so low that they passed under the engine]); *Moore v. Kansas City, Ft. S. & M. R. Co.* [1898] 146 Mo. 572,

There is no dispute as to the point that negligence may be predicated of the failure of a company to supply coupling pins and links of the kind required for the purpose of making a reasonably safe coupling under the circumstances.¹¹

In some cases of this type conformity or nonconformity to common usage is the controlling element, or one of the controlling elements,¹² but it must be remembered that its significance is not the same in all jurisdictions. See chapter VI., *ante*.

74. Other parts or appurtenances of railway cars and locomotives.—

In the cases collected in the note below, recovery was denied upon the ground that a railway company has the right to use whatever pattern of rolling stock it may prefer.¹ But proof that the servant

48 S. W. 487; *Hallett v. St. Louis, K. C. & N. R. Co.* [1878] 67 Mo. 239; and where there was no hand rail on a locomotive (*Chicago & G. W. R. Co. v. Travis* [1892] 44 Ill. App. 466).

¹¹ *Toledo, W. & W. R. Co. v. Ashburn* (1877) 84 Ill. 429 (drawbars overlapped).

¹² *Denyer, T. & G. R. Co. v. Simpson* (1891) 16 Colo. 55, 26 Pac. 339; *Wright v. Northeastern L. Co.* (1886) 25 S. C. 128 (cars of different heights); *Southern P. Co. v. Burke* (1893) 9 C. C. A. 229, 23 U. S. App. 1, 13 U. S. App. 110, 60 Fed. 704 ("Miller" and ordinary coupling apparatus); *St. Louis & E. F. R. Co. v. Keller* (1900) Kan. App. 62 Pac. 905 (coupling pins too large); *Missouri, K. & T. R. Co. v. Hamer* (1897) Tex. Civ. App. 43 S. W. 1078 (same facts).

¹³ On the one hand, it has been held not to be negligent to use drawheads of a certain well-known pattern (*Richardson & D. R. Co. v. Jones* [1890] 92 Ala. 218, 9 So. 276; *Georgia P. R. Co. v. Propst* [1887] 83 Ala. 518, 3 So. 764); nor to use double deadwoods (*Osborne v. Knorr & L. R. Co.* [1877] 68 Me. 48, 28 Am. Rep. 16); nor to omit to introduce a new kind of coupling, as long as the one retained is commonly used by railway companies (*Burns v. Carson, M. & St. P. R. Co.* [1886] 69 Iowa 450, 58 Am. Rep. 227, 30 N. W. 200). As to self-couplers, see *infra*.

On the other hand, companies have been held negligent in continuing to use a kind of coupling which has been generally abandoned by other companies, *Cane v. Missouri P. R. Co.* (1885) 87 Mo. 588 (locomotive drawhead of peculiar construction

dering it dangerous to couple to cars); *Bennett v. Northern P. R. Co.* (1891) 2 N. D. 112, 13 L. R. A. 465, 40 S. W. 408 (drawbars, shorter than those in common use).

In 1877 the supreme court of Illinois held that a railway was not bound to introduce self-couplers. *Toledo, W. & W. R. Co. v. Ashburn* (1877) 84 Ill. 429. More than twenty years afterwards, we find it laid down in North Carolina that the failure to furnish automatic car couplers in common use for light cars is negligence *per se*, which renders a railroad company liable to an employee for injuries received in attempting to couple cars having skeleton drawheads of unequal height. *Traylor v. Southern R. Co.* (1899) 124 N. C. 189, 44 L. R. A. 313, 32 S. E. 550. The difference between the two rulings is significant of the fact that this device had been almost universally adopted during the intermediate period. It has also been held to be for the jury to say, whether it is negligence to send out a train in which only the engine and four cars out of ten are provided with automatic brakes. *Wright v. Southern R. Co.* (1900) 127 N. C. 225, 37 S. E. 221.

Peas & P. R. Co. v. Winnick (1893) 6 C. C. A. 387, 13 U. S. App. 520, 57 Fed. 362 (bridge ignited by sparks from a smoke stack of peculiar design, the characteristics of which were known to the servant). A railway company, not being bound to adopt every new invention, is not negligent, simply because it has failed to exchange a hook for an eyebolt, as a means for the attachment of a brake, though the latter contrivance may have superior merits. *Wooler v. P.* (1870) 32 Md.

did not appreciate the risks involved lets in the operation of the principle discussed in chapter vii.²

In other decisions the determinative element has been the defendant's failure to provide a reasonably safe appliance.³

411, 3 Am. Rep. 143. Negligence cannot be inferred from the following facts: That the cars were not provided with check chains to lessen the risk of derailment. *Ladd v. New Bedford R. Co.* (1876) 119 Mass. 412, 20 Am. Rep. 331. That there were no hooks on a gangway laid from a car to a platform, for the unloading of freight, is not negligence. *D'Arcy v. Long Island R. Co.* (1898) 34 App. Div. 275, 54 N. Y. Supp. 553; *La Pierre v. Chicago & G. T. R. Co.* (1894) 99 Mich. 212, 58 N. W. 60 (use for fifteen years without accident was here emphasized). That a block and tackle was not provided to guide a cable which, while it was being used to draw a plow by which earth was unloaded from flat cars, was laid in a groove in a socket which held a stake on the side of one of the cars. *Nolan v. Montana C. R. Co.* (1901; Mont.) 63 Pac. 926. That the pattern of brake used was more dangerous than another kind. *Winkler v. St. Louis Basket & Box Co.* (1897) 137 Mo. 394, 38 S. W. 921. That there was no fusible plug in a locomotive boiler, and no stationary light to enable the engineer to see the test cocks. *Leury v. Lehigh Valley R. Co.* (1894) 76 Hun. 575, 28 N. Y. Supp. 187. That a car not originally designed for a caboose was used as one. *Galbreath, H. & S. A. R. Co. v. Davis* (1893; Tex. Civ. App.) 23 S. W. 1019. (Compare Pennsylvania case cited in note 4, *infra*.) That a device for picking up the cable of a motor car was not as safe as another kind. *Friel v. Citizens' R. Co.* (1893) 115 Mo. 503, 22 S. W. 498. That a street car had no guard extending outside the wheels to prevent the feet of employees who might fall off the car from getting on the track. *Denver Tramway Co. v. Nesbit* (1896) 22 Colo. 408, 45 Pac. 405.

Hand cars need not be of any particular pattern. *Hamilton v. Chicago, R. I. & P. R. Co.* (1894) 93 Iowa, 46, 61 N. W. 415. In a Texas case the court seemed to consider that, as a hand car, known as the "Sheldahl," was, on the whole, considered an improvement over those in ordinary use at the time when it was introduced, there was no negligence in adopting it, though it may have

been more likely to be derailed, owing to its lightness. But the decision was that, even conceding this lightness to be a defect, the danger arising from it was fully appreciated by the servant. *Gulf, C. & S. F. R. Co. v. Williams* (1888) 72 Tex. 159, 12 S. W. 172. In *International & G. N. R. Co. v. Doyle* (1878) 49 Tex. 190, it seems to have been considered that the use of an uncovered, eight-sided iron handle on the crank of a hand car did not expose a section hand, who grasped it with a gloved hand, to dangers exceeding those which were apparent with ordinary care and attention. But the precise position of the court on this point is not very clear.

Louisville & N. R. Co. v. Binger (1894) 107 Ala. 645, 18 So. 75 (broke of a certain pattern dangerous to inexperienced brakeman). The driver of a train car in a mine may recover for an injury caused by his striking against a low place in the roof, while he was sitting, in the usual manner, on a new car which he did not know to be higher than the ones he had been using. *Tennessee Coal, I. & R. Co. v. Carrier* (1901) 47 C. C. A. 161, 108 Fed. 19.

² A jury is warranted in finding negligence where the defendant used a locomotive, the footboard of which was about 9 inches, and the pilot 5 inches, above the rails (*Chicago & N. W. R. Co. v. Delaney* [1897] 169 Ill. 581, 48 N. E. 476 [pilot struck obstruction, which caused the breaking of the footboard on which plaintiff was standing]); and where there is no continuous hand hold on a switch engine (*Wible v. Burlington, C. R. & N. W. Co.* [1895] 100 Iowa, 557, 80 N. W. 679); and where a "push pole" which had no handle was used for propelling cars (*Philadelphia, W. & B. R. Co. v. Keenan* [1883] 103 Pa. 125); and where a yard engine with a square, instead of a sloping, tank is used (*Missouri P. R. Co. v. Lehmberg* [1889] 75 Tex. 61, 12 S. W. 838); and where no handles were provided on tank cars for the use of brakemen engaged in coupling (*Graham v. Boston & A. R. Co.* [1892] 156 Mass. 4, 30 N. E. 359); and where an ordinary freight engine is used for switching purposes in a yard, the evi-

Not a few decisions are controlled by the element of conformity or nonconformity to common usage.⁴ Others give prominence to, and are controlled by, the principle that appliances are only required to be reasonably safe for the purpose for which they are furnished.⁵

dence being that the latter is handled more easily, and that the engineer who is operating it can see signals more easily (*Missouri P. R. Co. v. Lamothe* [1890] 76 Tex. 219, 13 S. W. 194); and where cars without ladders are used (*Greenleaf v. Illinois C. R. Co.* [1870] 29 Iowa, 14, 4 Am. Rep. 181); and where cars were sent out, unprovided with proper lights (*Chicago & N. W. R. Co. v. Taylor* [1873] 69 Ill. 461, 18 Am. Rep. 626 [cars were making a flying switch]; *Denver & R. G. R. Co. v. Spies* [1899] 26 Colo. 17, 55 Pac. 1093 [cupola of caboose not lighted]). See also *Wedgwood v. Chicago & N. W. R. Co.* (1877) 41 Wis. 478 (long bolt unnecessarily projecting from brake beam); *Missouri P. R. Co. v. Fox* (1898) 56 Neb. 746, 77 N. W. 130. (1900) 60 Neb. 531, 83 N. W. 744 (truss rod projecting an unnecessary length through the nut in which it was screwed); *Evans v. Dolk* (1888; Tex.) 9 S. W. 550 (hand car derailed, owing to the fact that the pinion wheel was too small, so that the cogs caught, binding the car wheels to the rail as they were ascending a grade on a curve). Evidence that it is practicable to place railings about the top of tenders to increase their capacity, and that this was not done in the case in hand, is admissible on the question of negligence in loading a tender so that coal fell from it and injured the plaintiff. *Union P. R. Co. v. Erickson* (1894) 41 Neb. 1, 29 L. R. A. 137, 59 N. W. 347.

⁴It is not negligence to use on dirt cars brakes of a kind that are in common use, though not the best. *Henry v. Staten Island R. Co.* (1880) 81 N. Y. 373. Nor to receive into a train a foreign car of a kind which is in common use, although it has no hand hold or grab-iron at the end, the evidence being that the steps were so constructed as to serve for that purpose. *Dooner v. Delaware & H. Canal Co.* (1895) 171 Pa. 581, 33 Atl. 415. Nor to have cars with holes cut in the projecting roof at the ends, to enable brakemen to reach the ladder. *Benson v. New York, V. H. & H. R. Co.* (1901; R. L.) 49 Atl. 689. Nor to have projecting bolt on lever of hand car. *Carey v. Boston & M. R. Co.*

(1893) 158 Mass. 228, 33 N. E. 512. Nor to use as a caboose a box car with no platform or guard rail at either end. *Davis v. Baltimore & O. R. Co.* (1893) 152 Pa. 314, 25 Atl. 498. Nor to use the ordinary appliances for the purpose of carrying broad-gauge car bodies on narrow-gauge trucks. *Titus v. Bradford, B. & K. R. Co.* (1890) 136 Pa. 618, 20 Atl. 517. Nor to adopt a certain method of fastening the arch pipe of a locomotive, when there is no evidence of any common usage in respect to a different method. *Hale v. New York & N. E. R. Co.* (1899) 174 Mass. 317, 54 N. E. 844. Nor to omit to provide a resistance coil, to make the starting of an electric street car more gradual, there being no evidence that such a device was in common use. *Lorimer v. St. Paul City R. Co.* (1892) 48 Minn. 391, 51 N. W. 125. Negligence cannot be inferred from the failure to adopt the "Potter" draft iron with three couplings, where it appears that the single coupling is still extensively used. *Burns v. Chicago, M. & St. P. R. Co.* (1886) 69 Iowa, 450, 58 Am. Rep. 227, 30 N. W. 25. The use of hand-holds on cars, placed lengthwise instead of cross-wise, is not negligent, though a majority of railway companies use the latter kind. *Chicago & G. W. R. Co. v. Armstrong* (1895) 62 Ill. App. 228. On the other hand, it is negligent to run a freight engine without such a generally used device as a cowcatcher (*Tennessee Coal, I. & R. Co. v. Kyle* [1890] 93 Ala. 1, 12 L. R. A. 103, 8 So. 764); or to operate cars of a generally discarded pattern (*Palmer v. Denver & R. G. R. Co.* [1882] 3 McCrary, 635, 12 Fed. 392 [freight cars had only four wheels, and those were attached so rigidly that they could not accommodate themselves to curves]).

⁵Thus, it has been held that the safety chains between an engine and its tender need not be strong enough to bear the strain put upon them when the couplings give way. *Gardner v. St. Louis & S. F. R. Co.* (1896) 135 Mo. 90, 36 S. W. 214. And that there is no obligation to construct the rims of gravel cars in such a manner that they will serve as a safe means of support

Others again exemplify the exception to this principle, *viz.*, that, if the master himself puts an appliance to a new use, his liability is tested by the same standard as if it had been originally furnished for that purpose.⁶ See § 28, *ante*. Whether a "pushing pole" without a handle is a reasonably safe and suitable instrument for the work of making up trains, is a question for the jury.⁷

75. Elevators.—(See also § 91, *post*.)—An employer who uses an elevator for the conveyance of his servants must provide it with a reasonably effective safety-device to arrest the fall of the cage in case of an accident.¹ His duty in this regard is fulfilled if he furnishes a device of an approved style.² The elevator must also be made reasonably safe in other respects.³

to a servant attempting to mount the cars while in motion. *Timmons v. Central Ohio R. Co.* (1856) 6 Ohio St. 105. And that push cars need not be so constructed that employees can safely ride upon them. *York v. Kansas City, C. & S. R. Co.* (1893) 117 Mo. 405, 22 S. W. 1081. But this last-mentioned position is doubtless subject to some qualification, where the push cars are used for the conveyance of employees, with the acquiescence of the company. See *Miller v. Union P. R. Co.* (1883) 5 McCrary, 300, 17 Fed. 67, and the following note.

⁶The case was held to be for the jury where an engine used for switching purposes was not provided with the proper safeguards for that work. *Smith v. Buffalo, R. & P. R. Co.* (1893) 72 Hun, 545, 25 N. Y. Supp. 638. And where a road engine with a flat car in front of it was used, instead of a yard engine, for coupling purposes, the result being that an employee, being misled by the manner in which the light from the headlight was thrown on the flat car, was run over while he was crossing the track. *Texas & P. R. Co. v. Gentry* (1896) 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104.

⁷*Philadelphia, W. & B. R. Co. v. Keenan* (1883) 103 Pa. 124.

¹*Fairbank Canning Co. v. Innes* (1887) 24 Ill. App. 33. The existence of this obligation is assumed in the cases as to freight elevators cited *infra*.

²*Kaye v. Rob Roy Hosiery Co.* (1889) 51 Hun, 519, 4 N. Y. Supp. 571; *Biddiscomb v. Cameron* (1898) 35 App. Div. 561, 55 N. Y. Supp. 127.

³Whether an elevator door which closes by pneumatic pressure, operated by a button in the floor, and which closes

with force when the operator's foot is removed from the button, and which, when it has once started to close, cannot be stopped, is a dangerous appliance, is a question for the jury. *Auld v. Manhattan L. Ins. Co.* (1900) 165 N. Y. 610, 58 N. E. 1085, Affirming (1898) 34 App. Div. 491, 54 N. Y. Supp. 222. The proprietor of an elevator is not, as matter of law, free from negligence towards an employee who was killed by falling into the shaft while running the elevator, where the entire front of the elevator was open, and at the floor where the accident occurred the doors were open, a wooden bar placed across them about 34 feet from the floor, and the horizontal edge of the wooden lining of the shaft projected downward from above, and the operating cable was only a foot from the opening. *Dallemand v. Saalfeldt* (1898) 175 Ill. 310, 48 L. R. A. 753, 51 N. E. 645, Affirming (1897) 73 Ill. App. 151. A bucket suspended in a shaft by a rope, the sway of which is confined by a "follower," consisting of pieces of timber which are fastened across the shaft above the bucket, and ascend with it, is not reasonably safe where the follower is not attached firmly to the bucket, so that if any obstruction causes the stoppage of the follower the bucket will stop also. *Boardman v. Brown* (1887) 44 Hun, 336 (follower got caught, and afterwards fell on the persons in the bucket). Negligence may be inferred where a girder protrudes so far into the shaft of a freight elevator as to be in dangerous proximity to the edge of the platform. *Olson v. Hanford Produce Co.* (1900) 111 Iowa, 347, 82 N. W. 903.

On the ground that the nut of an eye-bolt, by which the hoisting cable of a

Where an elevator is designed solely for lifting goods, its construction must be such that it can be safely handled by servants.⁴ But the employer is entitled to act on the assumption that they will not use it as a means of conveyance, and is, therefore, not bound to provide it with those safety devices which are obligatory in the case of passenger elevators.⁵ In a Maryland case, this distinction was taken—that, where employees are merely allowed to use such an elevator as licensees, the measure of care owed to them is that which is designated as “ordinary,” but, if they are authorized or directed to use it as a means of transportation, the employer is required to exercise “great care and caution,” both in the construction and operation of the machine, so as to render it as free from danger as careful foresight and precaution may reasonably dictate.⁶ If a safety device is provided, the master’s duty is performed if it is one which is commonly used on a freight elevator which the servants are authorized to use.⁷

mine elevator was attached to the cross beam at the top of the cage, was not intended to serve as a hand-hold, recovery was denied, where the nut had worked loose, thus allowing the bolt to drop down about an inch when the cage was at rest, and the finger of a miner, who had grasped the nut on entering the cage, was crushed when the cable was tightened and the nut drawn up against the cross beam. *Jayne v. Schencking Coal Co.* (1896) 108 Mich. 242, 65 N. W. 971.

⁴A steamship is liable for injury to a fireman engaged in raising ashes by means of a patent steam-hoist which, when properly adjusted, could not raise the bucket containing the ashes to the upper edge of the door through which they were to be taken, in the cutting off of his finger by its being caught between the edge of the bucket and the top of such door. *New York & W. S. S. Co. v. McLaughlin* (1895) 14 C. C. A. 652, 28 U. S. App. 424, 67 Fed. 797. An injury caused by the bursting of a valve in an airhoist, which is insufficient to sustain the pressure put upon it, is actionable. *Slattery v. Walker & P. Mfg. Co.* (1901) 179 Mass. 307, 60 N. E. 782. On the ground of conformity to usage, the absence of a railing round a freight elevator was denied to be negligence in *Whitney v. Block* (1894) 95 Ga. 15, 21 S. E. 985.

⁵*Stringham v. Hilton* (1888) 111 N. Y. 188, sub nom. *Stringham v. Stewart*,

1 L. R. A. 483, 18 N. E. 870; *Kern v. De Castro & D. Sugar Ref. Co.* (1890) 125 N. Y. 50, 25 N. E. 1071; *Riordan v. Ocean S. S. Co.* (1900) 32 N. Y. S. R. 328, 11 N. Y. Supp. 57, Affirmed (1891) 124 N. Y. 655, 26 N. E. 1027; *O’Brien v. Western Steel Co.* (1889) 100 Mo. 182, 13 S. W. 402; *Sievers v. Peters Box & Lumber Co.* (1898) 151 Ind. 642, 50 N. E. 877, Rehearing denied in 151 Ind. 662, 52 N. E. 399. The point that the elevator upon which the plaintiff was being conveyed was intended for freight only cannot be raised on demurrer. *Anderson v. Hayes* (1899) 101 Wis. 519, 77 N. W. 903.

⁶*Wise v. Ackerman* (1892) 76 Md. 375, 25 Atl. 424 (recovery allowed where a joist, which projected so far into the elevator shaft that there was a space of only about 2 inches between it and the edge of the elevator platform, crushed the plaintiff’s foot, which happened to extend outside the platform). In *Strawbridge v. Bradford* (1889) 128 Pa. 200, 18 Atl. 346, the question of the employer’s negligence was held to be for the jury, where the evidence was that two sides of the elevator cage were unguarded; that it ran in a shaft the sides of which were 10½ inches from the platform, and into which, at each floor, unbeveled sills projected 8½ inches; and that it was intended that boys should use it.

⁷*Bocess v. Clausen & P. Brewing Co.* (1896) 12 App. Div. 366, 42 N. Y. Supp.

76. Unguarded machinery; generally.—(See also § 96, *post.*)—*a. Conditions not reasonably safe.*—The rationale of some decisions seems to be simply the principle that a jury is warranted in finding that the absence of a guard creates conditions of such a character that a servant who has to work with or near the machinery cannot perform his duties in reasonable safety by the exercise of ordinary care.¹ From this standpoint, evidence showing that the servant understood the risks created by the want of a guard is treated as being merely matter of defense, whether on the ground of an assumption of the risk or of contributory negligence.²

In some of the cases where recovery was allowed, the place where

848 (the safety device here was of such a nature that it only served as a safeguard against certain kinds of accidents).

¹ *Wallace v. Cutler Paper Mills Co.* (1892) 19 Se. Sess. Cas. 4th series, 915; *King v. Ford River Lumber Co.* (1892) 93 Mich. 172, 53 N. W. 10; *Roux v. Blodgett & D. Lumber Co.* (1893) 94 Mich. 607, 54 N. W. 492; *Anderson v. C. N. Nelson Lumber Co.* (1896) 67 Minn. 79, 69 N. W. 630; *Ames & F. Co. v. Strachurski* (1893) 145 Ill. 192, 34 N. E. 48 (covering over cogwheels was not fastened in any way, and employee who was passing slipped upon the floor and fell in such a manner as to displace the cover, and thus put his hand between the cogs). The question of negligence on the part of an employer in failing to guard a small circular saw, extending about 3 inches above a table, and running very rapidly, but not ordinarily used, is for the jury, where the plaintiff was injured while throwing blocks of wood over the table. *Egan v. Sawyer & A. Lumber Co.* (1896) 94 Wis. 137, 68 N. W. 756. An employer is not, as matter of law, free from negligence in placing a pulley made of rags, the ends of which are left loose, on a shaft, easily accessible, where the belt used on it is in a poor condition and requires frequent repair and readjustment, thus bringing someone in close proximity to the pulley. *Dodd v. Bell* (1897) 15 App. Div. 258, 44 N. Y. Supp. 198. An employer who leaves an enormous, rapidly revolving cogwheel partially unprotected, so that tongs carrying large masses of iron are liable to be caught and broken in it, and the pieces thrown all about the

room with such force as to kill any person with whom they come in contact, after having been advised by a skilled workman to encase it, is liable for an injury to a servant, resulting from the tongs catching in the cogs. *Richlands Iron Co. v. Elkins* (1893) 90 Va. 249, 17 S. E. 890. In *Nadau v. White River Lumber Co.* (1890) 76 Wis. 120, 43 N. W. 1135, the court reasoned thus: "That this set of cogwheels was dangerous, even to the most experienced workman, can hardly admit of a doubt. A slight forgetfulness on the part of the workman while attending to his work might bring him in contact with it; an accidental slip while at work might bring his clothing and limbs in contact with it; and we have no hesitancy in holding, when the employer places such a dangerous piece of machinery into which his employee, by the least forgetfulness or unavoidable accident, may be thrown and seriously injured, in the immediate vicinity of a place where his employee must do his work, he fails to furnish him a reasonably safe place for doing his work, and is guilty of gross negligence,—especially when the usefulness of the machine is not enhanced by reason of its being uncovered, and when the expense of covering would be a mere trifling sum."

² See *Wallace v. Cutler Paper Mills Co.* (1892) 19 Se. Sess. Cas. 4th series, 915; *Nadau v. White River Lumber Co.* (1890) 76 Wis. 120, 43 N. W. 1135; *Anderson v. C. N. Nelson Lumber Co.* (1896) 67 Minn. 79, 69 N. W. 630, *supra*; *Collins v. Laconia Car Co.* (1894) 68 N. H. 196, 38 Atl. 1047 (conditions were spoken of as a "defect" in the opinion).

the uncovered machinery was set up was imperfectly lighted.³ But it does not appear that this circumstance can ever be a differentiating one, either under the theory that the want of a guard imports negligence, or under the theory that it does not.

b. *Liability tested by the servant's knowledge or ignorance of the conditions.*—The rationale of several decisions is that a court cannot say, as matter of law, that the maintenance of the unfenced machinery is not negligence, where the evidence tends to show that the injured servant was excusably ignorant, either of the general risks incident to the use of such machinery, or the particular risks incident to the use of the machinery in question.⁴ For general principle, see § 58, *ante*.

In the cases in which the servant's knowledge is the controlling element, two conceptions emerge. Some of them proceed upon the theory that, under ordinary circumstances, the obvious character of

³*Jensen v. Hudson Sawmill Co.* (1897) 98 Wis. 73, 73 N. W. 434 (un-guarded saw); *Stubbs v. Atlanta Cotton-Seed Oil Mills* (1893) 92 Ga. 495, 17 S. E. 746 (unboxed gearing); *Knuth v. Geo. A. Weiss Milling & Elevator Co.* (1897) 72 Ill. App. 389 (servant's clothes caught on a shaft in a poorly lighted room); *Gisson v. Schwabacher* (1893) 99 Cal. 419, 34 Pac. 104 (similar facts).

⁴In *Wheeler v. Watson Mfg. Co.* (1883) 135 Mass. 294, the court said: "The jury might well hold the defendant to be acquainted with the tendency of a board, when warped, to spring back during the operation of sawing; and also with the tendency, especially on the part of an inexperienced person, to put his hand around behind the saw for the purpose of steadying the board, if running unsteadily. This is not a danger, so obvious that an inexperienced workman, just beginning to learn how to use a circular saw in splitting boards, must be held necessarily to take cognizance of it. The general danger of contact with such a saw, when in motion, is plain; the particular danger to be guarded against, from behind the saw, which, according to some of the testimony, is the danger from which accidents most commonly arise, might not be known without practice." An allegation that the defendant maintained an uncovered shaft the danger of which was known to him, and not to the servant, is sufficient to take the case to the

jury. *Miller v. Husen Cotton Seed Oil Co.* (1897; Tex. Civ. App.) 41 S. W. 366. See also *American Tobacco Co. v. Strickling* (1898) 88 Md. 500, 41 Atl. 1083 (clothing of inexperienced girl caught on upright revolving shaft while she was sweeping the floor); *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506 (hand of inexperienced boy was caught in un-guarded cogs); *Legare v. Explin* (1897) Rap. Jud. Quebec, 12 C. S. 113 (boy of fifteen injured by board-cutting machine); *Barbo v. Bassett* (1886) 35 Minn. 485, 20 N. W. 198 (cogwheels, formerly protected, but not covered at the time of the accident; servant had no notice of the change); *Craver v. Christian* (1887) 36 Minn. 413, 31 N. W. 457 (similar facts); *White v. Nonantum Worsted Co.* (1887) 144 Mass. 276, 11 N. E. 75 (want of guard had increased danger, owing to the fact that there had been a change in the direction of the revolution of the fan of a machine, and the servant had no notice of the fact that the fan was running in this dangerous manner). For similar reasons it has been held that the case cannot be taken from the jury, where, owing to the improper adjustment of a guard rail on a mangle, the servant was misled as to the amount of protection which it afforded, and thus allowed her hand to be drawn into the machine. *Stager v. Troy Laundry Co.* (1901) 38 Or. 480, 53 L. R. A. 459, 63 Pac. 645.

the danger which the servant is required to encounter in working near unfenced machinery relieves the employer of any obligation to change the condition.⁵ In other words, an employer owes no duty to a servant to place a guard on a machine which the servant has agreed to work with in the condition in which he finds it.⁶

The effect of this principle is that, where the employee has knowledge that machinery about which he is employed is complicated and dangerous, neglect to fence or cover is not of itself sufficient to make the master liable. Under such circumstances proof of some independent breach of duty is regarded as an essential prerequisite to the maintenance of an action for an injury caused by contact with the machinery.⁷ Such a failure of duty is shown where it appears that the servant received no instructions as to the dangers of the work, and the facts in evidence do not charge him with knowledge of those dangers.⁸

⁵ *McGuerty v. Hale* (1894) 161 Mass. 51, 36 N. E. 682; *Wilson v. Massachusetts Cotton Mills* (1897) 169 Mass. 67, 47 N. E. 506; *Murphy v. American Rubber Co.* (1893) 159 Mass. 266, 34 N. E. 268; *Rock v. Indian Orchard Mills* (1886) 142 Mass. 523, 8 N. E. 401; *Foley v. Pottee Mach. Works* (1889) 149 Mass. 294, 4 L. R. A. 51, 21 N. E. 304; *Tinkham v. Sawyer* (1891) 153 Mass. 485, 27 N. E. 6; *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506; *Guedelhof v. Ernsting* (1899) 23 Ind. App. 188, 55 N. E. 113; *Rudd v. Bell* (1887) 13 Ont. Rep. 47; *Schroeder v. Michigan Car Co.* (1885) 56 Mich. 132, 22 N. W. 220; *Sanborn v. Atchison, T. & S. F. R. Co.* (1886) 35 Kan. 292, 10 Pac. 860; *Hayden v. Smithville Mfg. Co.* (1861) 29 Conn. 548; *Bond v. Smith* (1891) 39 N. Y. S. R. 124, 14 N. Y. Supp. 932. In *Dillenberger v. Weingartner* (1900) 64 N. J. L. 292, 45 Atl. 638, it was not explicitly decided whether the absence of a guard did or did not import negligence, recovery being denied on the ground that the plaintiff appreciated and assumed the risk.

⁶ *Toomey v. Donovan* (1893) 158 Mass. 232, 33 N. E. 396; *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396; *Vicary v. Keith* (1873) 34 U. C. Q. B. 212.

⁷ *Craver v. Christian* (1887) 36 Minn. 413, 31 N. W. 457; *Murphy v. American Rubber Co.* (1893) 159 Mass. 266, 34 N. E. 268. It is not actionable

negligence *per se* for a master to omit to protect or cover dangerous machinery, but the question of negligence must depend upon the circumstances of each case,—such as the nature of the employment, degree of exposure to danger, and notice thereof to the employee. *Carroll v. Williston* (1890) 44 Minn. 287, 46 N. W. 352.

Murphy v. American Rubber Co. (1893) 159 Mass. 266, 34 N. E. 268; *Siroboda v. Ward* (1879) 40 Mich. 420; *Craver v. Christian* (1887) 36 Minn. 413, 31 N. W. 457 (here the covering originally placed over the machinery had been removed; master's liability held not to be diminished by the fact that the original object of the covering was to keep out dust). But a court, after the jury has been told that the defendant was bound to give the plaintiff suitable instructions, is not required to give an instruction of the following tenor: "If the jury are satisfied that the defendant ran the machine on which the plaintiff was injured, in the location it was in at the time of the injury, without fencing, or otherwise sufficiently guarding it, so that the plaintiff was exposed, while in the defendant's employ, to danger of which it gave no sufficient notice, then the defendant was negligent." Such an instruction implies that the defendant was negligent if he did not fence the machine, and is therefore regarded as misleading. *Rock v. Indian Orchard Mills* (1886) 142 Mass. 522, 8 N. E. 401.

Other decisions rely upon the consideration that the servant is, or ought to be, able to protect himself from a danger of this description, if he appreciates it.⁹

c. Liability negatived on the ground that a master may carry on his business in his own way.—In some of the cases cited in the last subdivision, as well as in others, the doctrine discussed in chapter v., *ante*, has been adverted to as a reason for holding that a servant cannot recover for injuries caused by uncovered machinery.¹⁰ The master is protected, though the suggested change might have been made at a trifling expense.¹¹ The impracticability of making a change and using the machine for the purposes for which it was designed is sometimes emphasized as a factor tending to exonerate the master.¹²

By one of the courts which refers the master's nonliability to the doctrine applied in the cases cited under the present subsection, it has lately been held that the use of an unguarded saw is not negligent, where sufficient room is left to carry on the work to be done.¹³

This proviso presumably indicates the limit beyond which the master's privileges, as regards the arrangement of his plant, do not extend.

d. Conformity or nonconformity to usage.—In several cases the use of machinery without a guard has been denied to be negligence for the reason that common usage sanctions such an arrangement,¹⁴ or that there was no evidence going to show that it was the gen-

⁹ *Young v. Burlington Wire Mattress Co.* (1890) 79 Iowa, 415, 44 N. W. 693; *Meyer v. Meyer* (1890) 86 Ill. App. 417.

¹⁰ *Foley v. Petter Mach. Works* (1889) 149 Mass. 294, 4 L. R. A. 51, 21 N. E. 504; *Kleene v. Kunkhardt* (1893) 160 Mass. 230, 35 N. E. 458; *Feely v. Pearson Cordage Co.* (1894) 161 Mass. 426, 37 N. E. 368; *Gleason v. Smith* (1898) 172 Mass. 50, 51 N. E. 460; *Rock v. Indiana Orchard Mills* (1886) 142 Mass. 522, 8 N. E. 401; *Plunkett v. Donoran* (1891) 36 N. Y. S. R. 91, 12 N. Y. Supp. 454; *Townsend v. Langles* (1890) 41 Fed. 919; *Schroeder v. Michigan Car Co.* (1885) 56 Mich. 132, 22 N. W. 220; *Roth v. Northern Pacific L. v. Irving Co.* (1889) 18 Or. 205, 22 Pac. 842; *Arizona Lumber & Timber Co. v. McCreary* (1895; Ariz.) 42 Pac. 952.

¹¹ *Sjogren v. Hall* (1884) 53 Mich. 274, 18 N. W. 812 (bull wheel in a saw-mill). Where there is a satisfactory reason for the difference, negligence cannot be inferred from the fact that the

guards furnished for emery wheels used for certain work are lighter than those used for other work. *Berning v. Medart* (1894) 56 Mo. App. 443. The omission to screw an iron plate over an emery wheel, to confine the fragments if it should burst, was denied to be negligence, in *Augenstein v. Jones* (1891) 139 Pa. 183, 21 Atl. 24.

¹² *Palmer v. Harrison* (1885) 57 Mich. 182, 23 N. W. 624; *Young v. Burlington Wire Mattress Co.* (1890) 79 Iowa, 415, 44 N. W. 693; *Keenan v. Waters* (1897) 181 Pa. 247, 37 Atl. 342; *Mackin v. Alaska Refrigerator Co.* (1894) 100 Mich. 276, 58 N. W. 999.

¹³ *Journeaux v. E. H. Stafford Co.* (1899) 122 Mich. 396, 81 N. W. 259.

¹⁴ *Cunsingham v. Bath Iron Works* (1899) 92 Me. 501, 43 Atl. 106; *Young v. Burlington Wire Mattress Co.* (1890) 79 Iowa, 415, 44 N. W. 693; *Ford v. Anderson* (1891) 139 Pa. 261, 21 Atl. 18; *Sanborn v. Atchison, T. & S. F. R. Co.* (1886) 35 Kan. 292, 10 Pac. 860; *Mackin v. Alaska Refrigerator Co.*

eral custom to operate it with a guard.¹³ But the significance of this factor will obviously depend on the doctrine held in the jurisdiction where the accident occurred.¹⁴ See chapter VI., *ante*.

On the other hand, liability has been imputed on the ground that the defendant failed to conform to usage.¹⁵

e. The probability or improbability of injury resulting from the machinery in question, — respect being had to its position and the character of the work in which the servant was engaged, is a circumstance which will either strengthen the inference otherwise indicated, or will operate as a differentiating element, according to the general theory of the court regarding the liability of the master for injuries of this sort.¹⁶

(1894) 100 Mich. 276, 58 N. W. 999; *Fritz v. Salt Lake & O. Gas & E. L. Co.* (1899) 18 Utah, 493, 56 Pac. 90; *Townsend v. Langley* (1900) 41 Fed. 919; *Higgins v. Fanning* (1900) 195 Pa. 399, 46 Atl. 102; *Stoll v. Hoopes* (1888; Pa.) 22 W. N. C. 159, 14 Atl. 658 (apparently this is the ground of the decision, but no reasons are stated in the brief opinion). A strong and somewhat dubious application of this principle is that the failure to provide screens in a bottling establishment, to protect employees from fragments of exploding bottles, does not import negligence. *Omaha Bottling Co. v. Thieler* (1899) 59 Neb. 257, 80 N. W. 821.

¹³ On this ground, it was denied to be negligent to omit to have a "spreader" for a saw (*Delaware River Iron-Ship Bldg. & Engine Works v. Nuttall* [1888] 119 Pa. 149, 13 Atl. 65); and to have a guard to prevent planks, forced over "dead" rollers, from coming into contact with a slab saw (*Mississippi River Logging Co. v. Schneider* [1896] 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. 195).

¹⁴ In *Craver v. Christian* (1887) 36 Minn. 413, 31 N. W. 457, common usage was held not to be a protection to the master.

¹⁵ *Jensen v. Hudson Sawmill Co.* (1897) 98 Wis. 73, 73 N. W. 134; *Lemmer v. St. Joseph Furniture Mfg. Co.* (1897) 70 Mo. App. 209. A duty to screen saws cannot be established by evidence that such screens were used on machines different from the one in question. *Journeaux v. E. H. Stafford Co.* (1899) 122 Mich. 396, 81 N. W. 259.

¹⁶ It is for the jury to say whether a master is negligent in not guarding a

revolving shaft over which, with the knowledge and acquiescence of his foreman, the workman was in the habit of stooping to remove lumps of ore from a spout on the opposite side, or in failing to adopt another method of doing the work. *Tobin v. New Glasgow Ice, Coal & R. Co.* (1894) 26 N. S. 268. Negligence may be inferred where no guard is placed over cogwheels, across which a servant is frequently obliged to lean in order to open a gate for the passage of billets of iron, the amount of exertion required being variable, and often very considerable. *Rummell v. Dilworth* (1885) 111 Pa. 343, 2 Atl. 355. An employer is negligent in furnishing for an employee a circular saw, for the purpose of sawing blocks 3 inches long, which is operated by placing the wood on a slide and pushing the slide towards the saw, holding the wood in place with the hand, where the slide is unsupported for 18 inches next to the saw, and when if any pressure is placed on that end the slide is thrown off, and the operator's hand is likely to be injured. *Stillier v. Bohm Mfg. Co.* (1900) 80 Minn. 1, 82 N. W. 981. A rapidly revolving shaft in a sawmill, below and only a few feet from a narrow elevated platform where an inexperienced boy is stationed with a hook or pike pole, charged with the duty of keeping chutes clear of clogged slabs by striking the hook into them and pulling them towards him, and liable to be precipitated upon the shaft if the hook or slabs are unexpectedly released, — is a dangerous place, and ought to be covered. *King v. Ford River Lumber Co.* (1892) 93 Mich. 172, 53 N. W. 10. The court said: "There is a difference between

77. Revolving shafts.—The doctrine adopted by some courts is that a master is, as matter of law, not guilty of negligence in maintaining a shaft with a projecting screw, this doctrine being referred to the principle that it is a common contrivance.¹ Or, as the rule may also be stated, to leave gearings, set screws, and other parts of machinery unboxed is not negligence, where other manufacturers in the same line of business operate their machinery in the same manner.² It follows, therefore, that, although there may be a safer kind of set screw

working with or at a piece of machinery, and being engaged in other work in close proximity to such machinery. In the one case, attention is naturally directed to the machinery; and in the other, attention is directed to the work, and not to the machinery, and the more attention is given to the work, the less must necessarily be given to the machinery. Take the present case. Slabs were clogged, and were collecting in this chute. The boy had not control of the work, but the work was driving him. To what would his attention be naturally directed, and what would naturally challenge his entire attention, if not the clogged chute? If, from the nature of this boy's work, he was liable to be thrown against this shaft, sudden contact with which was dangerous, can there be any question but that the place was one of danger? There was testimony tending to show that shafting like this was not usually covered; but the necessity for covering any dangerous machinery arises from the probability of contact with it, from its proximity to persons engaged at work in its vicinity. This shafting was 8 feet and 5 inches from the mill floor. Independent of the fact that this conductor and these chutes and this platform had been constructed there, and this boy placed at work beside this shaft, it would have been entirely unnecessary to cover or guard it. If this boy was likely to be thrown against this shaft, and, being thrown against it, would be likely to have his clothes caught, or to clutch it, is there any question but that it should have been guarded or covered so as to prevent just those consequences? Can it be said not to be dangerous, because he ought not to have, or might not have, clutched it, or his clothes might not have caught? If the uncovered machinery is so high above the level where the servants are that it will clear their persons under ordinary circumstances, the employer cannot be held liable, unless it is shown that it was dangerous

in that position, or that it might reasonably have been anticipated that an employee might be injured thereby. *Eckels v. Chicago Ship Building Co.* (1896) 63 Ill. App. 436. See also the cases cited in note 1, *supra*, and compare note 5 to § 77, *infra*.

¹ *Hale v. Cheney* (1893) 159 Mass. 268, 34 N. E. 255 (there plaintiff was only sixteen years of age, but no weight was attached to this fact); *Goodman v. Walpole Emery Mills* (1888) 146 Mass. 261, 15 N. E. 576; *Dillman v. Hamilton* (1898) 14 Mont. Co. L. Rep. 92 (plaintiff was twenty years old); *Lewis v. Simpson* (1892) 3 Wash. 641, 29 Pac. 207; *Hoffman v. American Foundry Co.* (1897) 18 Wash. 287, 51 Pac. 385; *Kreider v. Wisconsin River Paper & Pulp Co.* (1901) 110 Wis. 645, 86 N. W. 662. In *Middaugh v. Mitchell* (1899) 120 Mich. 581, 79 N. W. 806, and in *Sokol v. Rickel* (1897) 113 Mich. 476, 71 N. W. 833, the court did not expressly decide whether a set screw imported negligence, the case turning upon the contributory negligence of the plaintiff. But, in view of the general trend of the decisions in this state, it may reasonably be inferred that the action would not have been sustained in any event. See decisions cited in the last section.

² *Wabash Paper Co. v. Webb* (1896) 146 Ind. 303, 45 N. E. 474; *Keats v. National Hoisting Mach. Co.* (1895) 13 C. C. A. 221, 21 U. S. App. 656, 65 Fed. 940 (but see chapter v., as to the doctrine of the Federal courts as to effect of conformity to usage); *Demers v. Marshall* (1899) 172 Mass. 548, 52 N. E. 1066 (1901) 178 Mass. 9, 59 N. E. 451. Under this doctrine, an adult workman assumes the risk from a screw placed upon the shaft without his knowledge after the beginning of his employment, in the absence of any pretense that he remembered the previous condition of the shaft, and was acting in reliance upon his former observation

which is also in common use, the master owes the servant no duty to box the pulley or shaft, or to change the set screw for a safer one.

In one case, where no projecting screw was involved, recovery was denied simply on the ground that the shaft was a permanent structure, creating an obvious risk.⁴

By other courts it is held that a jury may properly find a master liable for injuries caused by such a contrivance,⁵ and that common usage is not a conclusive justification for adopting or retaining it.⁶

at the time of his injury. *Ford v. Mt. Tom Sulphite Pulp Co.* (1899) 172 Mass. 544, 48 L. R. A. 90, 52 N. E. 1065.

⁴*Rooney v. Scull & D. Cordage Co.* (1894) 161 Mass. 153, 159, 36 N. E. 789; *Goodnow v. Walpole Emery Mills* (1888) 146 Mass. 261, 15 N. E. 576.

⁵*Lemoine v. Aldrich* (1900) 177 Mass. 89, 58 N. E. 178.

⁶See cases cited in the next note. In Minnesota, the question as to a master's negligence was held to be for the jury, in an action for injuries to a servant whose coat sleeve was caught by a set screw on a revolving shaft as he was attempting to place a belt upon a pulley 2 inches therefrom, where it appears that the head of the screw was not protected or guarded in any way, that it was a cube $\frac{1}{2}$ inch square and projected at least $\frac{1}{2}$ of an inch from the shaft, which was revolving about 150 times to the minute, and that it was frequently necessary to adjust the belt upon the pulley. *Pruke v. South Park Foundry & Mach. Co.* (1897) 68 Minn. 305, 71 N. W. 276. But, in another case, the same court took the rather refined distinction that, even if the defendant was negligent in having a shaft with a set screw projecting so far as to be dangerous to a servant whose work required him to be in close proximity to it, there could be no liability for an injury received by a servant who was oiling the machinery at some distance away, where the chances of his falling against the shaft were so slight and remote that they could not reasonably have been anticipated. *Groff v. Duluth Imperial Mill Co.* (1894) 58 Minn. 333, 59 N. W. 1049. The present writer ventures to think that the reference to the test of reasonable anticipation is, under such circumstances, wholly unwarrantable. That the duty to provide a safe place of work inures in favor of all servants who are rightfully at the particular point where the dangerous conditions which are alleged to import culpability

are found seems to be a necessary corollary from the principles which define the position of a person invited on premises, as contrasted with the position of one who is a mere licensee or trespasser. The only ground, it is submitted, upon which a servant injured by uncovered machinery should be debarred from recovery is that his presence at the spot where the accident occurred amounted to positive contributory negligence; and this is the single case in which a master should be allowed to excuse himself by the plea of nonanticipation. In *Galveston Oil Co. v. Thompson* (1890) 76 Tex. 235, 13 S. W. 60, the court seems to have regarded a shaft with protruding screws as an appliance the maintenance of which imported negligence, but the specific ground of recovery was that the plaintiff had been negligently ordered to perform a service not within the scope of his employment. Under the civil law as administered in Quebec, a master who maintains a shaft with a dangerous projection thereon is deemed guilty of a breach of duty. *George Matthews Co. v. Bouchard* (1897) Rap. Jud. Quebec, 8 B. R. 550. See also *Harbor v. Vulcan Iron Works Co.* (1897) 13 App. Div. 508, 43 N. Y. Supp. 699, where, however, the successful plaintiff was an independent contractor.

⁷*Homestake Min. Co. v. Fullerton* (1895) 16 C. C. A. 545, 36 U. S. App. 32, 69 Fed. 923 (liability of the master held to be for the jury to decide, the evidence being that the servant's clothing was caught upon protruding bolts of a coupling of a rapidly revolving shaft, located in a narrow and dark tunnel, near a cross timber under which he was obliged to stoop or crawl while passing through the tunnel in the discharge of his duties); *Geo. v. Fall Mountain Paper Co.* (1895) 68 Vt. 571, 35 Atl. 475 (instruction embodying opposite rule held erroneous).

In some of the cases already cited, as well as in others in which the element of usage is not adverted to, the employer's liability is made to turn, wholly or partially, upon the fact of the servant's knowledge or ignorance of the conditions.⁷

Under any theory of the master's obligations with regard to such machinery, he clearly cannot be held liable where the injury resulted from the fact that the servant was using it for purposes having no connection with his duties.⁸ See § 26, *ante*.

78. Employer's liability for injuries caused by various other mechanical appliances.—In the subjoined note are collected a number of cases in which the liability of the master for injuries due to various kinds of mechanical appliances has been discussed and determined with reference to the general question of reasonable safety, and to the effect of the specific principles reviewed in the preceding chapters.¹

¹ A complaint stating that plaintiff, while in the employ of defendant, received injuries through the failure of defendant to guard a dangerous set screw, the existence of which was unknown to plaintiff, is not demurrable. *Rabe v. Consolidated Ice Co.* (1899) 91 Fed. 457. That a jury might find it negligent to require a servant to drive under a shaft which had been, without his knowledge, repaired with projecting bolts was held in *Hurkins v. Johnson* (1885) 105 Ind. 29, 55 Am. Rep. 169, 4 N. E. 172. Whether a master can be held liable for omitting to instruct a servant as to the position of a set screw depends upon whether the servant was inexperienced to such a degree that he could not reasonably be expected to understand the danger arising from it, and the master knew or ought to have known of that inexperience. *Ingerman v. Moore* (1891) 96 Cal. 410, 27 Pac. 396; *Keller v. Gaskill* (1894) 9 Ind. App. 670, 36 N. E. 303; second appeal (1898) 20 Ind. App. 502, 50 N. E. 363. A machinist and engineer is chargeable with knowledge that set screws are in constant use in machinery, and cannot hold a master liable for an omission to apprise him of the danger caused by one on a shaft which he is repairing. *Goodnow v. Walpole Emery Mills* (1898) 146 Mass. 261, 15 N. E. 576; *Keats v. National Hoisting Mach. Co.* (1895) 13 C. C. A. 221, 21 U. S. App. 656, 65 Fed. 940. See, generally, as to the master's duty to give instructions, chapter XVI, *post*.

269, 18 L. R. A. 124, 29 Pac. 481 (no recovery where a servant was injured in trying to remove a towel from a shaft which began to revolve after he had, for his own convenience, hung the towel on it).

¹ (1) *Appliances for raising heavy weights.*—Negligence is inferable where a well-known device for preventing accidental changes in the gear of a crane was not adopted. *Bonner v. Pittsburg Bridge Co.* (1897) 183 Pa. 278, 38 Atl. 896. A jury may infer negligence from the want of a brake on a windlass. *Cartter v. Cotter* (1891) 88 Ga. 286, 14 S. E. 476. The mere fact that a derrick which fell was not provided with guy ropes, and proved to be too light for the work which the servants tried to accomplish with it, does not import negligence. *Rosa v. Volkering* (1901) 64 App. Div. 426, 72 N. Y. Supp. 236. Negligence is inferable from the fact that a smaller hook than was customary was used to support a heavy bucket. *Casselmon v. Dunfee* (1901) 59 App. Div. 467, 69 N. Y. Supp. 271. A court cannot say, as matter of law, that the use of ratchet jacks to hold up the body of a derailed car imports negligence. *Louisville & W. R. Co. v. Jones* (1901; Ala.) 30 So. 586. Negligence cannot be imputed from the fact that hand power was not used instead of a derrick, to draw up the shoring planks from a sewer. *Joyce v. Worcester* (1885) 140 Mass. 245, 4 N. E. 565. It is not negligence to use a piece of bridge timber, as a lever to raise a broken turntable. *Bohn v. Chicago, R. I. & P. R. Co.*

⁸ *Kauffman v. Maier* (1892) 94 Cal.

(1891) 106 Mo. 429, 17 S. W. 580 (conformity to usage proved). A pole is an adequate appliance for use as a lever in prizing up ties on a track. *Young v. Virginia & N. C. Constr. Co.* (1891) 109 N. C. 618, 14 S. E. 58.

(2) *Appliances involving the use of steam.*—It is not negligence to use a boiler of a widely used type, though the addition of certain attachments would have made it safer. *Service v. Rhoneman* (1900) 196 Pa. 63, 46 Atl. 292. The want of a safety valve, to prevent an inrush of steam from a boiler into a "cooker," imports negligence. *Empson Packing Co. v. Vaughn* (1899) 27 Colo. 66, 50 Pac. 749. It is not negligent to use hot water instead of steam to heat a drier, where hot water is customarily employed for that purpose. *Glover v. Meinrath* (1896) 133 Mo. 292, 34 S. W. 72. The use of cast iron for a stop valve on a steamer is not negligent where the use of that material is customary. *Wuman v. The Dart Castle* (1899) 6 Can. Exch. 387. It is negligent to use steam pipes without attaching a drip pipe to draw off the water from condensed steam. *Mellor v. C. R. Remington & Son Co.* (1901) 62 App. Div. 472, 70 N. Y. Supp. 1970.

(3) *Appliances for breaking up pieces of metal.*—It is not negligent to use, for breaking castings, an appliance which is similar to those used in other foundries. *Wood v. Heiges* (1896) 83 Md. 257, 34 Atl. 872.

(4) *Appliances for the transmission of power.*—A master is not bound to exchange a shipper on a belt for another kind. *Cushman v. Cushman* (1901; Mass.) 61 N. E. 262. Where an employer has conformed to general usage, he cannot be held negligent in failing to use certain suggested contrivances to prevent the shifting of a belt shipper. *Ross v. Pearson Cordage Co.* (1895) 164 Mass. 257, 41 N. E. 284. Negligence is not inferable from the mere fact that a belt was used, which was apt to slip back from the loose on to the fixed pulley, if it was not held a certain length of time on the loose pulley after it was shifted. *Shaffer v. Haish* (1885) 110 Pa. 575, 1 Atl. 575. The mere fact that the addition of a counter shaft and a fast and loose pulley to a machine would have made it safer to connect and disconnect the power does not render an employer guilty of negligence in not making that addition. *Jacobson v. Cornelius* (1889) 52 Hun. 377, 5 N. Y. Supp. 306. Whether it is negligent to

operate a planer without a belt shifter or tightener is a question for the jury where there is evidence that such a device was sometimes used, and also evidence that it was impracticable in the given case. *Murvell v. Zbarski* (1900) 93 Ill. App. 334. An employer may be found guilty of negligence, where the evidence tends to show that the means adopted for fastening together the pieces of a belt were inadequate for the purpose. *Mellor v. National & P. Worsted Mills* (1901) 22 R. I. 347, 17 Atl. 1092 [belting laced by a single strand placed in a single row of holes at each end of a joint]; especially if it appears that he did not conform to general usage. (*Nie v. Texas P. R. Co.* [1888] 82 Tex. 473, 18 S. W. 571). But it cannot be declared to be negligent merely because he uses one kind of tightener, rather than another. *Harbo v. Buffalo Car Mfg. Co.* (1894) 142 N. Y. 31, 36 N. E. 813. In *Columbia & P. S. R. Co. v. Hawthorne* (1888) 3 Wash. Terr. 353, 19 Pac. 25, where the injury was caused by the fact that a pulley on a shaft, having become loose, impinged on the nut at the end of the shaft, and thus caused the nut to unscrew and come off, and so let the pulley fall, the court said that the nut should have been screwed on in such a manner that the friction would tighten it.

(5) *Appliances for handling ladles of molten metal.*—On the ground that common usage required the adoption of another appliance, it has been held that the use of a common round stick with out holes in it, as a lever for tipping large ladles of molten metal imports negligence. *Flaherty v. Norwood Foundry Co.* (1898) 172 Mass. 134, 57 N. E. 463.

(6) *Emery wheels.*—The fact that use copper as a filling for emery wheels is not negligent, where the custom merely is that one manufacturer uses copper. *Braig v. Chicago & W. M. R. Co.* (1898) 98 Mich. 222, 57 N. W. 118.

(7) *Appliances for handling iron.*—Whether the furnishing of crow bars and pinch bars, instead of cant hooks, to handle piles, is negligence, is a question for the jury, where the evidence is that cant hooks are the usual appliances. *Anderson v. Illinois C. R. Co.* (1899) 109 Iowa, 524, 80 N. W. 561.

(8) *Devices for attaching parts of appliances to each other.*—Negligence is inferable where a heavy iron bar is placed where it is liable to be struck by the arm of a crane, and sus

79. Structures.—(See also § 97, *post*.)—The servant is sometimes allowed to recover, simply on the ground that the structure in question was dangerous to a person exercising reasonable care.¹

The obvious character of the risk involved will ordinarily prevent recovery for an injury, caused by the fact that the servant was required to work on an elevated structure which was unprotected by a railing or other safeguard to prevent him from falling off.² The de-

pended by chains to which it is attached only by two open hooks. *Monaghan v. Pacific Rolling Mill Co.* (1889) 81 Cal. 190, 22 Pac. 590.

(9) *Devices for keeping heavy machinery in place.*—No negligence is imputable where machinery, which is set up in the usual way, falls on a servant. *Schultz v. Bear Creek Ref. Co.* (1897) 180 Pa. 272, 36 Atl. 739; *Amersbach v. Jones* (1891) 139 Pa. 183, 21 Atl. 24.

(10) *Formers.*—A railway company is not liable because it uses a single former in its shops, instead of a double one, though the latter is superior. *Cagney v. Hannibal & St. J. R. Co.* (1879) 69 Mo. 416.

(11) *Appliances for cutting rails.*—A jury cannot be allowed to declare a railway company negligent because a hammer and chisel were used, instead of a saw, as on some roads, to cut rails. *Apati v. Delaware, L. & W. R. Co.* (1901) 64 App. Div. 515, 72 N. Y. Supp. 322 (fragment broke off of hammer).

(12) *Appliances on ships.*—A ship has been held liable for furnishing to a seaman, for the purpose of painting a mast, a new rope, too large for the purpose, and so stiff that, on the short toggle furnished, by reason of its unyielding, it could not be made to grip hard enough to hold the toggle in place, or to make the half hitches made around the rope by the running part of the gant. *Johnson v. Johansen* (1898) 30 C. C. A. 675, 53 U. S. App. 104, 86 Fed. 856. No negligence is inferable where the chock on a tugboat is constructed and secured in the usual way. *The Lizzie Frank* (1887) 31 Fed. 477.

(13) *Arrangements permitting automatic movements of machinery.*—It is not negligent to omit to provide a clutch for an embossing machine, other than the pedal, to prevent the automatic motion in the machine. *Sweeney v. Berlin & J. Envelope Co.* (1886) 101 N. Y. 526, 34 Am. Rep. 722, 5 N. E. 358. Where the guard of a dieing-out ma-

chine was so placed that it threw a piece of leather into such a position that the head block of the machine "repeated" at an unexpected time, and crushed a servant's hand, it was held that he could not recover as the attachment was a permanent, visible one. *Quillen v. Thomas G. Plant Co.* (1896) 165 Mass. 368, 43 N. E. 205. See also subd. 4 of this note, *supra*.

As, where a platform, designed for use in oiling an overhead shaft, consisted of a single plank 10 or 12 inches wide, at a considerable height from the floor, and resting upon brackets placed at different heights and different angles, so that the board was inclined. *Zimmerman v. Detroit Sulphite Fibre Co.* (1897) 113 Mich. 1, 71 N. W. 321. A reasonably safe means of access to an elevated structure must be provided. *Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918 (no ladders or other means of reaching a tramway). It is negligence to construct a coal chute the sides of which are so low that lumps of coal roll over. *Crown Coal Co. v. Hiler* (1892) 43 Ill. App. 310.

As, where the servant was required to stand on a platform for the purpose of assisting in the work of storing ice (*Moulton v. Gage* [1895] 138 Mass. 390); or to wheel heavy loads on a barrow along a narrow platform (*Kaare v. Tray Steel & L. Co.* [1893] 139 N. Y. 369, 34 N. E. 901); or to use a steep stairway without a railing, and with steps at irregular distances (*Sweet v. Ohio Coal Co.* [1890] 78 Wis. 127, 9 L. R. A. 861, 47 N. W. 182); or to stand on a platform while endeavoring to prize a pulley off of a shaft (*Chesapeake, O. & S. W. R. Co. v. McDowell* [1894] 16 Ky. L. Rep. 1, 24 S. W. 607); or to work on a narrow platform running alongside the track of an elevated railway (*Nugent v. Brooklyn Union Elev. R. Co.* [1901] 64 App. Div. 351, 72 N. Y. Supp. 67).

fective lighting of the structure may be a differentiating factor, sufficient to take the case to the jury, if the platform is so shaped that the want of the light converts it into a pitfall at some particular point.³ Compare § 80, note 7. Otherwise, it seems, this circumstance will not enable the servant to recover.⁴

The particular kind of structure furnished for a given purpose is left to the discretion of the master,⁵ except in so far as the usages of the business may affect his responsibility.⁶

80. Unguarded openings in floors, open hatchways, etc.—(See also § 100, *post*.)—Some courts proceed upon the theory that the maintenance of unguarded openings required for the purposes of the master's business does not import negligence, where they are plainly visible, and there is no special circumstance which renders them peculiarly dangerous.¹ The rationale of the conclusion thus arrived at

¹ *H. C. Akley Lumber Co. v. Rouen* (1893) 7 C. C. A. 424, 19 U. S. App. 253, 58 Fed. 668 (platform, at the place of the accident, extended only 6 or 8 inches outside the track along which loaded cars had to be pushed. No light available but that of a fellow servant's lantern).

² A master who builds a bridge for the purpose of giving access to his works, and makes it sufficiently wide to admit of the passage of vehicles, cannot be found guilty of negligence on the ground that it was not protected on either side by a fence, and not lighted by a lamp. *Robertson v. Adamson* (1862) 24 Sc. Sess. Cas. 2d series, 123 (stress was here laid on the fact that the injured person had been in the service for twenty years, and the bridge had been in the same condition the whole of that time).

³ Negligence is not inferable from the fact that a single ladder 120 feet long, instead of several shorter ones, was used as a means of ascending and descending a shaft. *O'Neill v. Wilson* (1858) 20 Sc. Sess. Cas. 2d series, 427. Nor from the fact that a passage and steps in a basement are cut out of the solid earth, instead of being made from stone, wood, or cement. *McCarthy v. Shoneman* (1901) 198 Pa. 568, 48 Atl. 493. Nor from the fact that movable steps were used as a means of access to a cellar. *Regan v. Donovan* (1893) 159 Mass. 1, 33 N. E. 702.

⁴ Usage has been held to sanction the employment of a board track on which to run push cars loaded with the lumber used in building a bridge. *Bedford*

Belt R. Co. v. Brown (1895) 142 Ind. 659, 42 N. E. 359. On the ground of conformity to usage, it has been denied that there was negligence in locating wooden buildings so close to the intake air way that, if they are set on fire, that way will be filled with smoke and possibly suffocate miners. *Coal Creek Min. Co. v. Davis* (1891) 90 Tenn. 711, 18 S. W. 387. For the same reason it has been held that no action could be maintained for an injury caused by the want of a fence round the lower part of a shaft through which iron ore is raised to a furnace gangway (*Murray v. Merri* [1890] 17 Sc. Sess. Cas. 4th series, 815 [laborer injured by a stone which fell down the shaft, and, striking against the side, rebounded so that it hit him while he was standing outside]); or by the omission to provide a covering to protect workmen from coal which may fall from a hoisting bucket at a dock (*Prghilski v. Northwestern Coal R. Co.* [1898] 98 Wis. 413, 74 N. W. 117). On the ground that there was no evidence of any different usage, it has been held that the fact that no staging was furnished for the transfer of cotton from a barge to a river steambot does not import negligence. *Red River Line v. Smith* (1900) 39 C. C. A. 620, 99 Fed. 520. On the other hand, the master's nonconformity to usage has been held to justify a jury in finding that it was negligence to build a platform only one plank thick in a shaft. *Smizel v. Ohio Iron Co.* (1898) 116 Mich. 149, 74 N. W. 488.

⁵ Recovery has been denied, where

is, mainly, that the servant understands and assumes the risks incident to such arrangements. See chapter vii., *ante*. But nonculpability is also supposed, in some instances, to be a proper inference from the fact that the risks to which the servant is exposed are of such a nature that he can avoid injury by the exercise of ordinary care.²

Other courts consider that the servant's right to recover for injuries caused by conditions of this sort is primarily a question for the jury, the view being taken that the general rule of law, by which the owner of premises is bound to guard persons lawfully entering thereon from injury by pitfalls, is applicable as between master and servant no less than between persons having no contractual relations with each other.³ In some cases it has been held that even the fact of the defendant's having conformed to general usage in regard to the maintenance of the opening did not necessarily absolve him.⁴

The courts belonging to the former group regard the liability of the master as being a question for the jury, where the opening in question had no direct connection with the business carried on at the establish-

servants fell through a trap door in a passage way (*Anthony v. Leuret* [1887] 105 N. Y. 591, 12 N. E. 561); an unguarded and unlighted hole in the floor of a theater (*Seymour v. Maddox* [1851] 16 Q. B. 326; decision denied to be correct in *Ryan v. Fowler* [1862] 24 N. Y. 410, 82 Am. Dec. 315); a trap door in a laundry, for passing goods from one floor to the other (*Moore v. Ross* [1890] 17 Sc. Sess. Cas. 4th series, 796); a trap door in a factory (*Kolb v. Sandwick Enterprise Co.* [1890] 36 Ill. App. 419); a pit in a railway roundhouse (*McDonnell v. Illinois C. R. Co.* [1898] 105 Iowa, 459, 75 N. W. 336); a cistern (*McCann v. Atlantic Mills* [1898] 20 R. I. 566, 40 Atl. 500); an uncovered well, containing hot water (*Fitch v. Pearson Cordage Co.* [1894] 161 Mass. 420, 37 N. E. 368).

²This consideration was emphasized in a case where a trap door was frequently opened within 6 feet of the bench where a servant worked. *Kupp v. Rummel* (1901) 199 Pa. 90, 48 Atl. 679.

Nyback v. Champagne Lumber Co. (1901) 48 C. C. A. 632, 109 Fed. 732 (no guard rail round an opening in the floor of a mill); *Powers v. Calcasieu Sugar Co.* (1896) 48 La. Ann. 483, 19 So. 455 (open ditch of scalding water); *Musick v. Jacob Dold Packing Co.*

(1894) 58 Mo. App. 322 (uncovered and unguarded tank of hot water); *Traver v. St. Louis Brewing Co.* (1897) 69 Mo. App. 17 (similar facts).

An employer who sets an employee to work to rake out the contents of a cylindrical tank more than 5 feet in diameter and 3 feet high, through a door less than a foot wide, with a space 2 feet 11 inches wide on each side of the center of the door to stand upon, with a vat filled with boiling tallow immediately adjoining and covered by a lid liable to be misplaced, or so constructed that a step of the laborer may precipitate him into the vat,—is liable for his death by falling into such vat. The footing thus provided is too narrow for a servant whose attention is apt to be diverted by his work. *Hess v. Rosenthal* (1894) 55 Ill. App. 324. Affirmed in (1896) 160 Ill. 621, 43 N. E. 743.

⁴*McCormick Harvesting Mach. Co. v. Barandt* (1891) 136 Ill. 170, 26 N. E. 588, Affirmed (1890) 37 Ill. App. 165 (unguarded trough); *Reichla v. Grunsfelder* (1892) 52 Mo. App. 43 (unguarded tank); *Kirk v. Seelly* (1898) 79 Ill. App. 67 (opening in floor of building nearly completed); *Indiana Pipe Line & Ref. Co. v. Neusbaum* (1899) 21 Ind. App. 361, 52 N. E. 471 (open well, just dug, was left unguarded on a dark night).

ment where the servant was working.⁵ These courts also consider that the master may properly be found negligent, where the opening is so located as to be peculiarly dangerous to employees.⁶ Nor, it would seem, could it be successfully contended in any jurisdiction that a servant's right of action is not primarily a question for the jury, where the opening in question was rendered unusually hazardous by the want of proper lighting.⁷ Compare § 79, note 3.

The appointment of a watchman to warn servants against the dangers created by openings is a sufficient performance of the master's duty to guard them.⁸

81. Substances generating explosive gases.—(See also § 103, *infra*.)—Negligence has been denied to be inferable from the fact that the paint supplied for painting a tank was composed of ingredients

⁵ In *Hoffman v. Clough* (1889) 124 Pa. 505, 17 Atl. 19, it was held that the plaintiff, who had been hired to operate a carding machine, could not be said, as a matter of law, to have assumed the risk of falling into a well of water with a loose cover which was frequently removed. The court said: "The dangers incident to the business of operating a carding machine, reasonably suitable for the work to be done, were assumed when the employee entered upon his work; but dangers from an opening in the floor, from an insufficient staircase, or other defect in the building, were incident to the place where the business was conducted."

⁶ It has been held error to nonsuit the servant where he fell through an open trap door, which was maintained on the line along which employees had to pass, in going from one room to another. *Johnson v. Bruner* (1869) 61 Pa. 58, 100 Am. Dec. 613; *Maguire v. Little* (1887; R. L.) 13 Atl. 108.

⁷ In *Eastland v. Clarke* (1901) 163 N. Y. 420, 59 N. E. 202, Reversing (1898) 28 App. Div. 621, 51 N. Y. Supp. 1149, the plaintiff recovered for an injury caused by his falling into a hole in the cellar of a house, the hole being left without the cover provided for it. In *Sansol v. Compagnie Générale Transatlantique* (1900) 101 Fed. 390, a longshoreman who fell through a trap door in a dark passage on a steamer was allowed to recover. A ship is liable where a workman, in the discharge of his duty, falls down an open and unlighted hatchway in a passage along the side of a ship. *The Guillermo* (1886) 26 Fed. 921, distinguishes cases where the ordi-

nary hatches for the discharge of cargo are left open, which, as they may be expected to be left open in port, persons going on board ships must avoid at their peril. The existence, on an elevated trestle, within 7 feet of where employees were working, of an uncovered hole 7 feet long and 4 feet wide, through which a fall might prove fatal, is a peril to which defendant cannot properly expose its servants at night, in the absence of light sufficient to disclose its presence. *Boyle v. Dequon-McLean Constr. Co.* (1900) 47 App. Div. 311, 61 N. Y. Supp. 1043, leave to appeal denied 49 App. Div. 636, 63 N. Y. Supp. 1105. In *National Syrup Co. v. Carlson* (1893) 47 Ill. App. 178, plaintiff recovered, where the railing of the elevator shaft had been taken off during the day without his knowledge, and he had come into the building after dark. In a Massachusetts case, it was observed that a jury would perhaps be warranted in finding that an employer was negligent in leaving an elevator well, which was situated in a dark basement, where his servants were obliged to go frequently, open and unguarded by a fence or any suitable protection. *Taylor v. Cane Mfg. Co.* (1855) 140 Mass. 150, 3 N. E. 21. The nature of the duty of a shipowner in regard to the lighting of open hatchways is a question to be determined by considering the usual custom in respect to such lighting on board similar vessels. *Sunnicy v. Holt* (1883) 15 Fed. 883.

⁸ *Gray v. Thomson* (1889) 17 Sc. Sess. Cas. 4th series, 200 (watchman here was appointed by a shipowner in compliance with the by-laws of the harbor).

which gave off an explosive gas, where it is also shown that it was an article in common use and of a well-known brand.¹ It has also been held that conformity to usage was a conclusive defense, where the employer had purchased, for the conveyance of castings, old barrels which had been filled with benzine, whisky, etc., so that there was likely to be an explosion if a naked light were placed near them.² But the present writer is of opinion that, in each of these instances, it was a fair question for the jury whether the employer ought not to have inquired more closely into the conditions, before allowing the appliances in question to become part of his plant.

82. Substances giving off poisonous fumes.—It is not negligent to use in a stove a patent fuel which produces dangerous fumes which will suffocate anyone sleeping in the room, if the door is closed.¹ An employer cannot be found negligent because he uses acids which give off poisonous fumes, unless it is shown that his practice in this respect is different from that of other employers in the same business.²

83. Appliances for giving servants warning of danger.—On the ground of conformity to usage, it has been held that a mine owner cannot be held guilty of negligence because he has not provided any appliance in the mine for giving warning to persons working in a pocket that a draw is about to be made of the coal from the chutes.¹ So, also, it has been laid down that the question whether whipping straps, or telltales of some other kind, should be adopted as a means of warning trainhands of the proximity of low bridges, is one which is to be determined by the common usage of well-conducted railway companies.²

The tags used to indicate cars condemned as unfit for further use and ordered to be taken to the repair shop are not sufficient, unless they are of such a size and character as to give due notice of the condition of the cars to employees who have to handle them at night.³

Numerous cases dealing with the sufficiency of the master's performance of the obligation to warn his servants of danger, in so far

¹ *Allison Mfg. Co. v. McCormick* (1888) 118 Pa. 519, 12 Atl. 273.

² *Purdy v. Westinghouse Electric & Mfg. Co.* (1900) 197 Pa. 257, 51 L. R. A. 881, 47 Atl. 237.

³ *Murch v. Thomas Wilson's Sons & Co.* (1897) 168 Mass. 408, 47 N. E. 111 (not the least singular example of the unflinching steadiness with which this court follows out a principle, even to the most preposterous conclusions).

¹ *Corcoran v. Wanamaker* (1898) 185 Pa. 496, 39 Atl. 1108.

² *Lehigh & W. B. Coal Co. v. Hayes* (1889) 128 Pa. 294, 5 L. R. A. 441, 18 Atl. 387.

³ *Louisville & N. R. Co. v. Hall* (1890) 91 Ala. 112, 8 So. 371.

⁴ *Meyers v. Illinois C. R. Co.* (1897) 49 La. Ann. 21, 21 So. 120.

as such performance is connected with the manner in which his business is conducted, are cited in chapters xv. and xvi., *post*.

B. INJURIES CAUSED BY CONDITIONS OF AN ABNORMAL, TRANSITORY, OR SPORADIC CHARACTER.

84. Conditions of railway tracks and appurtenances by which the safe operation of trains is affected.—(See also §§ 67, 68, *supra*.)—Negligence is inferable from the fact that the track itself was in an intrinsically defective condition;¹ or from the fact that the bridges and other structures built to support the track were inadequate for

¹ As, where the ties or rails were of poor quality. *O'Donnell v. Allegheny Valley R. Co.* (1868) 59 Pa. 239, 98 Am. Dec. 336; *Burrell v. Gowen* (1890) 134 Pa. 527, 19 Atl. 678; *McFee v. Vicksburg, R. & P. R. Co.* (1890) 42 La. Ann. 790, 7 So. 720; *James v. Northern P. R. Co.* (1891) 46 Minn. 168, 48 N. W. 783; *Mehan v. Syracuse, B. & N. Y. R. Co.* (1878) 73 N. Y. 585; *Louisville, E. & St. L. Consol. R. Co. v. Miller* (1895) 140 Ind. 685, 40 N. E. 116; *Henry v. Lake Shore & M. S. R. Co.* (1882) 49 Mich. 495, 13 N. W. 832; *Krogg v. Atlanta & W. P. R. Co.* (1886) 77 Ga. 292; *Chicago, L. S. & E. R. Co. v. Hartmann* (1897) 71 Ill. App. 427; *Sinadley v. Missouri P. R. Co.* (1893) 118 Mo. 268, 24 S. W. 140; *Houston & T. C. R. Co. v. McNamara* (1893) 59 Tex. 255; *Taylor, B. & H. R. Co. v. Taylor* (1890) 79 Tex. 104, 14 S. W. 918; *Little Rock, M. R. & T. R. Co. v. Leverett* (1886) 48 Ark. 333, 3 S. W. 50; *Berlin v. Wabash, St. L. & P. R. Co.* (1885) 87 Mo. 545; *Wright v. Southern R. Co.* (1898) 122 N. C. 959, 30 S. E. 348. Or where the rails were out of alignment. *Coughlin v. Brooklyn Heights R. Co.* (1901) 59 App. Div. 126, 68 N. Y. Supp. 1105. Or where the track was too rough for the safe operation of trains. *Sabine & E. T. R. Co. v. Ewing* (1894) 7 Tex. Civ. App. 8, 26 S. W. 638 (see, however, cases at the end of this note). Or where the rails were not properly fastened. *McCombs v. Pittsburg & W. R. Co.* (1889) 130 Pa. 182, 18 Atl. 613 (want of fish plates on a siding); *Rosenbaum v. St. Paul & D. R. Co.* (1888) 38 Minn. 173, 36 N. W. 447 (ties not spiked on temporary siding); *Chicago G. W. R. Co. v. Price* (1899) 38 C. C. A. 239, 97 Fed. 423; *Dale v. St. Louis, K. C. & N. R. Co.* (1876) 63 Mo. 455 (defective joint); *Houston & T. C. R. Co. v. Gaither* (1896: Tex. Civ. App.) 35 S. W. 179. Or where the defective drainage rendered a portion of the track temporarily insecure. See § 68, *c*, *supra*. That a rail broke solely by reason of frost and cold weather does not import negligence. *Berlin v. Wabash, St. L. & P. R. Co.* (1885) 87 Mo. 545. In *Atchison, T. & S. F. R. Co. v. Croll* (1896) 3 Kan. App. 242, 45 Pac. 112 (Reversed in 57 Kan. 548, 46 Pac. 972, but this point was not discussed), it was held that the existence of low joints at certain points along a railroad track, caused by the ground being wet and the frost coming out of the ground, did not of itself charge the company with negligence rendering it liable for injuries to an employee working near the track from the fall of coal from a passing tender, due to one of such low joints, where the track is a good rock-ballasted track, and in good order in other respects. In Indiana it has been held that negligence cannot be inferred merely from the fact that a side track on a new line was so uneven as to jolt a servant off of a train. For anything that such a condition shows, the company may have exercised proper care. *O'Neal v. Chicago & I. Coal R. Co.* (1892) 132 Ind. 110, 31 N. E. 669. In Massachusetts the possibility of an occasional jolt is regarded as an ordinary risk of the work of an employee on a street railway. *McCandley v. Springfield Street R. Co.* (1897) 169 Mass. 301, 47 N. E. 1096 (no action maintainable by a conductor who goes out on the bumper in order to facilitate the operation of replacing the trolley on the wire).

that purpose;² or had been destroyed by some catastrophe;³ or from the fact that a switch had fallen into disrepair;⁴ or from the fact that certain material substances extrinsic to the track itself, but situated on or near it, rendered the operation of trains unduly dangerous.⁵

A servant operating a construction train cannot maintain an action on the theory that the ballasting was imperfect and the number of

¹ *Bogart v. Delaware, L. & W. R. Co.* (1895) 145 N. Y. 283, 40 N. E. 17; *Warner v. Erie R. Co.* (1868) 39 N. Y. 468; *Vosburgh v. Lake Shore & M. S. R. Co.* (1884) 94 N. Y. 374, 46 Am. Rep. 148; *Faulkner v. Erie R. Co.* (1867) 49 Barb. 324; *Toledo, P. & W. R. Co. v. Conroy* (1873) 68 Ill. 561 (1871) 61 Ill. 162; *Louisville, N. A. & C. R. Co. v. Sandford* (1889) 117 Ind. 265, 19 N. E. 770; *Carlson v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 454, 28 Pac. 497; *Bowen v. Chicago, B. & K. C. R. Co.* (1888) 95 Mo. 268, 8 S. W. 230; *Locke v. Sioux City & P. R. Co.* (1877) 46 Iowa, 109; *Chicago G. W. R. Co. v. Healy* (1898) 30 C. C. A. 11, 57 U. S. App. 513, 86 Fed. 245; *Bach v. Iowa C. R. Co.* (1900) 112 Iowa, 241, 83 N. W. 959 (rotten timbers of a cattle guard sank under the engine, so that the pilot struck the guard rail and moved the switch).

² *Maydole v. Denver & R. G. R. Co.* (1900; Colo. App.) 62 Pac. 964 (a bridge burned down). The liability in such a case as this is, of course, predicated only when it is shown that the defendant was chargeable with notice of what had occurred. See, generally, chapters x., xi., *post*.

³ *Harter v. Atchison, T. & S. F. R. Co.* (1895) 55 Kan. 250, 38 Pac. 778 (derailment of train).

⁴ As, where obstructions are allowed to remain on the track. *True v. Lehigh Valley R. Co.* (1897) 22 App. Div. 588, 48 N. Y. Supp. 86; *Fisher v. Oregon Short Line & U. N. R. Co.* (1892) 22 Or. 533, 16 L. R. A. 519, 30 Pac. 425 (a snow slide covered track; case distinguished from one of a snow drift, which is a risk assumed); *Wellman v. Oregon Short-Line & U. N. R. Co.* (1892) 21 Or. 530, 28 Pac. 625 (same facts); *Henru v. Wabash Western R. Co.* (1891) 109 Mo. 488, 19 S. W. 239 (a freight car, not being properly secured on a siding, escaped onto the main track. But *quære*, as to the liability under such circumstances, since the accident presumably occurred ow-

ing to the negligence of fellow servants, and, according to the ordinary view, the company would not be liable unless it was negligent in failing to discover what had occurred in time to prevent a catastrophe. See chapter x., *post*); *Balhoff v. Michigan C. R. Co.* (1895) 106 Mich. 606, 65 N. W. 592 (water flooded the track and froze); *McClarny v. Chicago, M. & St. P. R. Co.* (1891) 80 Wis. 277, 49 N. W. 963 (an accumulation of dirt, ice, snow, and chaff around the rails of a side track caused a derailment). Or where the sides of the cuttings through which the line is carried are left in such a condition that masses of earth, rocks, etc., may fall upon the roadbed. *True v. Lehigh Valley R. Co.* (1897) 22 App. Div. 588, 48 N. Y. Supp. 86 (an earth slide); *Bean v. Western N. C. R. Co.* (1890) 107 N. C. 731, 12 S. E. 600 (rocks were likely to fall on the track at any moment); *Little Rock & Ft. S. R. Co. v. Voss* (1892; Ark.) 18 S. W. 172 (a large rock slipped down upon the track). Or produce in some other way conditions which will unduly imperil the security of employees. *Holden v. Fitchburg R. Co.* (1880) 129 Mass. 268, 37 Am. Rep. 343 (bank fell on a derrick, and thus brought one of the guys so close to the track that it swept a brakeman off a car). Or where there was a thick growth of bushes near the track, which prevented the engineer from seeing ahead of the train. *Fames v. Texas & N. O. R. Co.* (1885) 63 Tex. 660; *Oregon Short Line & U. N. R. Co. v. Tracy* (1895) 14 C. C. A. 199, 29 U. S. App. 529, 66 Fed. 931. But no action can be maintained on the theory that the track was frequently obstructed by the movements of the cars, so that a crossing could not be seen. This is an ordinary risk. *Bancroft v. Boston & M. R. Co.* (1893) 67 N. H. 466, 30 Atl. 409 (collision of train with team); *Rumsey v. Delaware, L. & W. R. Co.* (1892) 151 Pa. 74, 25 Atl. 37 (a similar accident).

ties inadequate, where these conditions were a necessary incident of one of the stages of the work as it was being carried on.⁶

As regards employees engaged in the work of repairing a defective track, the company is not under any obligation to keep it in good condition.⁷ The extent of its duty is merely to give them timely notice of the defects, so that they may take the appropriate precautions to secure themselves against injury.⁸ See generally, as to cases of this class, § 29, *ante*.

85. Track considered as a footway for servants.—(See also § 69, *supra*.)—*a. Track and roadbed itself.*—From the decisions cited below, it will be seen that the servant has generally been permitted to recover for injuries due to the abnormal condition of any of the component parts of the permanent way.¹ But there is some conflict of opinion as to the liability of the company for one particular kind of injury, viz., that caused by a brakeman's clothes catching in splinters projecting from old and battered rails.²

By a court which denies that there is any obligation on the part of a company to keep the track safe as a footway (see 68, *b, supra*), it has been held that inequalities on a track at a station, occasioned by

⁶ *Evansville & R. R. Co. v. Henderson* (1893) 134 Ind. 636, 33 N. E. 1021.

⁷ *Mitchell v. Fullington* (1889) 83 Ga. 301, 9 S. E. 1083.

⁸ *St. Louis, I. M. & S. R. Co. v. Morgart* (1885) 45 Ark. 318.

¹ The action has been held maintainable where the cause of the injury was a loose and worn plank on a crossing. *Bird v. Long Island R. Co.* (1896) 11 App. Div. 134, 42 N. Y. Supp. 888. Defective planking on the track. *Chicago & W. L. R. Co. v. Massig* (1893) 50 Ill. App. 666. A hole in the track. *Northern P. R. Co. v. Teeter* (1894) 11 C. C. A. 332, 27 U. S. App. 316, 63 Fed. 527; *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 36 Am. Rep. 454; *Lake Erie & W. R. Co. v. Wilson* (1901) 189 Ill. 89, 59 N. E. 573. A hole outside the track. *Missouri, K. & T. R. Co. v. Kirkland* (1895) 11 Tex. Civ. App. 528, 32 S. W. 588; *Needham v. Louisville & N. R. Co.* (1887) 85 Ky. 423, 3 S. W. 797, 11 S. W. 306. A defective frog. *Hunt v. Kane* (1900) 40 C. C. A. 372, 100 Fed. 256. The defective blocking of a guard rail. *Paine v. Eastern R. Co.* (1895) 91 Wis. 340, 64 N. W. 1005. A depression in the track causing an abnormal movement of cars which were being coupled. *Texas,*

S. V. & N. W. R. Co. v. Gun (1893) Tex. Civ. App. 23 S. W. 633 (draw bars slipped past each other); *Louisville & N. R. Co. v. Kemper* (1899) 153 Ind. 618, 53 N. E. 931 (the track suddenly settled, and allowed a car to rush down into the depression with unexpected speed, crushing a brakeman's foot).

² In Georgia it has been held that such a condition imported a prima facie breach of duty. *Preston v. Central R. & Bkg. Co.* (1889) 84 Ga. 588, 11 S. E. 143. In Minnesota the right of action has been denied,—in one case on the ground of there being a common practice in that part of the country to use old rails for side tracks (*Doyle v. St. Paul, M. & M. R. Co.* (1889) 42 Minn. 79, 43 N. W. 787); and, in another case, apparently for the reason that a projecting splinter at the end of a rail on a side track, extending inwards $\frac{1}{2}$ of an inch for a distance of 3 inches along the rail, created what was merely an ordinary risk. *Barrett v. Great Northern R. Co.* (1898) 75 Minn. 113, 77 N. W. 540. In Michigan the same conclusion has been reached, the reason assigned being that the risk thus created was obvious. *Michigan C. R. Co. v. Austin* (1879) 40 Mich. 247.

recent repairs, are presumed to be known to a brakeman, and that he cannot recover for injuries received through stumbling.³

b. Casual obstructions on or near the track.—Several courts have rendered decisions which proceed upon the theory that negligence may be inferred where movable articles having no immediate connection with the operation of trains are left lying on the track, and cause employees to lose their footing.⁴ Similarly, employees have been allowed to recover where their injuries were due to obstructions of this kind beside the track.⁵ But it is conceded that the company may, without culpability, allow such articles to remain temporarily near the track, when they are placed there in the ordinary way for the purpose of repairing the track itself.⁶

Other courts absolve the company on the ground, more or less distinctly formulated, that a railway company cannot be found guilty of negligence on the theory that it is bound to keep the entire surface of its premises clear of every object that may cause an employee to slip or be thrown down.⁷

The existence of any obligation to keep the ground near the track free from accumulations of snow and ice has been denied in one case on the ground that the danger they create is one of the ordinary risks of work in cold climates.⁸ By other authorities they seem to be put

³ *Philadelphia & R. R. Co. v. Schertle* (1881) 97 Pa. 450.

⁴ *Kennedy v. Lake Superior Terminal & Transfer R. Co.* (1896) 93 Wis. 32, 66 N. W. 1137 (ashes); *Linck v. Louisville & N. R. Co.* (1899) 21 Ky. L. Rep. 1097, 54 S. W. 184 (rubbish); *Louisville & N. R. Co. v. Vestal* (1899) 20 Ky. L. Rep. 1288, 49 S. W. 204 (a large clinker about 1 foot long and 6 inches thick turned under a switchman's foot); *Fish v. Illinois C. R. Co.* (1896) 96 Iowa, 702, 65 N. W. 995 (cobble stones had dropped from gravel trains).

⁵ *Hulchan v. Green Bay, W. & St. P. R. Co.* (1887) 68 Wis. 529, 32 N. W. 529 (blocks of timber beside the track); *Southern P. R. Co. v. Markey* (1892; Tex.) 19 S. W. 392 (similar facts); *Hall v. Missouri P. R. Co.* (1881) 74 Mo. 298 (rail near the track); *Boughton v. Chicago, St. P. M. & O. R. Co.* (1891) 47 Minn. 486, 50 N. W. 531 (a section man stumbled over a log while trying to get out of the way of a train); *Chicago, R. I. & P. R. Co. v. Kinnare* (1900) 91 Ill. App. 508, affirmed in (1901) 190 Ill. 9, 60 N. E. 57 (sand and gravel alongside track).

⁶ *Hurst v. Kansas City, P. & G. R. Co.* (1901) 163 Mo. 309, 63 S. W. 695 (recovery denied where a brakeman stumbled over one of several piles of gravel distributed in a yard, as a preliminary to using them for ballast).

⁷ It has been held that no action can be maintained for an injury to an employee caused by falling over a clinker of unusual size in descending from an engine. Such an injury is simply a misfortune,—the incident of the employment, and of the risk consequent therein. *Lee v. Central R. & Bkg. Co.* (1890) 86 Ga. 231, 12 S. E. 307. Nor can a brakeman recover damages where he trips over a small spiral spring which has been left lying on a repair track. *Williams v. St. Louis & S. F. R. Co.* (1893) 119 Mo. 316, 24 S. W. 782. The risks created by the heaps of ashes which it is the custom to drop out of the fire box onto the track are assumed by servants handling cars. *Huachuca v. Winona & St. P. R. Co.* (1880) 27 Minn. 137, 6 N. W. 773.

⁸ *Piqueño v. Chicago & G. T. R. Co.* (1883) 52 Mich. 40, 50 Am. Rep. 243, 17 N. W. 232.

in the same category as any other kind of casual obstruction, the company being held liable or not, according to circumstances.⁹

96. Objects dangerous to employees in moving trains or cars.—(See also §§ 70, 71, *supra*.)—*a. On the track.*—An employee who, while seated on a hand car with his legs hanging down over the edge, was struck by a plank of a crossing which stuck up several inches above its proper level, has been held entitled to recover.¹

It is not negligence to leave cars on a side track so close to a switch that a train traveling at the usual speed of 30 or 35 miles an hour, and running out upon the side track, cannot be stopped in time to avoid a collision.²

b. Alongside the track.—It may be presumed that even the courts which deny that a train hand can recover for an injury caused by striking against a rigid object close to the track, while it is in its normal position, would all concede that there is a *prima facie* right of action where the injury was due to the fact that the object in question was closer than usual to the track at the time when the accident occurred.³

Nor is there any ground upon which the presence of a casual ob-

⁹ Recovery has been allowed where a brakeman lost his footing on frozen mud and snow which had accumulated between the rails. *Lake Shore & M. & N. R. Co. v. Conway* (1896) 67 Ill. App. 155. And where he fell on heaped-up snow, which the company permitted to be shoveled from its tracks onto the space between them. *Clegg v. Chicago & W. M. R. Co.* (1892) 91 Mich. 624, 52 N. W. 62. In one Minnesota case a plaintiff was nonsuited on the theory that a railway company is not bound, unless under very special and peculiar circumstances, to remove all the snow from its switch yards; and if it keeps the surface of the snow practically level, and does not allow it to accumulate above the level of the rails, or in dangerous ridges or hummocks, or to form dangerous holes, it cannot be charged with negligence; nor is it negligent in failing to cover the snow with ashes or cinders. *Fay v. Chicago, St. P. M. & O. R. Co.* (1898) 72 Minn. 192, 75 N. W. 15. But in a case decided a few months later it was held that the question as to the negligence of a railroad company in permitting a ridge of ice covered with snow, and about 2 inches higher than the rails, to remain for about a week between the rails of a track in a large and busy switch yard,

was for the jury. *Rifley v. Minneapolis & St. L. R. Co.* (1898) 72 Minn. 469, 75 N. W. 704, distinguishing the *Fay Case*, on the grounds (1) that more care should be used in securing safe conditions in a yard in which a large amount of traffic is handled than one where the amount of traffic is small, and (2) that in the earlier case the place where the plaintiff fell was covered with level snow, with no concealed ridge of ice under it. In one case of this type the breach of duty was admitted, but the servant failed to recover on the ground that he appreciated the risk. *Way v. Chicago & N. W. R. Co.* (1888) 76 Iowa, 393, 41 N. W. 51 (defective condition was the accumulation of ice on a track where car repairs worked).

¹ *Pool v. Chicago, M. & St. P. R. Co.* (1881) 53 Wis. 657, 11 N. W. 15 (the contention was that the road was not defective, because the plank would in no way interfere with the passage of trains).

² *Grant v. Raleigh & G. R. Co.* (1891) 108 N. C. 462, 13 S. E. 200 (instruction to opposite effect rightly refused).

³ So held in *Malott v. Laufman* (1899) 89 Ill. App. 178 (a mail crane became so loose on its foundation that it leaned towards the track).

struction near the track can be excused after a sufficient period has elapsed to charge the company with notice of its position.⁴ See chapters x., xi., *post*.

Most of the courts which have dealt with such facts also hold that a railway company is negligent if movable objects which have no connection, or only an indirect connection, with the operation of the road, are left so close to the track that the safety of train hands is endangered.⁵

The Massachusetts doctrine, however, seems to be that such obstructions are an ordinary incident of railway work, and that the train hands are presumed to be able to protect themselves against the resulting risks.⁶

c. *Above the track*.—All courts, whether they do or do not regard as culpable the maintenance of overhead structures so low as to endanger train hands, hold a company liable if these structures cause an injury while they are abnormally low.⁷

87. Railway fences.—(See also § 72, *supra*.) Whether there is or

⁴ *Chicago & N. W. R. Co. v. Delaney* (1897) 160 Ill. 581, 48 N. E. 476 (a piece of drawbar lying on the track struck the pilot of the engine, and was thrown against the footboard, breaking it).

⁵ *Gaffney v. New York & V. E. R. Co.* (1887) 15 R. I. 456, 7 Atl. 284 (lumber pile); *Beecher v. Chicago & N. W. R. Co.* (1878) 45 Wis. 477 (lumber pile); *Smith v. Winona & St. P. R. Co.* (1889) 42 Minn. 87, 43 N. W. 968 (stone pile); *Meredith v. Cranberry Coal & L. Co.* (1888) 90 N. C. 576, 5 S. E. 659 (a wood pile seems to be regarded as importing negligence; but the opinion does not contain a direct affirmation of this doctrine); *Powers v. Thayer Lumber Co.* (1892) 92 Mich. 533, 52 N. W. 937 (tree). But no negligence can be inferred from the mere fact that a tree was left standing close to the track on a road under construction. *Manning v. Chicago & W. M. R. Co.* (1895) 105 Mich. 260, 63 N. W. 312.

⁶ In *Thompson v. Boston & M. R. Co.* (1891) 153 Mass. 391, 26 N. E. 1070, where a brakeman in getting out along the side of a car after setting a brake struck against a pile of rails, it was held that he could not recover, mainly for the reason that, knowing that there was a possibility that such obstructions might exist, he negligently failed to look out for the pile in question. That the maintenance of such obstructions

was not regarded as implying negligence is, however, clearly indicated by the remark of the court that, while a rail road corporation should keep its freight yard in such condition that its employees may do their work in reasonable safety, there must sometimes be piles of rails, or sleepers, near its track, and it cannot be expected to keep the yard in such condition that they may themselves neglect ordinary precaution.

⁷ *Warden v. Old Colony R. Co.* (1884) 137 Mass. 204 (a rope supporting telltale was defective, and allowed it to sink); *Wallace v. Central Vermont R. Co.* (1893) 138 N. Y. 302, 33 N. E. 1069 (telltale out of order); *Hines v. New York C. & H. R. R. Co.* (1894) 78 Hun. 239, 28 N. Y. Supp. 829 (same facts); *Ohio, I. & W. R. Co. v. Johnson* (1889) 31 Ill. App. 183 (brakeman killed by a water-supply pipe, which, by reason of defective appliances for holding the pipe in position when not in use, had swung around over the train upon which deceased was riding); *Gates v. Chicago, M. & St. P. R. Co.* (1892) 2 S. D. 422, 50 N. W. 907 (arm of derrick, not being properly secured, swung over the track); *Holden v. Fitchburg R. Co.* (1880) 129 Mass. 268, 37 Am. Rep. 343 (a derrick was thrown down by an earth slide, and so brought one of the guys low enough down to sweep a brake man off a car).

not any common-law duty to fence a track, it would seem that a railway company must at least exercise due care to see that a fence which has been erected is kept in good condition. The position taken is, that a servant working on a fenced line only assumes the risks incident to its operation while the fence is in good condition.¹

88. Rolling stock on railways.—(See also §§ 73, 74, *supra*).—Negligence is inferable where a railway company uses rolling stock defective in the respects indicated by the subjoined note.¹

¹ *Quill v. Houston & T. C. R. Co.* (1898) Tex. Civ. App. 46 S. W. 847. Writ of Error dismissed in (1898) 92 Tex. 335, 48 S. W. 168, distinguishing the cases in which no fence had even been erected.

The same view was apparently taken in three other cases, as the only points discussed were whether the defenses of assumption of risks or contributory negligence were available to the defendant under the circumstances. *Necessary v. Central P. R. Co.* (1880) 57 Cal. 15; *Magee v. North Pacific Coast R. Co.* (1889) 78 Cal. 430, 21 Pac. 114; *Dewey v. Chicago & N. W. R. Co.* (1871) 31 Iowa, 373.

(1) *Defective locomotives.*—Actions have been maintained where the following parts were in bad order: Boilers. *Texas & P. R. Co. v. Barrett* (1893) 14 C. C. A. 373, 30 U. S. App. 196, 67 Fed. 214. Affirmed in (1897) 160 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707; *Barter v. Chicago & N. W. R. Co.* (1899) 104 Wis. 307, 80 N. W. 644; *Atchison, T. & S. F. R. Co. v. Holt* (1883) 20 Kan. 149; *Cone v. Delaware, L. & W. R. Co.* (1880) 81 N. Y. 206, 37 Am. Rep. 491; *Lake Erie & W. R. Co. v. McHenry* (1894) 10 Ind. App. 525, 37 N. E. 186; *Kirkpatrick v. New York C. & H. R. R. Co.* (1879) 70 N. Y. 240; *Keegan v. Western R. Corp.* (1853) 8 N. Y. 175, 59 Am. Dec. 476; *Flynn v. Wabash, St. L. & P. R. Co.* (1885) 18 Ill. App. 235; *Chicago & A. R. Co. v. DuBois* (1896) 65 Ill. App. 142. Wheels. *Bridges v. St. Louis, I. M. & S. R. Co.* (1879) 6 Mo. App. 389. Levers. *Burlington & M. R. Co. v. Wallace* (1889) 28 Neb. 179, 44 N. W. 223. Drawbars. *Ousley v. Central R. & Bkg. Co.* (1891) 86 Ga. 538, 12 S. E. 938; *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564, 45 N. E. 108; *Norfolk & W. R. Co. v. Nunnally* (1892) 88 Va. 546, 14 S. E. 367. Footboard. *O'Mellia v. Kansas City, St. J. & C. B.*

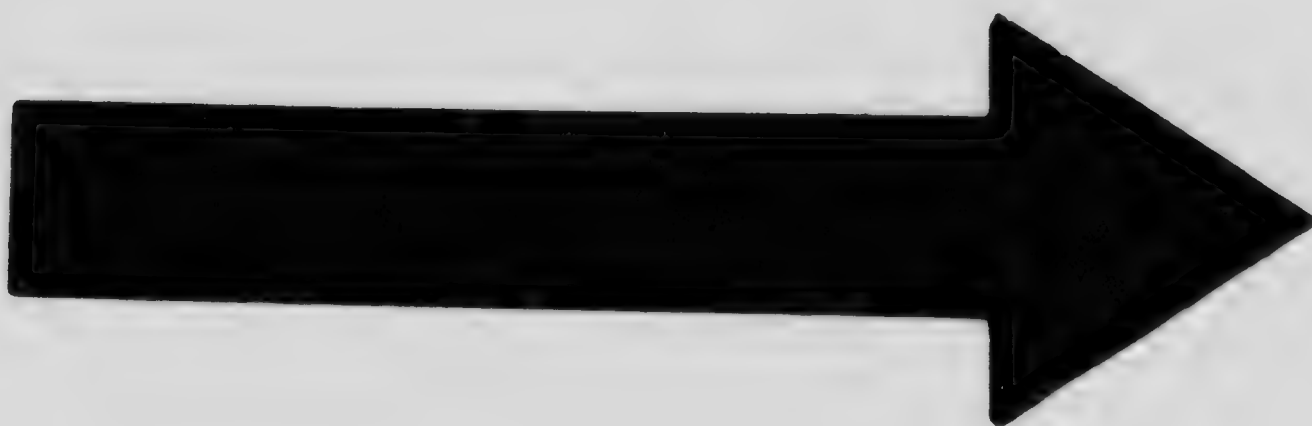
R. Co. (1893) 115 Mo. 205, 21 S. W. 503.

The case is for the jury where no proper headlight was provided for the tender of an engine which was backing. *Southern P. Co. v. Yeargin* (1901) 48 C. C. A. 497, 109 Fed. 430.

Other cases in which the liability of the defendant for defective locomotives was recognized are *Wabash & W. R. Co. v. Morgan* (1892) 132 Ind. 430, 31 N. E. 601; *Durgin v. Munson* (1864) 9 Allen, 396, 85 Am. Dec. 770; *Atchison, T. & S. F. R. Co. v. Holt* (1883) 20 Kan. 149; *Geary v. Kansas City, O. & S. R. Co.* (1897) 138 Mo. 251, 30 S. W. 774; *McCauley v. Southern R. Co.* (1897) 10 App. D. C. 500; *Chicago & A. R. Co. v. Shannon* (1867) 43 Ill. 338, 339; *Dunn v. New York, N. H. & H. R. Co.* (1901) 46 C. C. A. 546, 107 Fed. 666 (nonsuit held erroneous where a brakeman working at the switching of cars with a road engine not provided with a hand-hold such as is ordinarily used on yard engines took hold of the figure plate and it gave way).

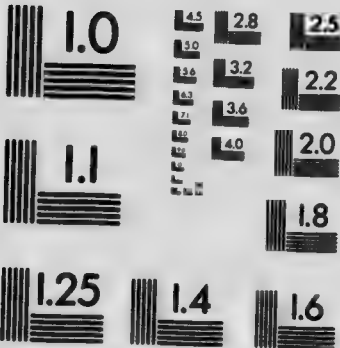
(2) *Defective freight cars.*—Injuries caused by the condition of the couplings were declared actionable in *Powers v. New York C. & H. R. R. Co.* (1891) 60 Hun. 19, 14 N. Y. Supp. 408. Affirmed in 128 N. Y. 659, 29 N. E. 148; *Bradshaw v. Chicago, R. I. & P. R. Co.* (1897) 58 Kan. 618, 50 Pac. 876; *Munch v. Great Northern R. Co.* (1898) 75 Minn. 61, 77 N. W. 541; *Bowers v. Union P. R. Co.* (1885) 4 Utah, 215, 7 Pac. 251; *Norfolk & W. R. Co. v. Appy* (1896) 93 Va. 108, 25 S. E. 226; *Illinois C. R. Co. v. Harris* (1894) 53 Ill. App. 502; *Fordyce v. Yarrowburgh* (1892) 1 Tex. Civ. App. 260, 21 S. W. 421; *Druyer, T. & G. R. Co. v. Simps* (1891) 16 Colo. 55, 26 Pac. 339; *Taylor v. Southern R. Co.* (1898) 122 N. C. 902, 30 S. E. 117; *Illinois & R. Co. v. Barslow* (1901) 94 Ill. App. 206; *Knight v. Chicago, M. & St. P. R. Co.*

- (1890) 44 Minn. 141, 46 N. W. 291 (trapped edge on a drawhead caught the clothing of a brakeman). The following cases recognize the liability which a company incurs when couplings are defective in such a manner that the cars to be coupled are not kept at a safe distance apart. *Norse v. Northern P. R. Co.* (1880) 39 Fed. 487; *Kin v. Ohio & M. R. Co.* (1882) 11 Riss. 362, 14 Fed. 277; *St. Louis, I. M. & N. R. Co. v. Higgins* (1890) 53 Ark. 458, 14 S. W. 653; *Ehlin, J. & E. R. Co. v. Enlin* (1896) 68 Ill. App. 90; *Louisville & N. R. Co. v. Foley* (1893) 94 Ky. 220, 21 S. W. 806; *Karrer v. Detroit, G. H. & M. R. Co.* (1889) 76 Mich. 400, 43 N. W. 370 (drawbar had dropped down); *Heuser v. Flint & P. M. R. Co.* (1885) 56 Mich. 620, 23 N. W. 440 (similar facts); *Bender v. St. Louis & N. F. R. Co.* (1897) 137 Mo. 240, 37 S. W. 132; *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462, 3 N. E. 344; *Evans v. Chamberlain* (1892) 40 S. C. 104, 18 S. E. 213; *Richmond & D. R. Co. v. George* (1891) 88 Va. 223, 13 S. E. 429; *Chesapeake & O. R. Co. v. Lush* (1890; Va.) 24 S. E. 385. The furnishing of the crooked link customarily used in coupling cars of different heights is not a sufficient discharge of the company's duty to absolve it from liability for allowing a foreign car with a bumper that had sagged to be taken into a train. *Goodrich v. New York C. & H. R. Co.* (1889) 116 N. Y. 398, 5 L. R. A. 750, 22 N. E. 397.
- Hand holds. *Felton v. Bullard* (1899) 37 C. C. A. 1, 94 Fed. 781; *Brown v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5; *Settle v. St. Louis & S. F. R. Co.* (1895) 127 Mo. 330, 30 S. W. 125; *Hagden v. Platt* (1895) 84 Hun, 987, 32 N. Y. Supp. 1144; *Thompson v. Great Northern R. Co.* (1900) 79 Minn. 201, 82 N. W. 637.
- Brakes. *Northern P. R. Co. v. Charles* (1892) 2 C. C. A. 380, 7 U. S. App. 359, 51 Fed. 562; *Mexican C. R. Co. v. Jones* (1901) 48 C. C. A. 227, 107 Fed. 64; *Central Trust Co. v. Texas & St. L. R. Co.* (1887) 32 Fed. 448; *Bailly v. Rome W. & O. R. Co.* (1893) 139 N. Y. 302, 34 N. E. 918; *Chicago, B. & Q. R. Co. v. Kellogg* (1898) 55 Neb. 718, 76 N. W. 462 (First Hearing, 54 Neb. 127, 74 N. W. 454); *Hickman v. Missouri P. R. Co.* (1886) 22 Mo. App. 444; *Mad River & L. F. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 512; *Morton v. Detroit, B. C. & A. R. Co.* (1890) 81 Mich. 423, 46 N. W. 111; *Myers v. Erie R. Co.* (1890) 44 App. Div. 11, 60 N. Y. Supp. 422; *Louisville, N. A. & C. R. Co. v. Buck* (1888) 116 Ind. 506, 2 L. R. A. 320, 10 S. E. 453; *Praeger v. Montana C. R. Co.* (1895) 17 Mont. 372, 30 L. R. A. 814, 43 Pac. 81; *Chicago & N. W. R. Co. v. Taylor* (1873) 60 Ill. 461, 18 Am. Rep. 620; *Texas P. R. Co. v. White* (1891) 82 Tex. 543, 18 S. W. 478 (brakeman's foot was caught by a drooping brake). A verdict for the plaintiff will not be set aside where a servant was killed by the failure of air brakes to work, because of a leak in a steam pipe in the smoke box. *Pierman v. New York, N. H. & H. R. Co.* (1900) 53 App. Div. 363, 65 N. Y. Supp. 1639.
- Ladders. *Richmond & D. R. Co. v. Williams* (1880) 86 Va. 165, 9 S. E. 990; *Richmond & D. R. Co. v. Moore* (1883) 78 Va. 93; *Goodman v. Richmond & D. R. Co.* (1886) 81 Va. 570; *Jones v. New York C. & H. R. R. Co.* (1882) 28 Hun. 364; *Lake Shore & M. S. R. Co. v. Ryan* (1897) 70 Ill. App. 45; *Thompson v. Great Northern R. Co.* (1900) 79 Minn. 201, 82 N. W. 637; *Missouri, K. & T. R. Co. v. Chambers* (1897) 17 Tex. Civ. App. 487, 43 S. W. 1090; *Missouri, K. & T. R. Co. v. Miller* (1901) Tex. Civ. App. 61 S. W. 978.
- Steps. *Texas P. R. Co. v. Wisenor* (1886) 66 Tex. 674, 2 S. W. 667; *Cambron v. Great Northern R. Co.* (1898) 8 N. D. 124, 77 N. W. 1016 (steps removed temporarily from a car).
- Truss rod. *Missouri, K. & T. R. Co. v. Murphy* (1898) 50 Kan. 774, 5 Pac. 863 (rod broke and caught switchman, and threw him under the wheels).
- Floor. *Chicago & E. R. Co. v. Brangan* (1894) 10 Ind. App. 570, 37 N. E. 190.
- Wheels. *Union P. R. Co. v. Daniels* (1894) 152 U. S. 684; *Union P. R. Co. v. Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 750, Affirming (1890) 6 Utah, 357, 23 Pac. 762.
- Stakes. *Jones v. Chicago, St. P. M. & O. R. Co.* (1900) 80 Minn. 488, 49 L. R. A. 640, 83 N. W. 446; *Ryan v. New York C. & H. R. R. Co.* (1895) 88 Hun, 269, 34 N. Y. Supp. 665; *Bushby v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374, 14 N. E. 407.
- (3) Defective hand cars.—Action held maintainable in *Indiana, I. & L. R. Co. v. Snyder* (1895) 140 Ind. 647, 39 N. E. 912; *Solomon R. Co. v. Jones* (1883) 30 Kan. 601, 2 Pac. 657; *Norton v. Louisville & N. R. Co.* (1895) 16 Ky. L.



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89. Vehicles other than those used on railways.—The action has been sustained where the dangerous instrumentality was a defective brake;¹ a defective linchpin;² a defective flange in a wheel.³

90. Appliances designed to support or lift heavy objects.—The action has been held maintainable where the cause of the injury was the defective condition of ropes and cables,¹ chains,² hooks,³ eye-bolts,⁴ rods designed to support a certain weight,⁵ jackscrews,⁶ pul-

Rep. 864, 30 S. W. 599; *Clowers v. Wabash, St. L. & P. R. Co.* (1886) 21 Mo. App. 213 (lever of hand car cracked at a place where it was covered by the iron at the shoulder); *Gulf, C. & S. F. R. Co. v. Silliphant* (1888) 70 Tex. 623, 8 S. W. 673 (section hand injured by the giving way of the lever of a hand car).

(4) *Defective street cars.*—Recovery was allowed in *Beardsley v. Minneapolis Street R. Co.* (1893) 54 Minn. 504, 56 N. W. 176 ("bucking" car); *Murdock v. Oakland, S. L. & H. Electric R. Co.* (1900) 128 Cal. 22, 60 Pac. 469 (car started with a lunge).

¹ *Mahood v. Pleasant Valley Coal Co.* (1892) 8 Utah, 85, 30 Pac. 149; *Matthews v. McDonald* (1865) 3 Se. Sess. Cas. 3d series, 506.

² *Boyce v. Schroeder* (1898) 21 Ind. App. 28, 51 N. E. 376.

³ *Byrne v. Eastmans Co.* (1900) 163 N. Y. 461, 57 N. E. 738. Reversing (1898) 27 App. Div. 270, 50 N. Y. Supp. 457.

⁴ *Canard S. S. Co. v. Carey* (1886) 119 U. S. 245, 30 L. ed. 354, 7 Sup. Ct. Rep. 1360; *Senior v. Ward* (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261; *Perry v. Ricketts* (1870) 55 Ill. 234; *The Phoenix* (1888) 34 Fed. 760; *Wood v. Pitfield* (1887) 26 N. B. Rep. 210; *The Carolina* (1886) 30 Fed. 199; *The Ethelred* (1899) 96 Fed. 446; *Hannigan v. Union Warehouse Co.* (1896) 3 App. Div. 618, 73 N. Y. S. R. 753, 38 N. Y. Supp. 272; *Ocean S. S. Co. v. Matthews* (1890) 86 Ga. 418, 12 S. E. 632; *McGuigan v. Beatty* (1898) 186 Pa. 329, 40 Atl. 490; *Bruce v. Beall* (1897) 99 Tenn. 303, 41 S. W. 445; *Baker v. Allegheny Valley R. Co.* (1880) 95 Pa. 211, 40 Am. Rep. 634; *Yaw v. Whitmore* (1901) 167 N. Y. 605, 60 N. E. 1123, Affirming (1899) 46 App. Div. 422, 61 N. Y. Supp. 731 (cable supporting derrick broke); *The Persian Monarch* (1892) 49 Fed. 669 (wire rope used as a guy of a derrick gave way); *Ashley Wire Co. v. Mercier* (1895) 61 Ill. App. 485 (similar accident); *Steen v. St. Paul & D. R. Co.* (1887) 37

Minn. 310, 34 N. W. 113 (a frayed wire rope supporting a pile-driver hammer dangerous to touch with a mittened hand when it was in motion).

⁵ *Murphy v. Phillips* (1876) 24 Week. Rep. 647, 35 L. T. N. S. 477; *Whitelaw v. Moffat* (1849) 12 Sc. Sess. Cas. 21 series, 434; *Hackett v. Middlesex Mfg. Co.* (1869) 101 Mass. 101; *Tanney v. J. B. Wilson & Co.* (1891) 87 Mich. 453, 49 N. W. 666; *Honijus v. Chambersburg Engineering Co.* (1900) 196 Pa. 47, 46 Atl. 259; *Vincent v. Alden* (1901) 62 App. Div. 558, 71 N. Y. Supp. 149 (some of the links here had been reduced about a third in thickness); *Consolidated Ice Mach. Co. v. Kiefer* (1888) 26 Ill. App. 466; *Hoffman v. Dickinson* (1888) 31 W. Va. 142, 6 S. E. 53. Evidence that a chain broke under a strain only one tenth of that which, according to expert testimony, one of that size should bear, if made of the best material, will justify a conclusion by a jury that the chain was defective. *De Graff v. New York C. & H. R. Co.* (1879) 76 N. Y. 125. "The amount of strain spoken of [by the experts] is contemplated to be applied when the chain is new, either by hydraulic pressure, or a dead weight, and not in the mode in which the chain is used on a car. Its use would naturally weaken its power of resistance, and there is no obligation to keep it up to its maximum strength, and hence the breaking might have been from natural and unforeseen causes. But these were considerations for the jury."

⁶ *Spicer v. South Boston Iron Co.* (1885) 138 Mass. 426.

⁷ *Painton v. Northern C. R. Co.* (1890) 83 N. Y. 7; *Killman v. Robert Palmer & Son Shipbuilding & Marine R. Co.* (1900) 42 C. C. A. 281, 102 Fed. 224; *Doyle v. White* (1896) 9 App. Div. 521, 35 N. Y. Supp. 760, 41 N. Y. Supp. 628.

⁸ *Moynehan v. Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574.

⁹ *Kennedy v. Chicago, H. & St. P. R. Co.* (1894) 57 Minn. 227, 58 N. W. 878.

leys and their attachments,⁷ jiggers,—contrivances for loading wheels on a railway car,⁸—handles on boxes.⁹

91. Elevators.—(See also § 75, *supra*.)—An employer may be held liable if the safety devices which he is bound to provide for an elevator designed for the use of his servants prove defective.¹ The employer must also respond in damages if an elevator, which is either constructed specially for the conveyance of the servants, or which, though constructed primarily for the carriage of freight, is also used, with his acquiescence, for the conveyance of servants, is in any other way abnormally dangerous to use.²

92. Vessels subjected to the pressure of steam.—(See also § 88, *supra*.)—A servant may maintain an action for injuries caused by

¹ *Romona Goolitic Stone Co. v. Phillips* (1894) 11 Ind. App. 118, 39 N. E. 96.

² *Kain v. Smith* (1882) 89 N. Y. 375. Affirming 25 Hun. 146 (parts were of unequal length, where they should have been equal; joints were loose and infirm, where they should have been tight and steady; and grip iron was so blunted that it would not hold).

³ *Sim v. Dominion Fish Co.* (1901) 2 Ont. L. Rep. (C. A.) 69.

⁴ *Biddiscombe v. Cameron* (1900) 161 N. Y. 637, 57 N. E. 1104. Affirming (1898) 35 App. Div. 561, 55 N. Y. Supp. 127; *Baltimore Boot & Shoe Mfg. Co. v. Jamar* (1901) 93 Md. 404, 49 Atl. 847.

⁵ As where it suddenly jumps up several inches after being brought to a level with a floor. *Meyers Sons v. Falk* (1901) 99 Va. 385, 38 S. E. 178. Or the supporting cable or chain is defective. *Bruce v. Beall* (1897) 99 Tenn. 303, 41 S. W. 445; *Mulvey v. Rhode Island Locomotive Works* (1885) 14 R. I. 204; *Brydon v. Stewart* (1855) 2 Macq. H. L. Cas. 30; *Bucher v. Prygibil* (1897) 19 App. Div. 126, 45 N. Y. Supp. 972. Or the spring intended to close an elevator gate automatically does not act properly. *Larkin v. Washington Mills Co.* (1899) 45 App. Div. 6, 61 N. Y. Supp. 93. Or the cage runs so loosely on the guides that the catches act so as to stop it with dangerous suddenness. *Mangum v. Bullion B. & C. Min.* (1897) 15 Utah. 534, 50 Pac. 834.

the brake controlling the descent of hoisting apparatus becomes less effective by wear, and fails to perform its functions. *Myers v. Hudson Iron Co.*

(1889) 150 Mass. 125, 22 N. E. 631.

Where it appears that a scrubbing girl was obliged, in her work, to use a hotel freight elevator, which was a movable platform with iron guards on the sides which did not reach to the floor, but left space enough for a foot to pass under them, and at the time of the accident it had swayed to one side and tilted over, and she was thrown down, and her foot passed under the guard, and she was injured, the defendant is liable, the elevator being unfitted for the safe transportation of human beings. *McKinnie v. Kilgallon* (1887; Pa.) 11 Atl. 614. For other cases where injuries caused by defective elevators were held actionable, see *Phillip v. Dixon* (1852)

14 Sc. Sess. Cas. 2d series, 953; *White-lair v. Moffatt* (1849) 12 Sc. Sess. Cas. 2d series, 434; *Ross v. Cross* (1890) 17 Ont. App. Rep. 29; *McGregor v. Reid, M. & Co.* (1899) 178 Ill. 464, 53 N. E. 323; *Union Show Case Co. v. Blindauer* (1898) 75 Ill. App. 358; *Wilson v. Williams* (1900) 22 Ky. L. Rep. 567, 58 S. W. 444; *Bartley v. Trorlicht* (1892) 49 Mo. App. 214; *Derwin v. Herrman* (1890) 31 N. Y. S. R. 179, 9 N. Y. Supp. 722; *Leland v. Hearn* (1900) 49 App. Div. 111, 63 N. Y. Supp. 204; *Hart v. Naumberg* (1888) 50 Hun. 392, 3 N. Y. Supp. 227; *Findlay Brewing Co. v. Bauer* (1893) 50 Ohio St. 560, 35 N. E. 55; *Johnson v. Armour* (1883) 18 Fed. 490; *Weiden v. Brush Electric Light Co.* (1889) 73 Mich. 268, 41 N. W. 269 (the wire rope of an elevator had become broken and ragged); *Anderson v. Hayes* (1899) 101 Wis. 519, 77 N. W. 903.

the defective condition of a boiler,¹ or of a valve,² or of the steam drum supplied by the boiler,³ or of a barrel which is cleaned by turning steam into it.⁴

That an exhaust steam pipe was turned so as to point in a dangerous direction warrants a finding of negligence.⁵

93. Miscellaneous appliances.—Employers have been held liable for injuries caused by the softness of the timber furnished for a maul-head;¹ by shears with a cracked surface;² by a defective rollway and defective chock-blocks in a sawmill;³ by the defective quality of the spurs furnished for climbing electric-light poles.⁴

94. Imperfect attachment of parts of apparatus.—(See also § 97, note 1, subd. (1), *infra*.)—Negligence is inferable where the means used for holding together the several parts of instrumentalities are so defective that one of these parts is detached, or otherwise changes its position, to the injury of the servant.¹

¹ *Lehigh Valley Coal Co. v. Kiszal* (1897) 25 C. C. A. 566, 51 U. S. App. 265, 80 Fed. 470; *Glossen v. Gichman* (1892) 147 Pa. 619, 23 Atl. 843; *Bal-lard v. Hitchcock Mfg. Co.* (1895) 145 N. Y. 619, 40 N. E. 163, Affirming (1893) 71 Hun. 582, 24 N. Y. Supp. 1101; *Johnson v. Boston & M. Consol. Copper & S. Min. Co.* (1895) 16 Mont. 64, 40 Pac. 298; *Jones v. Malvern Lum-ber Co.* (1893) 58 Ark. 125, 23 S. W. 679; *Woods v. Chicago & G. T. R. Co.* (1896) 108 Mich. 396, 66 N. W. 328; *Egan v. Dry Dock, E. B. & B. R. Co.* (1896) 12 App. Div. 556, 42 N. Y. Supp. 188. See also cases as to locomotives, in § 88, note 1, subd. (1), *supra*.

² *Hoes v. Ocean S. S. Co.* (1900) 56 App. Div. 259, 67 N. Y. Supp. 782.

³ *Re California Nav. & Improv. Co.* (1901) 110 Fed. 670.

⁴ *Crowell v. Thomas* (1897) 18 App. Div. 520, 46 N. Y. Supp. 137 (explosion was caused by the insertion of a plug in the vent).

⁵ *Russell v. Pacific Can. Co.* (1897) 116 Cal. 527, 48 Pac. 616.

¹ *Daly v. Lee* (1901) 167 N. Y. 537, 60 N. E. 1109, Affirming (1899) 39 App. Div. 188, 57 N. Y. Supp. 293.

² *Pacheco v. Judson Mfg. Co.* (1896) 113 Cal. 541, 45 Pac. 833.

³ *Foley v. Webster* (1892) 2 Brit. Col. 138, Affirmed in 21 Can. S. C. 580.

⁴ *Indiana Natural & Illuminating Gas Co. v. Marshall* (1899) 22 Ind. App. 121, 52 N. E. 232.

⁵ The case has been held to be for the

jury where a heavy cylinder fell owing to the giving way of the bolts which kept it in place. *Weems v. Mathieson* (1861) 4 Macq. H. L. Cas. 215. Where a pin securing a tackle block to the mast of a derrick worked out, and allowed the block to fall on plaintiff. *Houston v. Brush* (1894) 66 Vt. 331, 29 Atl. 380. Where the devices by which the arms of a derrick were attached proved defective. *Dyer v. Pittsburg Bridge Co.* (1901) 198 Pa. 182, 47 Atl. 979; *McMahon v. McIlale* (1899) 174 Mass. 320, 54 N. E. 854; *Scandell v. Columbia Constr. Co.* (1900) 50 App. Div. 512, 64 N. Y. Supp. 232; *Richmond & D. R. Co. v. Weems* (1893) 97 Ala. 270, 12 So. 186. Where a pin which held the parts of a machine together was defective. *Bradbury v. Kingston Coal Co.* (1893) 157 Pa. 231, 27 Atl. 400. Where a pin which prevented a hoisting apparatus from falling out of gear became loose and fell out. *Union Bridge Co. v. Techan* (1900) 92 Ill. App. 259. Where the shackle which held the block of a hoisting apparatus proved inadequate. *The Para* (1893) 56 Fed. 241. Where a clamp, if it had been made of proper material, would have borne a strain twice as great as that under which it broke. *Walsh v. Cronell* (1900) 49 App. Div. 203, 63 N. Y. Supp. 44. Where a pump was so illy secured that it fell apart. *Stimper v. Fuchs & L. Mfg. Co.* (1898) 26 App. Div. 333, 49 N. Y. Supp. 785, Affirmed in 161 N. Y. 636, 57 N. E. 1125. Where

95. Abnormal movements of machinery.—(See also § 78, note 1, subds. (4), (12), and § 88, note 1, subd. (1), *supra*.)—An employer fails in his duty if he allows machinery to fall into such a condition that it is apt to start automatically,¹ or some part of it to move further in a certain direction than it should do,² or if it fails to move smoothly.³

96. Changes in the parts of machines.—A servant may recover damages for an injury caused by the removal or alteration of some essential part of a machine, when the danger of using it is thereby materially increased.¹ Hence, whatever doctrine may be entertained as to the existence of a duty on the part of the employer to keep dangerous machinery covered (see §§ 76, 77, *supra*), the employer is *prima facie* liable for an injury resulting from the entire or partial removal of a cover which had been provided. The conditions thus created are clearly more dangerous, because misleading, than those to which the servant is exposed when there has never been a cover at all. In such cases, therefore, the right to maintain the action is complete, and can only be defeated by showing that he understood and deliberately encountered the specific risks arising from the changed circumstances.²

a heavy piece of shafting fell out of its supports. *Copithorne v. Hardy* (1899) 173 Mass. 400, 53 N. E. 915. Where a nut which kept an eye bolt in place was missing. *Monmouth Min. & Mfg. Co. v. Erling* (1894) 148 Ill. 521, 36 N. E. 117. Where a defect in a water spout used for filling engines, whether caused by the need of having the nuts in the apparatus for lowering and raising it loosened, or from a broken pulley, caused it to fall suddenly after it had been raised. *Texas & P. R. Co. v. Crow* (1893) 3 Tex. Civ. App. 266, 22 S. W. 928.

¹ *Mooney v. Connecticut River Lumber Co.* (1891) 154 Mass. 408, 28 N. E. 352; *Donahue v. Brown* (1891) 154 Mass. 21, 27 N. E. 675; *Blanton v. Dold* (1891) 109 Mo. 64, 76, 18 S. W. 1149 (belting was liable to slip, and thus set machinery in motion without a movement of the apparatus provided for that purpose); *Heucke v. Rock* (1901) 24 Wash. 556, 64 Pa. 55; *Donoran v. O'orman & S. Cordage Co.* (1900) 22 Ky. L. Rep. 770, 58 S. W. 798.

² *McMillan v. Union Press-Brick Works* (1879) 6 Mo. App. 434 (exces-

sive depression of a mould plunger on a brick-making machine).

³ *Swift v. Foster* (1896) 163 Ill. 50, 44 N. E. 837 (the broken tooth of a cog-wheel caused tackle to jerk and throw out a load of lumber which was being hoisted); *Atchison, T. & S. F. R. Co. v. McKee* (1887) 37 Kan. 592, 15 Pac. 484 (a frame in which a saw was set did not hold it firmly, but allowed it to vibrate, the consequence being that a block of wood was "kicked," and threw the servant's wrist against the saw).

¹ *Plefka v. Knapp-Stout Lumber Co.* (1897) 72 Mo. App. 309; *Mirick v. Morton* (1901) 62 Kan. 870, 64 Pac. 609.

² *Wuatilla v. Duluth Lumber Co.* (1887) 37 Minn. 153, 33 N. W. 551 (covering left off for two weeks); *Mullin v. Northern Mill Co.* (1893) 53 Minn. 29, 55 N. W. 1115 (some of covering removed); *Carrer v. Christian* (1887) 34 Minn. 397, 26 N. W. 8, 36 Minn. 413, 31 N. W. 457 (similar facts); *Martin v. Leragood* (1891) 47 Kan. 36, 27 Pac. 122 (cover left off of cogs that were usually covered).

Still more clearly is negligence inferable where the cover of the machinery had itself become defective.³

97. Structures.—(See also § 79, *supra*).—Structures are considered to be defective if, either by reason of the bad quality of the materials, or the unskilful manner in which they are put together or secured in their position, they are unable to support the pressures and other strains to which they are subjected, while they are being erected, or after they have been put into use as a part of the master's plant.¹ But the right of recovery in cases of this type is greatly

¹ *Kelley v. Silver Spring Bleaching & Dyeing Co.* (1878) 12 R. I. 112, 34 Am. Rep. 615; *Swift & Co. v. Holouben*, (1901; Neb.) 86 N. W. 900, Reversing judgment in (1900) 60 Neb. 784, 84 N. W. 249.

² (1) *Scaffolds, stagings, platforms, etc.*—*Roberts v. Smith* (1857) 2 Hurlst. & N. 213, 3 Jur. N. S. 469, 26 L. J. Exch. N. S. 319; *Webb v. Rennie* (1865) 4 Fost. & F. 615; *Westland Gold Coin Mines Co.* (1900) 41 C. C. A. 193, 101 Fed. 59; *Manning v. Hogan* (1879) 78 N. Y. 615; *Benzing v. Steiney* (1886) 101 N. Y. 547, 5 N. E. 449; *Malone v. Hathaway* (1875) 6 Thomp. & C. 1, 3 Hun, 553. Reversed in (1876) 64 N. Y. 5, 21 Am. Rep. 573, but not on this point; *Chapman v. Southern P. Co.* (1895) 12 Utah, 30, 41 Pac. 551; *Twomey v. Swift* (1895) 163 Mass. 273, 39 N. E. 1018 (hemlock boards supplied in cold weather, a time when they are very apt to be brittle); *Haworth v. Seavers Mfg. Co.* (1892) 87 Iowa, 765, 51 N. W. 68, 62 N. W. 325; *Arkerson v. Dennison* (1875) 117 Mass. 407; *Eddy v. Aurora Iron Min. Co.* (1890) 81 Mich. 548, 46 N. W. 17; *Flynn v. Union Bridge Co.* (1890) 42 Mo. App. 529; *Johnson v. Bellingham Bay Improv. Co.* (1896) 13 Wash. 455, 43 Pac. 370; *Alexander Dye Works v. Roufousse* (1895) 57 N. J. L. 700, 52 Atl. 373 (a railing on a platform gave way); *Smigel v. Odanah Iron Co.* (1898) 116 Mich. 149, 74 N. W. 488; *Hutton v. Hilton Bridge Constr. Co.* (1899) 42 App. Div. 400, 59 N. Y. Supp. 272; *Chicago & A. R. Co. v. Maroney* (1897) 170 Ill. 520, 48 N. E. 953, Affirming (1896) 67 Ill. App. 618; *Doyle v. Missouri, K. & T. Trust Co.* (1897) 140 Mo. 1, 41 S. W. 255; *Cochran v. Sess* (1900, 49 App. Div. 223, 62 N. Y. Supp. 1088 (liable to collapse); *Lechman v. Hooper* (1890) 52 N. J. L. 253, 19 Atl. 15 (similar facts).

(2) *Posts, poles, etc.*—*McDonald v. Postal Tele. Co.* (1900) 22 R. I. 131, 46 Atl. 407 (telegraph pole with defective cross arm); *Essex County Electric Co. v. Kelly* (1897) 60 N. J. L. 306, 37 Atl. 619, Affirmed in 61 N. J. L. 289, 41 Atl. 1115 (similar condition); *Jarvis v. Northern N. Y. Marble Co.* (1900) 55 App. Div. 272, 67 N. Y. Supp. 78 (the mast of a derrick was composed of rotten timber); *Trainor v. Philadelphia R. R. Co.* (1890) 137 Pa. 148, 20 Atl. 632 (tall pole not sufficiently guyed); *Riker v. New York, O. & W. R. Co.* (1901) 64 App. Div. 357, 72 N. Y. Supp. 168 (telegraph pole not properly fixed in the ground); *McLean County Coal Co. v. McVey* (1890) 38 Ill. App. 158 (imperfectly secured post in a mine).

(3) *Bridges, gangways, etc.*—*Buzzell v. Laconia Mfg. Co.* (1861) 48 Me. 113, 77 Am. Dec. 212; *Bennett v. Standard Plate Glass Co.* (1893) 158 Pa. 120, 27 Atl. 874 (a barrier on a plank walk over a pit not replaced after it had been taken away); *Louisville & C. Packet Co. v. Samuels* (1900) 22 Ky. L. Rep. 979, 59 S. W. 3 (eight steamboat hands required to go out over a river on a poplar plank 11 inches wide, 3½ inches thick, and 16 feet long); *Lafayette Bridge Co. v. Olsan* (1901) 47 C. C. A. 367, 54 L. R. A. 33, 108 Fed. 335 (unsafe timbers furnished for a false work).

(4) *Ice slide.*—*Fink v. Des Moines Ice Co.* (1892) 84 Iowa, 321, 51 N. W. 155 (defective supports).

(5) *Window casing.*—*Heneke v. Ellis* (1901) 110 Wis. 532, 86 N. W. 171.

(6) *Room built out from the wall of a factory.*—*Ryan v. Forster* (1862) 24 N. Y. 410, 82 Am. Dec. 315.

(7) *Roof.*—*Garety v. King* (1896) 9 App. Div. 443, 41 N. Y. Supp. 633 (servant fell through skylight while shoveling off the snow); *Engstrom v. Ashland Iron & S. Co.* (1894) 87 Wis. 166, 53

qualified by the doctrine to be discussed in a later chapter (xxxii.), as to the nonliability of the master for the negligence of servants in executing the details of the work. In designing them he is bound to take into account the action of the elements.² See, generally, § 141, *post*.

98. Injuries caused by falling rocks, earth slides, etc.— Negligence is inferable where a trench is not adequately shored or sheathed in cases where the nature of the soil which is being excavated requires such a precaution,¹ or where the roofs or sides of shafts, passages, tunnels, or entries in mines are in such a condition that they are liable to fall at any moment;² or where adequate measures are not taken

N. W. 241 (refuse had not been cleared away).

(8) *Stairway or steps*.—*Ferris v. Bernsheim Bros.* (1899) 51 La. Ann. 178, 24 So. 771; *Krampe v. St. Louis Brewing Asso.* (1894) 59 Mo. App. 277.

(9) *Floor*.—*Cooper v. Hamilton Mfg. Co.* (1867) 14 Allen, 193; *Flynn v. Harlow* (1892) 46 N. Y. S. R. 872, 19 N. Y. Supp. 705; *Kirk v. Scally* (1898) 79 Ill. App. 67; *Chicago General R. Co. v. McNamara* (1901) 94 Ill. App. 188.

(10) *Covers of dangerous openings*.—*O'Brien v. Sullivan* (1900) 195 Pa. 474, 46 Atl. 130 (opening in floor covered over with a thin packing-box lid, not supported by joists); *The Yaford* (1887) 33 Fed. 521 (defective hatch cover gave way under a seaman); *W. C. De Pauw Co. v. Stubblefield* (1892) 132 Ind. 182, 31 N. E. 796 (covering of trench broke under a heavy wheel).

(11) *Scat*.—*Spaulding v. Forbes Lithograph Mfg. Co.* (1898) 171 Mass. 271, 50 N. E. 543 (liable to tip up when servant's weight came upon it).

¹ Recovery has been allowed where a roof, not being strong enough to bear the snow which accumulated upon it, broke down and fell on a servant. *Johnson v. First Nat. Bank* (1891) 79 Wis. 414, 48 N. W. 712. And where a railway company constructed a signal tower not capable of bearing wind pressures which might be anticipated. *Hesketh v. New York C. & H. R. Co.* (1899) 37 App. Div. 78, 55 N. Y. Supp. 898.

² *Baird v. Reilly* (1899) 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884; *Kraus v. Long Island R. Co.* (1890) 123 N. Y. 1, 25 N. E. 206; *Wanamaker v. Rochester* (1892) 44 N. Y. S. R. 45, 17 N. Y. Supp. 321; *Schmit v. Gillen* (1899) 41 App. Div. 302, 58 N. Y. Supp.

458; *Bartholomew v. McKnight* (1901)

178 Mass. 242, 59 N. E. 804; *Breen v. Field* (1892) 157 Mass. 277, 31 N. E.

1075; *Ross v. Shonley* (1900) 185 Ill. 390, 56 N. E. 1105, Affirming (1899) 86

Ill. App. 144; *Lasalle v. Kostka* (1901)

190 Ill. 130, 60 N. E. 72, Affirming

(1900) 92 Ill. App. 91; *Ft. Wayne v. Christie* (1901) 156 Ind. 172, 59 N. E.

385; *Scott v. Springfield* (1899) 81 Mo.

App. 312 (here blasting close by en-

hanced the danger, and made it more

obligatory upon the defendant to brace

the walls of the trench); *Van Steen-*

burgh v. Thornton (1895) 58 N. J. L.

160, 33 Atl. 380; *Laporte v. Cook*

(1897) 20 R. I. 261, 38 Atl. 700; *Finn-*

ghan v. Peters (1861) 2 Se. Sess. Cas.

2d series, 260. Whether it was negli-

gence, under the circumstances, to leave

without shoring a trench about 31 feet

deep and 4 feet wide is for the jury,

where it is dug through hardpan, but

the soil has been for some time exposed

to the disintegrating effect of water

that has percolated through it. *Finn*

v. Cassidy (1901) 165 N. Y. 584, 53 L.

R. A. 877, 59 N. E. 311, Affirming

(1899) 39 App. Div. 641, 57 N. Y.

Supp. 1138. An employer is liable for

injuries to a workman engaged in dig-

ging a ditch alongside of a timber, by

the giving way of the bank from the

weight of the timber, where the work

was done precisely as it was marked

out for such workman to perform, and

by proper care and foresight the acci-

dent would have been provided against.

Texas & P. R. Co. v. French (1893;

Tex. Civ. App.) 22 S. W. 866.

² *Union P. R. Co. v. Jarri* (1892) 3 C.

C. A. 433, 10 U. S. App. 439, 53 Fed. 67;

Consolidated Coal Co. v. Sche

(1896) 65 Ill. App. 304; *Quincy C*

to protect servants from the dangers created by a bank of earth, gravel, etc., which is in process of being excavated.³

But the servant's right of recovery for injuries due to negligence of this description is in some courts very considerably qualified by the construction put upon the doctrine that a master is not liable for negligence in the execution of the details of the work. See chapter xxxii., *post*.

99. — by other heavy substances.—An action may be maintained, where, owing to the negligence of the employer, a heavy object is put or left in such a situation that, as a result either of physical laws or of the action of employees which may reasonably be anticipated under the circumstances, it is liable to be set in motion, and thus imperil the safety of persons working under or near it.¹

Co. v. Hood (1875) 77 Ill. 68; *Hanley v. California Bridge & Constr. Co.* (1899) 127 Cal. 232, 47 L. R. A. 597, 59 Pac. 577; *Sampson Min. & Mill Co. v. Schaud* (1890) 15 Colo. 197, 25 Pac. 89 (roof not timbered); *Rogers v. Leyden* (1891) 127 Ind. 50, 26 N. E. 210; *Linton Coal & Min. Co. v. Persons* (1896) 15 Ind. App. 69, 43 N. E. 651; *Corson v. Coal Hill Coal Co.* (1897) 101 Iowa, 224, 70 N. E. 185 (rocks fell on car track and obstructed it); *Freeman v. San Coulee Coal Co.* (1901; Mont.) 64 Pac. 347; *Kearney Electric Co. v. Laughlin* (1895) 45 Neb. 401, 63 N. W. 941 (supports of roof inadequate); *Tetherton v. United States Tale Co.* (1899) 41 App. Div. 613, 58 N. Y. Supp. 55; *Wellston Coal Co. v. Smith* (1901) 65 Ohio St. 70, 55 L. R. A. 99, 61 N. E. 143 (roof fell into disrepair, and was brought down by the concussion of a blast); *Vanesse v. Catsburg Coal Co.* (1893) 159 Pa. 403, 28 Atl. 200; *Trihay v. Brooklyn Lead Min. Co.* (1886) 4 Utah, 468, 11 Pac. 612 (want of proper timbering); *Cunningham v. Union P. R. Co.* (1885) 4 Utah, 206, 7 Pac. 795 (pillars supporting roof were cut away till they were smaller than was customary); *Fowler v. Pleasant Valley Coal Co.* (1898) 16 Utah, 348, 52 Pac. 594; *Severance v. New England Tale Co.* (1900) 72 Vt. 181, 47 Atl. 833 (mine-owner, when sinking the shaft of a tale mine, failed to take out the mixture of tale and quartz which separated the tale from the adjacent rock); *Davis v. Nuttallburg Coal & Coke Co.* (1890) 34 W. Va. 500, 12 S. E. 559; *Strahlendorf v. Rosenthal* (1872) 30 Wis. 674.

¹*O'Driscoll v. Faxon* (1892) 156 Mass. 527, 31 N. E. 685; *Elledue v. National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720; *Pantzar v. Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 368, 2 N. E. 24; *Deppe v. Chicago, R. I. & P. R. Co.* (1892) 36 Iowa, 52; *Chicago Anderson Pressed Brick Co. v. Sobkowiak* (1892) 45 Ill. App. 317 (bank was undermined to a greater extent than usual).

²The servant recovered where the injury was caused by the fall of the following objects: Boards used to cover the coping of a building in course of erection, and left in a loose condition. *Whitney & S. Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242. A large stone not adequately propped. *Blondin v. Oolitic Quarry Co.* (1894) 11 Ind. App. 395, 37 N. E. 812. A dress form sometimes exposed to a strong draught on the top of a show case, which was not protected by a railing. *Cacanagh v. O'Neill* (1900) 161 N. Y. 657, 57 N. E. 1106. Affirming (1898) 27 App. Div. 48, 50 N. Y. Supp. 207. A board laid upon a scaffolding, which was gradually shaken off by the jar of mach very near it. *Pitkey v. Harrower* (1901) 59 App. Div. 378, 69 N. Y. Supp. 243. A wooden beam placed in a position of unstable equilibrium. *Sackeritz v. American Biscuit Mfg. Co.* (1899) 78 Mo. App. 144. The frame of a window which fell out while a piece of machinery was being moved through it. *Chicago v. Edson* (1891) 43 Ill. App. 417. Stones on a coping, which, not being properly attached, fell off. *Gibson v. Sullivan* (1895) 164 Mass. 557, 42 N. E. 110.

If the plant itself, or the things handled or manufactured, are of such a nature, or in a condition so defective, as to create a risk of injury from flying or falling bodies, a duty arises to protect the servants, either by altering the plant, or by devising some safeguard which will minimize the perils of the employment as far as is reasonably possible.²

Posts not securely braced when girders are about to be set on them. *Herdler v. Buck's Store & Range Co.* (1896) 136 Mo. 3, 37 S. W. 115. Projecting rocks in a quarry. *McWilliam Marble Co. v. Black* (1890) 89 Tenn. 118, 14 S. W. 479. A box imperfectly secured. *Indiana Stone Co. v. Stewart* (1893) 7 Ind. App. 563, 34 N. E. 1019. Wheat which had accumulated on the side of a bin in which the servant was working. *McGovern v. Central Vermont R. Co.* (1890) 123 N. Y. 280, 25 N. E. 373. An accumulation of ice and snow on a roof. *Dugal v. People's Bank* (1890) 34 N. B. Rep. 581. Fragments of ore in a pile, portions of which were being removed. *Illinois Steel Co. v. Schynanowski* (1896) 162 Ill. 447, 44 N. E. 876. Bags of cement which slipped down owing to the irregular surface of the floor. *Page v. Naughton* (1901) 63 App. Div. 377, 71 N. Y. Supp. 503. Ties not properly stacked. *Texas & N. O. R. Co. v. Echols* (1897) 17 Tex. Civ. App. 677, 41 S. W. 488. A mining company is liable for injury to a workman by the fall of a stone from a slope under which he is set to work, where he does not know that pebbles and stones in unusual numbers have been falling there during the day, but this fact is known to the superintendent of the mine, who orders him to work without first having the stone removed or taking any other precaution to avert accidents. *Devereux v. Michigan Iron Min. Co.* (1895) 128 Mich. 1, 84 S. W. 110. Affirming, without dissent (1893) 54 Mo. App. 476. It has been held not to be negligent to pile boards of unequal length so that the ends are even on the face of the pile, and they project over each other on the back of the pile. *Wetherbee v. Partridge* (1900) 175 Mass. 185, 55 N. E. 894.

²*Richlands Iron Co. v. Elkins* (1893) 90 Va. 249, 17 S. E. 890; *Smith v. Lidgerwood Mfg. Co.* (1900) 56 App. Div. 528, 67 N. Y. Supp. 533; *McGuire v. Cairns* (1890) 5 Sc. Sess. Cas. 4th series, 540; *Choute v. Ontario Rolling Mill Co.* (1900) 27 Ont. App. Rep. 155. *McAleen v. Walter* (1901) 3 Misc. 474, 70 N. Y. Supp. 335 (needle-bar of sewing machine was so loose that the needle struck the side of the plate through which it passed, the result being that it broke, and a fragment lodged in plaintiff's eye); *Dempsey v. Sawyer* (1901) 95 Me. 295, 49 Atl. 1035 (teeth of a saw were filed so thin that they broke and flew off, when they came in contact with the wood); *Littlefield v. Edward P. Allis Co.* (1900) 177 Mass. 151, 58 N. E. 692 (contrary to the common practice, a piece of iron pipe was used as a buffer to break the blows of a dolly bar by which bolts were being driven into a fly wheel); *Hall v. Emerson-Stevens Mfg. Co.* (1900) 94 Me. 445, 47 Atl. 924 (grind-stone burst); *De La Verane Refrigerating Mach. Co. v. Stahl* (1900) 24 Tex. Civ. App. 471, 60 S. W. 319 (splinter flew off of a cracked and chipped riveting hammer). The question as to whether the cutting of wires with nippers is dangerous is for the jury, where there is testimony, although inconsistent and conflicting, that fragments of wire are likely to fly off in cutting in that manner. *Ward v. Odell Mfg. Co.* (1898) 123 N. C. 248, 31 S. E. 495 (a servant was injured in the eye by a flying piece of wire. The contention was that defendant was negligent in allowing the wire to be cut close to the passway used by employees). The master's liability is for the jury where proper arrangements are not made to prevent the workmen on the lower floors of a building in course of erection from being struck by heavy articles falling from the upper floors. *Pioneer Fireproof Constr. Co. v. Howell* (1901) 189 Ill. 123, 59 N. E. 535. Evidence tending to show that deceased was killed, while mixing mortar in a cellar, by the falling of some hard substance from the upper portion of the building, and that there was no secure covering to protect persons required to prepare such mortar, is sufficient to sustain a verdict that the covering was de-

100. Unguarded openings.— (See § 80, *supra*.)—For injuries caused by unguarded and uncovered openings of a merely temporary nature, a servant would doubtless be held, in every jurisdiction, entitled to recover damages, irrespective of the doctrine which happens to prevail respecting the master's right to maintain such openings as a permanent part of his arrangements.¹ But the action has sometimes failed in cases of this class on the ground that the conditions were incidental to the work in progress,² or justified by the usages of the business.³

fective, and that defendant had been negligent. *Ford v. Lyons* (1886) 41 Hun. 512. Whether the defendant was negligent in not providing a proper covering for the workmen engaged in digging a trench in the basement of a building, the walls of which were being taken down, is a question for the jury, where the only protection was a platform on to which the bricks were discharged as they were detached, and this did not extend up to the walls. *Witkowski v. George W. Carter & Sons Co.* (1901) 60 App. Div. 577, 70 N. Y. Supp. 232. Negligence is not inferable, where the ladder well-hole and the elevator wellhole are both protected by planking for the purpose of preventing the fall of materials in a building under erection, this being the usual method of safeguarding the workmen. *Van Orden v. Acken* (1898) 28 App. Div. 160, 50 N. Y. Supp. 843. The question whether the failure to cross bolt the "head block" of a pile driver employed in pulling piles was negligence which rendered the master liable for the death of an employee from being struck by a piece of the block split off while a pile was being pulled, was held to be for the jury, upon the testimony of a witness who constructed the pile driver that he considered it unsafe to draw piles with the machine without such cross bolting, and of another expert that he always used cross bolts for safety, and evidence that of the six pile drivers in the harbor at the time of the accident all except the one in question were cross bolted. *McAlpine v. Laydon* (1896) 115 Cal. 68, 46 Pac. 865. See also the cases cited in note 4, § 207.

¹ *Frye v. Bath Gas & Electric Co.* (1900) 94 Me. 17, 46 Atl. 804 (hole left open in front of the boiler of which the plaintiff was fireman). In *Hogan v. Smith* (1890) 31 N. Y. S. R. 798, 9 N. Y. Supp. 881, recovery was allowed where the servant, who was standing on

a platform of planks laid upon the beams of the orlop deck of a steamer, was struck by a descending sling of flour bags, and thrown into the hold through an opening which was usually kept covered. The case is for the jury, where it is averred that the plaintiff's decedent was killed by falling into an open tank on a ship under construction, and that the tank was usually covered and lighted, but was neither covered nor lighted at the time when the accident occurred. *Jamieson v. Russell* (1892) 19 Sc. Sess. Cas. 4th series, 898, distinguishing *Fornyth v. Ramage* (1899) 18 Sc. Sess. Cas. 4th series, 21, on the ground that the facts there disclosed nothing more than an ordinary risk of the work in which the injured servant was engaged, and that no such rule had been there laid down as that a workman on a ship under construction can never recover damages for any accident caused by falling into an unfenced place.

² In *Wannamaker v. Burke* (1886) 111 Pa. 423, 2 Atl. 500, the court, while conceding that, if the hole in question had been in the middle of the floor, near a passageway, or where persons were accustomed to pass and repass in the regular course of business, it would have been, perhaps, a question for the jury whether leaving it uncovered, or insufficiently protected, even for a short space of time, was not negligence, but denied that there could be any recovery for an injury caused by a hole in the floor on the extreme side of the building, within 1 inch of the wall, outside of the ordinary walks of anyone, which had always been carefully guarded until the work of making certain alterations rendered it necessary to take the guards away; which was being used constantly during the alterations to get rid of the sweepings; which was only open for from two to four days while

100a. Surface of paths, floors, etc.—In some cases the servant has been allowed to recover for the reason that the surface on which he was required to stand or walk, while engaged in the performance of his duties, or while going to or returning from the place of work, furnished an unsafe footing.¹ In others the position taken was that the condition created a normal and visible risk, and therefore implied no negligence as regards employees.²

An employer is liable if the ways used by his servant, either in driving or walking, are encumbered with obstructions which render them abnormally dangerous.³

the alterations were in progress, and only open then when not in actual use; which was intended to be, and was, permanently covered as soon as the alterations were finished. "The defendants," it was said, "could not have anticipated such an accident as this as likely to flow from the condition of the hole at that time, and they are not to be held to a rule which would prevent the possibility of an accident. If they took reasonable care to provide a safe room for their employees to work in, it was all the law requires. It would be unreasonable to hold them to the same degree of strictness during alterations to the building as might be required after such alterations were completed. The fact that alterations were being made in the presence of the employees was notice to them of the possibility of danger of some sort, and of the necessity of exercising greater caution."

In *The Louisiana* (1896) 21 C. C. A. 60, 41 U. S. App. 324, 74 Fed. 748, it was held that a vessel was not liable for an injury to a stevedore who walked into an open hatchway, where it is not customary to protect or guard such hatchways, and it is usual to leave them open till the hold is fully stowed. Compare *Smith v. Occidental & O. S.* (1893) 99 Cal. 462, 34 Pac. 84, where the case turned on the question whether the servant had constructive notice of the fact that the hatchway was open on such occasions as that on which he was injured.

Weber Wagon Co. v. Kohl (1892) 139 Ill. 644, 29 N. E. 714 (floor worn smooth); *New Orleans Ice Co. v. O'Malley* (1899) 34 C. C. A. 233, 92 Fed. 108 (fellow servants, having nothing to walk on but slippery beams, while they were shifting heavy tackle, lost their

footing and let it fall on the plaintiff); *American Dredging Co. v. Walla* (1898) 28 C. C. A. 441, 55 U. S. App. 460, 84 Fed. 428 (want of cleats on an inclined table from which machinery had to be oiled); *Armour v. Cieschki* (1895) 59 Ill. App. 17 (a servant slipped on glue scattered on the floor, and fell through an unguarded opening into a crushing machine). See also *Smith v. Peninsular Car Works* (1886) 60 Mich. 501, 27 N. W. 662, the facts of which are stated in § 103, note 6 *infra*; *Fitzgerald v. Connecticut River Paper Co.* (1891) 155 Mass. 155, 20 N. E. 404 (ice-covered steps).

It is not negligence to leave all the hatchways of a vessel open while it is being loaded, although some of them are not constantly in use, especially where the cargo consists of several different kinds of goods, and it cannot be known when any particular one of the hatchways may be required. *Tully v. New York & T. S. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29.

²*Feely v. Pearson Cordage Co.* (1894) 161 Mass. 426, 37 N. E. 368; *Murphy v. American Rubber Co.* (1893) 159 Mass. 266, 34 N. E. 268.

³The driver of a municipal fire engine may recover for injuries caused by obstructions in the street. *Farley v. New York* (1897) 152 N. Y. 222, 46 N. E. 506, Reversing (1896) 9 App. Div. 536, 41 N. Y. Supp. 622 (obstructions in street endangering driver of fire engine). A gangway, along which the plaintiff's duty requires him to carry molten metal, obstructed with articles along its sides, is in a condition which implies negligence. *Bogenschutz v. Smith* (1886) 84 Ky. 330, 1 S. W. 578. See also § 105, note 1, *ad finem*.

101. Conditions exposing a servant to risk of injury from fire.—Injuries caused by fire are actionable where they are due to conditions which, either in consequence of the manner in which the business is carried on, or of an intrinsic defect in an instrumentality, create abnormal perils.¹

102. — from currents of electricity.— Negligence is inferable, where a wire carrying a current of electricity is not properly insulated so that servants who have to handle or work near it may do so without danger.¹ The want of such insulation is also culpable where the wire is so strung that it may come into contact with another, and so endanger a servant who may take hold of the latter in the belief that it is dead.² An employer is also liable for the defective insulation of a part of an apparatus into which there is danger that a current of electricity may pass.³

103. — from explosions.— (See also § 81, *supra*.)—An injury caused by blasting powders which are of a defective quality is actionable.¹ So, also, the servant may recover where he is injured because in proper appliances are provided for manipulating such powders,² or

¹ Actions have been held maintainable where an excessive accumulation of slabs in a slab burner engendered extreme heat, and thereby caused the structure to fall. *Furber v. T. B. Scott Lumber Co.* (1893) 86 Wis. 226, 56 N. W. 475. Where a blast furnace was in such a condition that there was a recurrent danger of a rush of flame from the door. *Henderson v. Carron Co.* (1889) 16 So. Sess. Cas. 4th series, 633. Where an appliance in a chute in a malt grinding mill, for preventing the spread of fire from one floor to another, was allowed to get out of order. *Wiedeman v. Everard* (1900) 56 App. Div. 358, 67 N. Y. Supp. 738.

² *Junior v. Missouri Electric Light & P. Co.* (1895) 127 Mo. 79, 29 S. W. 988 (a lineman had to handle the wire); *Myhan v. Louisiana Electric Light & P. Co.* (1889) 41 La. Ann. 964, 7 L. R. A. 172, 6 So. 709 (a servant had to stand astride the wire to do his work); *Ellsworth v. Metheny* (1900) 44 C. C. A. 484, 51 L. R. A. 389, 104 Fed. 113 (a miner was passing along an entry where the wire was strung). In *Dick v. Winning Electric Street R. Co.* (1897) 1 Man. 528, it was held that a finding that there was no defect in the system on which the business of an electric street railway company was conducted, but that a certain cut-off ought

to have been used to intercept the current which injured the plaintiff, does not show any negligence on the employer's part, but merely a breach of duty by a fellow servant.

³ *McAdam v. Central R. & Electric Co.* (1896) 67 Conn. 445, 35 Atl. 341. See also *Krautz v. Brush Electric Light Co.* (1890) 82 Mich. 457, 46 N. W. 787; *Jones v. Union R. Co.* (1897) 18 App. Div. 267, 46 N. Y. Supp. 321. But in both the last-cited cases the point which was more particularly emphasized was not the want of insulation, but the fact that the wires were so close to each other that a very slight sagging of the upper one would bring them into contact.

¹ *Moran v. Corliss Steam Engine Co.* (1809) 21 R. 1. 386, 45 L. R. A. 267, 43 Atl. 874.

² *Prentice v. Wellsville* (1893) 50 N. Y. S. R. 557, 21 N. Y. Supp. 820; *Spelman v. Fisher Iron Co.* (1870) 56 Barb. 151 (powder liable to explode when tamped).

³ An employer is guilty of negligence in furnishing to employees engaged in blasting rock with dynamite an iron rod for tamping, where the danger is greatly diminished by tamping with a wooden rod. *Ohio Valley R. Co. v. McKinley* (1895) 17 Ky. L. Rep. 1028, 33 S. W. 186. The use of an iron spoon

where insufficient precautions are taken to prevent their being set off when not in use;³ or where they are used in such a manner as to expose the servants to unnecessary perils.⁴

An employer is *prima facie* liable for injuries caused by the explosion of gas which has accumulated in the chamber of a mine;⁵ or by the inadequacy of the arrangement made to prevent the contact of water with substances so hot as to convert it suddenly into steam.⁶

104. — from dangerous fluids.—An employer is liable if he fails to keep in proper condition the vessels by which dangerous substances of

to take an unexploded charge of dynamite out of a hole is negligent. *Grimaldi v. June* (1901) 177 Mass. 505, 59 N. E. 451.

³A quarry master is negligent in not providing the furnace of an engine used to work a derrick for hoisting the stones with an ash pan or other device for preventing the escape of live cinders which may alight upon the powder used for blasting. *Grant v. Draydale* (1883) 10 Sc. Sess. Cas. 4th series, 1159. A complaint is good which alleges, in effect, that a railway company did not take proper precautions to keep out of reach of the sparks of an engine certain powder which was being carried in the caboose of a construction train. *Alford v. Spokane Falls & N. R. Co.* (1899) 21 Wash. 324, 58 Pac. 244. A servant injured by an explosion of gunpowder is not entitled to go to the jury on the issue that the system of work was defective, where the complaint shows that the powder was stored in a magazine about five minutes' distance from the work in small barrels; that when it was desired to fire a charge, a barrel was carried from the store and opened at the work; and that while the plaintiff was firing a charge a gust of wind carried a piece of the fuse to a barrel from which powder had been taken, thus causing the powder to explode and injure him. Such allegations disclose, rather, the occurrence of an accident through the recklessness of the servant himself in not covering the barrel. *Mulligan v. M'Alpine* (1888) 4 Sc. Sess. Cas. 4th series, 789.

⁴A system of blasting is defective which does not give workmen sufficient time to get out of reach of danger when a shot is about to be fired. *Sword v. Cameron* (1839) 1 Sc. Sess. Cas. 2d series, 493. In *Bartonshill Coal Co. v. McGuire* (1858) 3 Macq. H. L. C. 300, 4 Jur. N. S. 773 (per Lord Chelmsford)

and in *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. H. L. C. 290, 4 Jur. N. S. 767, this case was reconciled with the English doctrine of common employment on the express ground that the facts showed the violation of the master's personal duty, and not merely the negligence of a fellow servant.

⁵*Cerrillon Coal R. Co. v. Deacrant* (1897) 9 N. M. 49, 40 Pac. 807. The master is bound to see that a sufficient amount of pure air is forced into his mine, and so circulated as to dilute and render harmless or expel the gases. *Mosgrove v. Zimbleman Coal Co.* (1899) 110 Iowa, 169, 81 N. W. 227. But stoppage of ventilating machinery, in a mine from Saturday night until Sunday night is not sufficient to establish negligence in respect to the employees in the mine, where it is started and continuously run for twelve or fourteen hours before an accident occasioned by the explosion of gas in the mine. *Morgan v. Carbon Hill Coal Co.* (1893) 6 Wash. 577, 34 Pac. 152, 772.

⁶As, where a servant has to throw hot slag on a piece of ground in which are numerous cracks partially filled with water. *Kiras v. Nichols Chemical Co.* (1901) 59 App. Div. 79, 69 N. Y. Supp. 44. Or where rust and dross are not removed from holes in castings which are about to be filled with molten metal. *Dyer v. Brown* (1901) 64 App. Div. 89, 71 N. Y. Supp. 623. Or where a common laborer, not knowing that an explosion will follow if water comes into contact with molten metal, is ordered to carry a ladle filled with that substance along a passageway slippery with accumulated ice and snow. *Smith v. Peninsular Car Works* (1896) 60 Mich. 501, 27 N. W. 662. Or where live cinders are unloaded on a wet surface. *Western Tube Co. v. Polobinski* (1901) 94 Ill. App. 640.

a fluid nature are handled;¹ or allows such fluids to be in places where a servant is likely to be brought into contact with them in the course of his duties.²

105. Defective lighting.—Usually the negligence of the employer is a question for the jury, where the evidence tends to show that the place where the injury was received was inadequately lighted.¹ But the inference of negligence in this regard is sometimes negated by the character of the work in which the servant is engaged.²

106. Unseaworthy ships.—Questions arising out of the unseaworthiness of ships usually arise in dealing with the right of seamen to re-

¹ *Stapf v. V. Loewer's Gambrinus Brewing Co.* (1896) 1 App. Div. 405, 37 N. Y. Supp. 256 (pitch exuded through a crack in a kettle, and an explosion resulted); *Scherer v. Holly Mfg. Co.* (1895) 86 Hun. 37, 33 N. Y. Supp. 205 (apparatus employed to keep a ladle in which molten iron was conveyed, from tipping, was defective).

² *Dunn v. Connell* (1897) 21 Misc. 295, 47 N. Y. Supp. 185.

¹ *Nyback v. Champagne Lumber Co.* (1899) 63 U. S. App. 519, 33 C. C. A. 269, 90 Fed. 774; *Boyle v. Degnon-McLean Constr. Co.* (1900) 49 App. Div. 636, 63 N. Y. Supp. 1105 (1900) 47 App. Div. 311, 61 N. Y. Supp. 1043; *Sansol v. Compagnie Générale Transatlantique* (1900) 101 Fed. 390; *The Guillermo* (1886) 26 Fed. 921; *Atchison, T. & S. F. R. Co. v. Lannigan* (1895) 56 Kan. 109, 42 Pac. 343 (hand of brakeman was crushed while he was coupling, the light of his lantern being insufficient). The failure to have a light so that the fall of a winch, which was running after dark, could be seen by a seaman walking along the deck, on account of which he stepped into a snarl in the fall and was injured, renders the ship liable. *The Manhasset* (1893) 69 Fed. 843, Affirming (1893) 13 C. C. A. 677, 14 U. S. App. 710, 53 Fed. 843. The proprietor of a paper mill which is kept running all night is not, as matter of law, free from negligence in failing to have other available lights for use, where the means of lighting by electricity is defective so that the light frequently goes out, and the work of removing broken paper from the presses, which are kept in motion while the lights are out, is much more dangerous in the dark. *Sawyer v. Rumford Falls Paper Co.* (1897) 90 Me. 354, 38 Atl. 318. In *Price v. Hannibal & St. J. R.*

Co. (1883) 77 Mo. 508, it was not decided whether the want of light in a railway roundhouse, where men were in the habit of going to sleep on the ground, implied negligence, the plaintiff being denied recovery on the ground of his contributory negligence. It cannot be said, as matter of law, that the duty of furnishing a safe egress from the premises has been discharged by furnishing a hallway through which the servant must pass in the dark, owing to the employer's system of extinguishing the lights on the premises immediately after the close of the working hours, and in which it is customary to place material of such a character that involuntary contact with it may cause serious injury. *Dorney v. O'Neill* (1900) 49 App. Div. 8, 63 N. Y. Supp. 107 (a twig projecting from some debris put out plaintiff's eye).

² As where a passage in a building under construction is left in darkness. There is no obligation to light such a place, as the servants employed in the building are presumed to understand the risks involved, and to be able to protect themselves. *Murphy v. Greeley* (1888) 146 Mass. 196, 15 N. E. 654. The fact that the work of unloading cotton from a barge onto a steamboat engaged in the river trade on the Mississippi was carried on after dark, and while the boat was moving down the river, and that the mate was hurrying up the work, does not show negligence on the part of the owners of the steamboat, since it is the common practice and duty of the masters and crews of boats engaged in the river trade to push their employment, and, when called for, to receive, deliver, and stow freight at night as well as in the daytime. *Red River Line v. Smith* (1900) 39 C. C. A. 620, 99 Fed. 520.

pudiate their contract of service on account of that condition; but it is clear that defects of this kind will also constitute a cause of action in favor of any employee who may be personally injured as a result of their existence. The meaning of this expression "seaworthy" is, "that the ship shall be in a fit state, as to repair, equipment, crew, and in all other respects, to encounter the ordinary perils of the contemplated voyage," or, in the language of some of the authorities, "that the ship is in a condition in all respects to render it *reasonably safe* where it happens to be at the time referred to," or, as expressed by others, "that the ship was, at the commencement of the voyage, in such a state as to be *reasonably capable* of performing it."¹

107. Inadequate ventilation.—Negligence is inferable from evidence showing that there was no proper ventilation in a railway tunnel.¹

108. Inadequate protection against severe cold.—A good cause of action is stated by a complaint which alleges that the master failed to supply proper lodging for a servant, the result being that the latter was exposed to cold, and was thereby rendered sick.¹

¹This summary of the effect of the decisions is taken from the opinion in *The Lizzie Frank* (1887) 31 Fed. 477. 310 (but here the servant was held to have understood and accepted the risk). *v. Steel* (1854) 3 El. & Bl. 402, 2 C. L. Rep. 940, 23 L. J. Q. B. N. S. 121, 18 Jur. 515. ¹*Baltimore & P. R. Co. v. State use of Abbott* (1892) 75 Md. 152, 23 Atl. (1886) 9 Colo. 333, 12 Pac. 219.

CHAPTER IX.

MASTER'S OBLIGATIONS AS TO THE CONDITION OF HIS INSTRUMENTALITIES ARE CONTINUOUS.

- 110. Generally.
- 111. Duty to abandon the use of an abnormally dangerous instrumentality.
- 112. Duty to remedy defects in abnormally dangerous instrumentalities which are not disused.
- 113. Duty to change the positions of dangerous substances.
- 114. Duty to abstain from ordering servants to work in positions where the abnormal conditions will endanger them.
- 115. Duty to furnish appliances which will render the abnormal conditions less dangerous.
- 116. Liability of the master after the remedy has been applied.
- 117. Duty to warn the servant as to the existence of abnormal dangers.
- 118. Duty to alter improper methods.

110. Generally.— There is complete unanimity as to the doctrine that the degree of care which the law exacts from a master in respect to the maintenance of his instrumentalities in a safe condition is precisely the same as that which he is required to exercise in furnishing them.¹ Clearly, it is impossible to suggest any logical ground upon

¹ The duty of a master to keep appliances in repair stands upon no different ground than does his obligation to furnish safe appliances in the first instance. *Moore v. Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588. "The duty of a railroad company to use reasonable care to protect their employees from injury embraces the obligation to use such care both in furnishing suitable machinery in the first instance, and in keeping it in repair." *Bailey v. Rome, W. & O. R. Co.* (1893) 139 N. Y. 302. 34 N. E. 918. "It is the duty of the master to exercise reasonable care to furnish reasonably safe places in which, and appliances with which, the servants are to work, and to exercise the same care to keep them in such condition." *Pennsylvania Co. v. Witte* (1896) 15 Ind. App. 583. 43 N. E. 319, rehearing denied in (1896) 15 Ind. App. 594. 44 N. E. 377. "The obligation of the master [as respects due care] extends as well to the matter of examination and repair as to furnishing." *Anderson v. Minnesota & N. W. R. Co.* (1888) 39 Minn. 523. 41 N. W. 104. The extent of the master's duty is "that the danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept." *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405. "The servant has no more control of the repairs than of the purchase. —no more responsibility for the one than for the other. The use of it is for him, and the risk of that use, whatever it may be, he assumes. That comes within his contract. But, as part of the same contract, the employer provides the means of carrying on the business; and as a matter of course he assumes the responsibility

which a relaxation of vigilance should be deemed permissible after the instrumentalities have been brought into use.

In cases where the servant's injury was caused by abnormally dangerous conditions, which existed when he began to work, and continued to exist up to the time of his accident, his right to recover compensation is referable rather to the conception of a breach of the duty to furnish safe instrumentalities than to a conception of a breach of the duty to keep them in safe condition. The doctrine with which we are now concerned, therefore, finds its appropriate field of operation in cases where the instrumentality in question satisfied the obligatory standard of safety when the servant entered upon the performance of his contract, and afterwards fell below that standard. In this point of view it may be expressed in the form that "a duty rests upon the employer which requires him to exercise due care on his part that no risks and hazards to those in his employ shall be unnecessarily increased."²

that his work shall be done with due care; and as the responsibility continues so long as the means are used, so must the same care be exercised in keeping the required means in the same safe condition as at first." *Shanny v. Andross-coggin Mills* (1876) 66 Me. 420. Similar language is also found in the following cases, which are merely a few out of the very large number in which the doctrine is recognized: *Smith v. Baker* [1891] A. C. 325, 362, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660, per Lord Herschell; *Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 338; *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612; *Lehigh Valley Coal Co. v. Kissel* (1897) 25 C. C. A. 566, 51 U. S. App. 265, 80 Fed. 470; *Eureka Co. v. Bass* (1886) 81 Ala. 200, 8 So. 216; *Jager v. California Bridge Co.* (1894) 104 Cal. 542, 38 Pac. 413; *Wells v. Coc* (1886) 9 Colo. 159, 11 Pac. 50; *Indianapolis & St. L. R. Co. v. Watson* (1887) 114 Ind. 20, 15 N. E. 824; *Louisville, E. & St. L. Canal, R. Co. v. Utz* (1892) 133 Ind. 265, 32 N. E. 881; *Nall v. Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 28 N. E. 183, 611; *Hancock v. Keene* (1892) 5 Ind. App. 408, 32 N. E. 329; *Evansville & T. H. R. Co. v. Holcomb* (1894) 9 Ind. App. 198, 36 N. E. 39; *Cooper v. Central R. Co.* (1876) 44 Iowa, 134; *Atchison, T. & S. F. R. Co. v. Napole* (1895) 55 Kan. 401, 40 Pac. 669; *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149; *Chicago, K. & W. R. Co. v. Blevins* (1891) 46 Kan. 370, 26 Pac. 687; *Rice v. King Philip Mills* (1887) 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101; *Babcock v. Old Colony R. Co.* (1890) 150 Mass. 467, 23 N. E. 325; *Hewitt v. Flint & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 659; *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497; *Rodney v. St. Louis S. W. R. Co.* (1895) 127 Mo. 676, 28 S. W. 887, 30 S. W. 150; *Clowers v. Wabash, St. L. & P. R. Co.* (1886) 21 Mo. App. 213, 217; *Hickman v. Missouri P. R. Co.* (1886) 22 Mo. App. 344; *Musick v. Jacob Dold Pkg. Co.* (1894) 58 Mo. App. 322; *Harrison v. Central R. Co.* (1865) 31 N. J. L. 293; *Camden v. Bellerille Stone Co.* (1896) 59 N. J. L. 226, 36 Atl. 473; *Cullen v. National Sheet Metal Roofing Co.* (1887) 46 Hun. 562; *Wiedeman v. Everard* (1900) 56 App. Div. 358, 67 N. Y. Supp. 738; *Philadelphia, W. & B. R. Co. v. Keenan* (1883) 103 Pa. 124; *Knorrville Iron Co. v. Dobson* (1881) 7 Lea. 367; *Taylor, B. & H. R. Co. v. Taylor* (1890) 79 Tex. 104, 14 S. W. 918; *Baltimore & O. R. Co. v. McKenzie* (1885) 81 Va. 71; *Goodman v. Richmond & D. R. Co.* (1886) 81 Va. 576.

Many other cases to the same effect are also cited in the chapters dealing with the duty of inspection and the doctrine of non-delegable duties.

² *Anglin v. Texas & P. R. Co.* (1894) 9 C. C. A. 130, 23 U. S. App. 62, 60 Fed.

In so far as the increase of danger results from the manner in which the instrumentalities are used, the liability of the employer in those cases in which such use is not his own personal act (see § 10, *ante*) will depend upon the doctrines discussed in the subsequent chapters which deal with the defense of common employment in its various phases. In other words, the doctrine enunciated at the beginning of this section is to be taken as subject to the qualification that, where the servant's environment became more hazardous in consequence solely of the acts or omissions of a fellow servant of the injured person, a breach of the master's duty to exercise reasonable care cannot be enforced unless that fellow servant was a representative or vice principal of the master in the sense explained in those chapters.³ It is sufficient to mention in this place that the limitation upon the doctrine which is thus introduced is greatly narrowed in its actual scope, as a result of the operation of the theory applied in all the American courts, that the obligation to see that the various instrumentalities do not fall below the legal standard of safety cannot be delegated to an agent so as to relieve the master from responsibility for its adequate performance.

The secondary obligations indicated by an analysis of the elements involved in the duty to keep the servant's environment reasonably safe are reducible to two main categories: (1) To exercise a proper supervision over the various instrumentalities, for the purpose of ascertaining whether the required standard of safety is still satisfied; (2) to take such precautions as may be appropriate under the circum-

553. "Where a servant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur." *Clarke v. Holmes* (1862) 7 Hurlst. & N. 943, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 407, per Cockburn, Ch. J. A master cannot, of course, be held liable on this ground where the changes in evidence do not, as a matter of fact, increase the dangers to which he is exposed. See *Naylor v. New York C. & H. R. R. Co.* (1888) 33 Fed. 801, where the running direction of trains was altered,—an arrangement which, as the court pointed out, did not render the hazards from misplaced switches any greater than before.

³In *Wood v. Canadian P. R. Co.* (1899) 6 B. C. 561, the court used some

unnecessarily sweeping language in rejecting the theory of plaintiff's counsel, that there was a constantly recurrent duty on the part of a railway company to keep its tracks in safe condition. The American doctrine, that the maintenance of safe instrumentalities is a nondelegable duty, does not, as will be shown hereafter (chapter XXXI., *post*), prevail in England or the English Colonies. But the essential effect of this position is merely that the conception of a continuous obligation is controlled and overridden in a certain class of cases by the operation of the defense of common employment, not that this conception is entirely discredited. This conception is still applicable as a measure of liability wherever the business in question is managed by the master himself, or, in the case of a corporation, by the directors.

stances, to the end that the servant may not suffer injury from an instrumentality which has fallen below that standard.

The first of these obligations will form the subject of chapter XI. The second will be discussed under its different aspects in the following sections.

It will be observed that these two obligations, although predicated independently of each other, are intimately connected in this respect—that no legal liability can exist on the score of a failure to remedy defects, unless and until the master has obtained knowledge, actual or constructive, of those defects. See chapter X., *post*.

The cases do not bring out as clearly as is desirable the fact that the master's liability depends upon different considerations, according as his failure to obtain knowledge is a specific issue in the case or not. If such failure is relied upon and demonstrated to be due to the want of proper care, it is evidently quite unnecessary to inquire into the character of the master's conduct after the time when he should have been in possession of the knowledge. The charge of negligence, operating as an efficient cause of the accident, is completely made out, and the action is thus shown to be maintainable without proceeding further.⁴

But, in a juridical point of view, it is also possible to treat a negligent failure to obtain knowledge as equivalent to actual knowledge (see chapter X., *post*), and the knowledge so imputed may be made the starting point of a complaint based upon the theory that the master was culpable in not doing certain things after he obtained notice of the conditions to be dealt with. This way of putting the logical situation shows that there is some want of precision in the assertion that the question whether the employer is negligent in furnishing an unsafe instrumentality does not depend solely upon the fact that the instrumentality is known by him to be a dangerous one, but must be determined by considering whether, having that knowledge, he failed to do what a person of ordinary care would have done under similar circumstances.⁵ This statement is strictly correct only when applied to cases in which the obligations arising out of actual knowledge are in question.

111. Duty to abandon the use of an abnormally dangerous instrumen-

⁴Negligence, as evidenced by the omission to investigate conditions, with a view to ascertaining whether active steps for the protection of the servants should be taken, is discussed in the sections dealing with the duties of inspection, and of inquiry into the capacity of servants after the master has been informed of circumstances tending to show that they are unfit for their positions. Chapter XI., XIII., *post*.

⁵*Findlay Brewing Co. v. Bauer* (1893) 50 Ohio St. 565, 35 N. E. 55.

talities.—Failing the adoption of one or other of the methods by which, as indicated in the following sections, a master may discharge his duty to keep the servant's environment safe, he can relieve himself from responsibility only by discontinuing altogether the use of the defective instrumentality, and procuring a suitable substitute therefor.¹

112. Duty to remedy defects in abnormally dangerous instrumentalities which are not disused.—Except in so far as it may be qualified by the operation of the rule noticed in § 117, *post*, the principle is well settled that a servant may recover for an injury received by reason of the fact that an instrumentality was allowed to remain in an abnormally dangerous condition for an unreasonable period after that condition was brought to the notice of the master, or by proper inspection might have been known by him.¹ See chapters X.—XII.,

¹ *Lake Shore & M. S. R. Co. v. Fitzpatrick* (1877) 31 Ohio St. 479; *Atchison, T. & S. F. R. Co. v. Sadler* (1887) 38 Kan. 128, 16 Pac. 46; *Johnson v. Armour* (1883) 5 McCrary, 629, 18 Fed. 490; *Johnson v. Boston Tor-Boat Co.* (1883) 135 Mass. 209, 46 Am. Rep. 458; *Perry v. Ricketts* (1870) 55 Ill. 234; *Weiden v. Brush Electric Light Co.* (1889) 73 Mich. 268, 41 N. W. 269; *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698; *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312; *Honifus v. Chambersburg Engineering Co.* (1900) 196 Pa. 47, 46 Atl. 259. In *Louisville, N. A. & C. R. Co. v. Lynch* (1896) 147 Ind. 165, 34 L. R. A. 293, 44 N. E. 997, 46 N. E. 471, it was said that the duty to discard an unsafe boiler was imperative. In *Riley v. Baxendale* (1861) 6 Hurlst. & N. 445, 30 L. J. Exch. N. S. 87, 9 Week. Rep. 347, the defendant had enlarged the size of trucks, and the plaintiff had been crushed while one of them was being turned on a turntable where there had originally been ample room to work. Pollock, C. B., thought that, apart from the question of the proper form of pleading, the action could not have been maintained. The other members of the court discussed the case merely from the standpoint of the correctness of the pleadings. But this dictum of the learned Chief Baron is inconsistent with other English cases, except in so far as it may be intended to assert a disability to recover, for the reason that the risk was presumably known to the

servant. It has been laid down that a tool or implement which has become worn and defective by use, but which still answers its purpose, need not be cast aside as dangerous unless there is some apparent cause of danger in its continued use, and that it is therefore error to instruct the jury that, irrespective of any probability of danger or harm, if a tool was defective, and such defect might have, by the use of ordinary care and diligence, been known by the defendant, the defendant is liable to the plaintiff for the injury he received. *Little Rock & Ft. S. R. Co. v. Duffey* (1880) 35 Ark. 602.

¹ *Northern P. R. Co. v. Herbert* (1885) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Johnson v. Armour* (1883) 18 Fed. 490; *Deaver, T. & Ft. W. R. Co. v. Smock* (1897) 23 Colo. 456, 48 Pac. 681; *Krogg v. Atlanta & W. P. R. Co.* (1886) 77 Ga. 202; *Flynn v. Wabash, St. L. & P. R. Co.* (1885) 18 Ill. App. 235; *Allen Lime & Cement Co. v. Calvey* (1893) 47 Ill. App. 343; *Indiana Iron Co. v. Cray* (1897) 19 Ind. App. 565, 48 N. E. 803; *Lake Erie & W. R. Co. v. McHenry* (1891) 10 Ind. App. 525, 37 N. E. 186; *Martin v. Lerapood* (1891) 47 Kan. 36, 27 Pac. 122; *Johnson v. Boston Tor-Boat Co.* (1883) 135 Mass. 209, 46 Am. Rep. 458; *Holden v. Fitchburg R. Co.* (1880) 129 Mass. 268, 37 Am. Rep. 343; *Warden v. Old Colony R. Co.* (1884) 137 Mass. 204; *McDonald v. Chicago, St. P. M. & O. R. Co.* (1889) 41 Minn. 439, 43 N. W. 380; *Deeese v. Meramec Iron Min. Co.* (1895) 128 Mo. 423, 31 S. W. 119, Af-

post, as to the scope and significance of this proviso as to the master's knowledge. What shall be considered an unreasonable period for the purposes of this rule is a question of fact which is primarily

firming (1893) 54 Mo. App. 476; *Steenburgh v. Thornton* (1895) 58 N. J. L. 160, 33 Atl. 380; *Keegan v. Western R. Corp.* (1853) 8 N. Y. 175, 50 Am. Dec. 476; *Scherer v. Holly Mfg. Co.* (1895) 86 Hun. 37, 33 N. Y. Supp. 205; *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312; *Bennett v. Standard Plate Glass Co.* (1893) 158 Pa. 120, 27 Atl. 874; *Boyers v. Union P. R. Co.* (1885) 4 Utah, 215, 7 Pac. 251; *Norfolk & W. R. Co. v. Ampey* (1896) 93 Va. 108, 25 S. E. 226 (ear couplings injured in a wreck).

In *Pontz v. Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 368, 2 N. E. 24, where a piece of a cliff fell upon the plaintiff, the evidence was conflicting. On the part of the defendant it tended to show that the cliff was composed of gneiss, a mineral naturally marked by seams, joints, and foliations, and that defendant was in the frequent and continued habit of causing it to be examined, but that no appearances indicating immediate danger had been observed before the accident. Plaintiff's evidence showed that a large crack parallel with and about 10 feet back from the upper angle of the face of the cliff, had long existed and was plainly visible; that the superintendent and foreman were warned of its dangerous character; that after an experiment which showed that it was increasing in width, they still took no precautions to support the rock while the workmen were engaged under it, although such precautions were practicable and frequently adopted in other mines,—such as the use of braces of timbers, or blasting off the overhanging rock; also, that a wall would have furnished a support to the projecting mass. The plaintiff's evidence also tended to show that the rock broke off at the place where the crack had been observed, and that, with the fall, the crack disappeared. The court upheld a verdict for the plaintiff, saying: "It must therefore be assumed from the verdict of the jury that it was determined that the rock fell from a cause of which the defendant had notice, and that precautions which would have prevented the injury were not adopted, although they were practicable, and of easy and safe application." In

Union P. R. Co. v. Jarri (1892) 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65, 70, the roof in a dip slope, where the accident happened, was composed of clay rock about 3 feet thick, which defendant's inspectors knew to be a treacherous rock needing constant watching, as it was of a kind that water disintegrated; while the only way it could be properly tested was by sounding it with the hand, or a pick or cune. It had not been so tested or sounded for weeks, although the chief inspector testified that it needed watching; that, through the greater part of this dip slope the roof had proved so poor that the defendant had supported it with timber; that it had not done so at this point; and that, at a point but a few feet distant, where the two slopes joined, this rock had so crumbled and fallen that defendant had blasted it all down and removed it, two months before; there was also testimony that the roof at the place of the accident had long been wet. It was held to be a fair question for the jury whether or not the failure to protect this particular portion of the roof by timbers, or to remove it by blasting, was a lack of ordinary care. In *Carlson v. Oregon Short Line & U. V. R. Co.* (1892) 21 Or. 450, 28 Pac. 497, it was held that in so far as the danger of making repairs in a railroad bridge may be increased by the damaged condition of the track from natural causes, a trackman assumes the risk of such enhanced danger; but if it were increased by the neglect of the master to use proper care before the storm to keep the bridge in repair, or to ascertain the condition of the track or bridge after the storm, or to take such due and proper precautionary measures to prevent accidents to its employees as the exigencies of the situation might require, such risks are not assumed. The fact that he knew the track to be in a dilapidated condition and out of repair will not relieve the master from the discharge of his duty in the premises.

In *Quincy Coal Co. v. Hood* (1875) 77 Ill. 68, it was said that if the defendant company's superintendent had received notice of the dangerous condition of the roof of one of the gangways in

for the jury.² The mere fact that the master may have provided for an effective system of inspection is wholly immaterial after any particular risk has been found to exist. Inspection is merely a preliminary proceeding which is necessary to enable the master to ascertain whether the instrumentalities are defective or not, and, when it has served its purpose by disclosing an imperfection, other obligations

its mine, long enough before the accident to have given time to repair, this was sufficient to make the company liable for an injury caused by the fall of the roof.

If a foreign car comes to a company with defects visible, or discoverable by ordinary inspection, it should either refuse to receive it, or immediately repair it sufficiently to make it reasonably safe. *Chicago, St. L. & P. R. Co. v. Fry* (1891) 131 Ind. 319, 28 N. E. 989; *Atchison, T. & S. F. R. Co. v. Myers* (1894) 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793; *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462, 3 N. E. 344. See, further, chapter XII., *post*.

²A verdict finding a railroad company liable for the death of a brakeman killed while making a coupling, by steel rails which projected over the end of a flat car, will not be set aside, where the conductor in charge of the train observed the position of the rails thirty hours before the accident. *Corbin v. Winona & St. P. R. Co.* (1896) 64 Minn. 185, 66 N. W. 271. A railway company which had actual notice of the defective condition of a foreign car, several hours before a servant was injured in handling it, may properly be found liable. *Denver, T. & Ft. W. R. Co. v. Smock* (1897) 23 Colo. 456, 48 Pac. 681. An employer who knew that his machinery was defective, several weeks before an accident to an employee, is negligent, where he fails, without excuse, to make the necessary repairs. *Romona Oolitic Stone Co. v. Phillips* (1894) 11 Ind. App. 118, 39 N. E. 96. Two weeks is an unreasonable time for a railroad company to allow piles of gravel, used in ballasting, to remain between its tracks in its yards at a division station. *Hurst v. Kansas City, P. & G. R. Co.* (1901) 163 Mo. 309, 63 S. W. 695. It is not error to allow a plaintiff to prove that a defective switch which caused a derailment had been in the same condition for several weeks previously. *Kansas City, M. & B. R. Co. v. Webb* (1893)

97 Ala. 162, 11 So. 888. A verdict for the plaintiff is warranted, where a spring, intended to automatically lower a gate in front of the shaft of an elevator used by plaintiff while acting as porter for defendant, was left out of repair by defendant for three weeks after being notified thereof. *Larkin v. Washington Mills Co.* (1899) 45 App. Div. 6, 61 N. Y. Supp. 93. In *Doing v. New York, O. & W. R. Co.* (1893) 73 Hun. 270, 26 N. Y. Supp. 405, the plaintiff was held to be properly nonsuited for the reason that there was no evidence that a car had been out of repair a sufficient length of time to justify the jury in finding that the defendant knew of its condition, or was negligent in not ascertaining it. The court of appeals ([1897] 151 N. Y. 579, 45 N. E. 1028), however, said that, as the defendant had notice on Saturday that the car was out of order, the fact that an accident occurred from its use on the following Monday was some evidence of negligence. In *Knapp v. Sioux City & P. R. Co.* (1887) 71 Iowa. 41, 32 N. W. 18, a request of defendant for the following instruction was held to have been rightly refused for the reason that it failed to present the thought that defendant's employees used proper care in the inspection of the road, and, in the exercise of such care, there was "an apparent necessity" discovered by them to make the repairs required: "If the jury find from the testimony that the officers of the defendant employed skillful and competent men to look after and keep in repair its track, and furnished the requisite men and material to do the work and keep the track in good repair, and if you further find from the testimony that the track was frequently inspected by them, and that the old ties were taken out and replaced by new ties as often as there was any apparent necessity for so doing, you cannot find that the defendant was negligent in keeping and maintaining its tracks." In *Norfolk & W. R. Co. v. Gilman* (1891) 88 Va. 239, 13 S. E. 475, a rail-

come into play. "It is not sufficient to be simply cautionary, when a manifest danger exists that may and ought to be removed."³

Some authorities have undertaken to apply the converse of this principle, in a form which would relieve the master from liability, unless his knowledge, actual or constructive, was obtained sufficiently long before the injury was received to have enabled him to adopt remedial measures.⁴ But these cases do not, it is submitted, take proper account of the fact that the servant is, for the purposes of the argument, to be considered as having no knowledge of the defective conditions, since it would otherwise be a controlling issue whether he would be precluded from recovering, on the ground of an assumption

road had, for four years, kept a chained log at the end of a wharf to arrest its cars, instead of providing a stronger structure, fit for such a purpose. The court said: "Was not this negligence? The structure was temporary only, and not safe. This was known to the company, as better timbers were ordered; and yet, knowing the danger, and advised of the need, days were allowed to run into weeks, weeks into months, months into years, and still the temporary and unsafe structure had not been replaced by the permanent and substantial contrivance in use elsewhere, and which, if it had been in place on this wharf, would have arrested, without danger, these slowly moving cars. This was negligence, beyond question."

³*Dean v. Western North Carolina R. Co.* (1890) 107 N. C. 731, 12 S. E. 600. There, the fact that a railroad company employed a track walker, whose duty it was to examine and see, just after a train had passed a dangerous point, whether rock had fallen, was held to be no excuse for allowing a mass of rock to remain in such a position and condition that it fell upon the track and injured an employee, where the danger was obvious.

⁴Common-law rulings to this effect are, *Erskine v. Chino Valley Beet-Sugar Co.* (1895) 71 Fed. 270; *Johnson v. Armour* (1883) 18 Fed. 490; *Alabaster Co. v. Longman* (1900) 90 Ill. App. 353; *Percy v. St. Louis & S. F. R. Co.* (1900) 85 Mo. App. 218. Other decisions, in which the same view has been explicitly adopted, have been rendered in construing the employers' liability act of Alabama. But, as the measure of the employer's duty has been declared to be essentially the same under that act as un-

der the common law (*Wilson v. Louisville & N. R. Co.* [1887] 85 Ala. 269, 4 So. 701), these rulings may be appropriately referred to here. Mere notice of a defect in a machine or appliance, it has been said, will not render an employer liable for negligence in failing to remedy it, unless he had reasonable time and opportunity for doing so after receiving the notice. *Seaboard Mfg. Co. v. Woodson* (1891) 94 Ala. 143, 10 So. 87 (1892) 98 Ala. 378, 11 So. 733, holding that a complaint is demurrable, which merely alleges that a defect was known to some person intrusted by the master with the duty of seeing that the "ways, works, machinery, or plant were in proper condition" (Code, § 2590), and fails to state how long before the accident the defect was so known. In *United States Rolling Stock Co. v. Weir* (1892) 96 Ala. 396, 11 So. 436, it was held, following this case, that an instruction to the effect that the jury must find for the plaintiff if the defect which caused the injury was, or with proper diligence might have been, known to the defendant or his agents at the time the injury was suffered, is erroneous. The defendant must have had sufficient time to remedy the defect, after its discovery, before he can be chargeable with negligence in failing to effect the remedy. The same view reappears in the ruling that defects in a track, when they arise, do not at once fasten a liability upon the railroad company. It is only after they have existed long enough for diligent supervision to discover and remedy them, that liability attaches. *Kansas City, M. & B. R. Co. v. Webb* (1892) 97 Ala. 162, 11 So. 888.

of the risk or of contributory negligence. That it is always a material question whether the master exercised reasonable care and diligence in removing a danger after he had knowledge of its existence may be conceded.⁵ But it seems inequitable and unreasonable to declare that the servant should always be the one to suffer, simply because the employer has been reasonably prompt in taking the necessary steps for the repair of the defective instrumentality. The true rule, it is submitted, is that the duty of the master under these circumstances is not, as a matter of law, fully discharged, unless he at least sees that the servant is notified of the danger to which he will be exposed while the abnormal conditions to which that danger is owing are being rectified. See § 117, *post*. This would seem to be the rationale of a ruling by the supreme court of Pennsylvania that, where an employer is informed that certain machinery upon his premises, out of sight of his employees, is in a dangerous condition, and he takes steps to renew it, but, before such renewal is made, one of the employees, having no notice of the dangerous condition of the machinery, is injured by its breaking, in the ordinary course of his employment, the question of the employer's negligence is for the jury.⁶

As to the duty of a master after he has become aware of facts tending to show that a servant is unfit for his duties, see chapter XIII., *post*.

As to the duty to remedy defects, under the employers' liability act, see chapter XXXVII., *post*.

113. Duty to change the positions of dangerous substances.— Under certain circumstances, the appropriate remedy which suggests itself is the transfer of some substance to a new position where, for various reasons determined by its properties and character, it will no longer expose the servant to undue hazard.¹

⁵ *Alton Lime & Cement Co. v. Calvey* (1893) 47 Ill. App. 343.

⁶ *Murphy v. Crossan* (1881) 98 Pa. 495. See also *Indianapolis & C. R. Co. v. Lore* (1858) 10 Ind. 554, where the court remarked: "If a defect existed in the road, which was known to the company, but which it was impossible for them to immediately remove or remedy, and in consequence thereof the road was unsafe, it was not impassable, and yet they should have warned an employee upon the road, and seen that he, in ignorance of said defect, to attempt to operate it, and injury should thereby result to him, certainly there would be a liability."

¹ This point of view is illustrated by such decisions as those in which the master has been held liable for injuries received by servants who have been put to work in places where there are unexploded charges of blasting powder. *Niven v. Sears* (1892) 155 Mass. 303, 29 N. E. 472; *Alton Lime & Cement Co. v. Calvey* (1893) 47 Ill. App. 343. Or who have fallen, when they were using a stairway which had been moved, and put in such a position as to be insecure for anyone who stepped on it. *Tendrup v. John Stephenson Co.* (1889) 51 Hun, 462, 3 N. Y. Supp. 892, Affirmed in (1890) 121 N. Y. 681, 24 N. E. 1097.

114. Duty to abstain from ordering servants to work in positions where the abnormal conditions will endanger them—To refrain from giving orders which will require a servant to put himself in such a position that he will be subjected to the risk of injury from a defective instrumentality is a duty the breach of which is no less culpable than the breach of the analogous duty of abandoning the use of the defective instrumentality.¹ On the other hand, the master's duty is discharged if, pending the execution of repairs, he takes temporary measures which will prevent servants from having access to the dangerous instrumentality.²

115. Duty to furnish appliances which will render the abnormal conditions less dangerous.—Sometimes the duty to remove the cause of the danger may take the form of a duty to furnish special appliances, in view of the possibility that the servant may be occasionally exposed to dangers against which those appliances will be an adequate protection.¹

Or who, while working on a train, have come into collision with a structure or other object in dangerous proximity to a railway track. *Chicago & I. R. Co. v. Russell* (1887) 91 Ill. 298, 33 Am. Rep. 54; *Louisville & N. R. Co. v. Filburn* (1869) 6 Bush, 574, 99 Am. Dec. 690; *Texas & P. R. Co. v. Hohn* (1892) 1 Tex. Civ. App. 36, 21 S. W. 942. Or who have been struck by a mass of ice and snow which fell on them from a roof where it had accumulated. *Dugan v. People's Bank* (1899) 34 N. B. 581. If a railroad track is constructed in such a manner that rocks overhang it, or loose rocks are imbedded in the slopes of cuts through which it runs, in such a position that they may be displaced by the action of the elements and precipitated upon the track, it is the duty of the company either to remove them or to take other adequate precautions to guard against danger and render the track reasonably safe. *Clune v. Ristine* (1899) 36 C. C. A. 450, 94 Fed. 745 (Sanborn, J., dissented). See also *Bean v. Western North Carolina R. Co.* (1899) 107 N. C. 7, 12 S. E. 600, cited in note 3 to preceding section.

¹ A master who is notified that posts upon which girders are to be set are insecurely fastened is guilty of little less than criminal negligence in sending carpenters to work upon them, without bracing them. *Herdler v. Buck's Store & Range Co.* (1896) 136 Mo. 3, 37 S. W. 115. See also *Elledge v. National City*

& O. R. Co. (1893) 100 Cal. 282, 34 Pac. 720 (bank of earth caved in, defendant's representative being fully aware of its condition); *Deere v. Meramec Iron Min. Co.* (1895) 128 Mo. 423, 31 S. W. 110, affirming without comment (1893) 54 Mo. App. 476 (laborer put to work under slope down which pebbles and stones were constantly falling). See also *Consolidated Ice Mach. Co. v. Kirfer* (1888) 26 Ill. App. 466.

² A jury is warranted in finding that car inspectors who, upon finding the steps at the rear end of a sleeping car to be broken, remove them and do not condemn the car as being in an unfit condition to be left in the train, are negligent if they fail to secure the platform gate in such a manner as entirely to prevent the egress of persons from the interior of the car. *Cameron v. Great Northern R. Co.* (1898) 8 N. D. 124, 77 N. W. 1016.

³ Thus, as a railroad company is bound to know that foreign cars may often have drawheads of different heights, and to appoint inspectors to ascertain the existence of this as well as other dangers incident to the handling of such cars, it is error to rule that the want of the crooked links which are necessary for the safe coupling of such cars is one of the risks assumed by a brakeman. *Bennett v. Greenwich & J. R. Co.* (1895) 84 Hun, 216, 32 N. Y. Supp. 457.

116. Liability of the master after the remedy has been applied.—

The extent of the master's liability for injuries caused by an instrumentality which, at the time of the accident, had been again brought into service after having been withdrawn from use for the purpose of restoring it to its normal condition will obviously depend upon whether the remedial measures adopted by him or his agents have, as matter of fact, resulted in rendering it reasonably safe, in so far as that can be effected by the exercise of ordinary care.¹

As to the effect of the master's specific promise to remedy the dangerous conditions, see chapter XXII., *post*.

117. Duty to warn the servant as to the existence of abnormal dangers.—Where the servant is not safeguarded by immediate abandonment of the use of the defective instrumentality, or by its immediate restoration to a condition of normal safety, it is clearly the duty of the master to warn the servant of the danger to which he will be exposed, unless he is known to have received information as to this from other sources.¹ See chapter XVI., *post*.

The obligations of remedying defects and of warning the servant of the existence of those defects are sometimes spoken of as being strictly alternative in their nature, as though the master could relieve himself of responsibility by discharging either of them.² But this

¹*Chicago & N. W. R. Co. v. Delaney* (1897) 169 Ill. 581, 48 N. E. 476, affirmed (1896) 68 Ill. App. 307; *Pioneer Coöperage Co. v. Romanowicz* (1899) 85 Ill. App. 407, affirmed (1906) 186 Ill. 1, 57 N. E. 864 (but not on this point explicitly).

An employer is not, as matter of law, free from negligence toward an employee injured by the fall of a freight elevator, although it had just been repaired by an expert, where it was of a rather poor class of elevators, and the manager in charge knew of defects which were not repaired at all. *Goggin v. D. M. Osborne & Co.* (1906) 115 Cal. 437, 47 Pac. 248. The falling of the roof of a mine is not one of the ordinary hazards of the service of a driver therein, where the employer, upon notice of the condition of the roof, had appointed a timberman to secure it, and the roof had been left in an insecure condition. *Consolidated Coal Co. v. Scheiber* (1898) 65 Ill. App. 304. Where a locomotive boiler explodes, killing the fireman, and there is evidence that the engine was frequently taken to the repair shops for repairs, that it would not

hold water nor sustain a full head of steam, the question of the employer's negligence is one of fact for the jury. *Kirkpatrick v. New York C. & H. R. R. Co.* (1879) 79 N. Y. 240. The operator of a pulp mill is not, as a matter of law, negligent in requiring an employee to use a mended circular saw, where it had been worked for a month and did not appear to be weaker at the mended point than at any other, or to have broken at that point or in consequence of its mended condition. *Lau v. Fletcher* (1895) 104 Mich. 295, 62 N. W. 357.

²It is negligence, as matter of law, to leave the track in an exposed place like a gorge, where it is specially liable to be injured by a rain storm, without a guard for ten hours after the storm is over. *Hardy v. North Carolina C. R. Co.* (1876) 74 N. C. 734.

³"If the master knew, or under the circumstances ought to have known, that a machine in use was out of repair and dangerous, it was his duty to see that it was put in proper repair, or to warn those using it of the danger, if they were ignorant of it." *Rice v.*

way of putting the case is not a strictly accurate one. In the first place, it involves the hypothesis that it is a matter of legal presumption that the effect of a warning is to transfer the responsibility to the servant, or disable him from recovering damages for the reason that his continuance of work after having thus acquired a knowledge of the conditions charges him with an acceptance of the risk or with contributory negligence. This hypothesis cannot be entertained as to all jurisdictions. See chapters xvii., xviii., and xx., *post*. Another objection to the statement in question is that it involves the unwarrantable proposition that an employer who proceeds to remedy a defect with due diligence relieves himself thereby from all respon-

King Philip Mills (1887) 141 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101; *Louisville, N. A. & C. R. Co. v. Bates* (1897) 146 Ind. 504, 45 N. E. 108. To same effect see *Findlay Brewing Co. v. Bauer* (1893) 50 Ohio St. 565, 35 N. E. 55; *Alton Line & Cement Co. v. Calvey* (1893) 47 Ill. App. 343; *Denver, T. & Ft. W. R. Co. v. Smock* (1897) 23 Colo. 456, 48 Pac. 681; *Carlson v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 450, 28 Pac. 497. In *Henry v. Lake Shore & M. S. R. Co.* (1882) 40 Mich. 495, 13 N. W. 832, the negligence relied upon and attempted to be proved was that a sufficient number of men was not employed upon a certain section of a railway to give proper notice to approaching trains in case of an accident, and to make the repairs within such reasonable time as, at that season of the year, would be required by ordinary prudence, under all the existing circumstances and in view of the probable danger of injury. The court said: "In behalf of the company it was argued that the company owed no duty to its employees to repair this track within any specified time, or at all; that, as to its employees, it might leave the track in an impassable condition, while its duty to the public would be very different; and that the duty it owed its employees, in such a case, was to give them sufficient notice of the danger, so that they might not receive any injury in consequence thereof. This position would seem to be unanswerable. The company owes a duty to the public to keep its track in a safe and suitable condition, and also to run its trains with regularity and despatch over the same, for the carriage and transportation of passengers and freight. In so far as its employees are

concerned, if the track is injured, and thereby becomes unsafe, the company is under no obligation to repair the same. It must, however, give them due and timely notice of the injury, so that danger may be averted, and, having given such notice, may take whatever time it may deem proper to repair the same. If the injury is such a one as to prevent the running of trains over that part of the track, when proper notice thereof is given, the company may take such time to repair the same as it pleases, even an unreasonable time, and its employees cannot call it to account therefor. If the company owes a duty to its employees to keep the track in a good, safe, and suitable condition, upon which they could run, propel, and manage its locomotives and trains of cars, as charged, and if the company must, at all times, have a sufficient force of men on hand to repair in case of casualties of this kind, within even a reasonable time, the question at once arises, By what standard shall these things be determined? If a rail is broken, must the force be sufficient to repair the track before the arrival thereof of the next train? If so, then a much larger force must be employed where a train is approaching than in a case where several hours would intervene, although, in either event, the extent of the injury to the track were the same. The adoption of such a rule would permit no allowance to be made between slight and extensive injuries to the track. The injury might be such that a few men could make the necessary repairs in a very short time, or be of so serious a nature that a large force would necessarily be employed for days. Then how could the company know what force would be required? Should it anticipate slight,

sibility, whether he warns the servant or not. But it is plain that the circumstances may sometimes be such that a jury would be justified in inferring that he ought also to have given the servant such instructions as would have enabled him to protect himself more effectually, during the period which was to elapse before the dangerous conditions could be remedied.³ It is conceived, therefore, that the true principle in this connection is that, under the circumstances supposed at the commencement of this section, the master is always culpable if he does not warn the servant, and may or may not be subject to an ac-

ordinary, or severe damage to its track, and how and by whom should injuries thereto be classified? Then, again, the same rule could not be applied to all roads alike. Where the business of the road is large, and many trains are daily running over the same, a much more strict rule and larger force would necessarily be required than in a case where but few trains were running. . . . This is the best answer the nature of the questions will admit of, although a dangerous one when we consider the claim made in this case that four men instead of three should have been employed. But the duty to promptly repair its track, or to repair within a reasonable time, grows out of the duty to carry freight and passengers with promptness and despatch. This is the contract obligation which the company enters into with its patrons, but which it has not entered into with its employees. As to them, it may delay its trains, or it may stop them, temporarily, or permanently, and the employee cannot complain or seek redress in damages in consequence thereof. Their claim, if any, would grow out of their contract relation with the company for employment, and would not be based upon a stoppage in the running of trains, caused by delay in repairing the track, but for their wages, to which they would be entitled, if employed for a definite period, whether trains were run with regularity, or were not run at all. There could therefore be no such thing as a duty to the employees to repair within a reasonable time, or to repair at all. The duty to them is to furnish a reasonably good and safe track, and, if an injury occurred thereto, to discover the same with reasonable diligence and promptly give due and timely notice thereof to its employees, so that they might be protected from danger."

³ See *Denver, T. & Ft. W. R. Co. v. Smock* (1897) 23 Colo. 456, 48 Pac. 681, where the duty of a railway company to put a distinctive mark on a foreign car, discovered to be defective, was recognized. In this particular class of cases, however, the kind of warning thus given does not seem to be regarded by all courts as sufficient. In *Bolton v. St. Louis S. W. R. Co.* (1895) 127 Mo. 676, 28 S. W. 887, 30 S. W. 150, the court said: "The defendant did not discharge its full duty to the plaintiff by inspecting and marking the car. The duty to furnish reasonably safe appliances and machinery for the use of its servants in the course of their employment was not only an imperative, but a continuous, duty. It ran, so to speak, with the defective car from the moment it was discovered to be defective, continually calling upon the master to repair it, or to warn those of its servants whom it required in the course of their employment to handle it of its dangerous character." In *Carbin v. Winona & St. P. R. Co.* (1896) 64 Minn. 185, 66 N. W. 271, it was held that a railroad company was not, as matter of law, free from negligence towards a brakeman killed by steel rails necessarily projecting over the end of a flat car while he was making a coupling, where it was well known that this kind of freight was apt to slide backwards or forwards, and where the conductor in charge of the train observed the condition of the rails thirty hours before the accident, so that there was an opportunity to remove the danger by slack-tracking the car, as was customary with those in bad order, or by adjusting the rails so that they would not project beyond the end of the car. The fact that the conductor warned him to be careful in making the coupling did not, it was said, prevent his recovering under such circumstances.

tion on other grounds, even though he may have given the servant adequate warning.

118. Duty to alter improper methods.— In the cases so far cited as illustrative of the general principle that the master's obligations are continuous in their nature, the subject-matter has been the material substances themselves which constitute portions of the plant. It is plain, however, that the principle is also applicable where the abnormal dangers were caused by improper methods of doing work. The obligation of altering these attaches to the master from the time they are known or ought to have been known to him.¹

¹Thus, a master is bound, by promulgating a proper rule, or otherwise, to change a practice which, to his knowledge, has for a long time been followed by one set of his servants to the peril of another set. *Doig v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579, 45 N. E. 1028, *Reversing* (1893) 73 Hun. 270, 26 N. Y. Supp. 405 (the practice complained of was the shunting of cars onto tracks leading to a repair shop, without adopting proper precautions for preventing the cars from running through doors of the shop, or for warning such employees as might be at work there); *Harper v. Indianapolis & St. L. R. Co.* (1871) 47 Mo. 567, 4 Am. Rep. 353 (mismanagement of engines by firemen, company's agents being aware that such employees were in the habit of operating engines in the absence of the engineers). So, a master who has notice of the violation of a rule adopted for the protection of an employee is charged with the duty of taking the necessary steps to correct the evil and obviate the injury. *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 304, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266.

CHAPTER X.

KNOWLEDGE AS AN ELEMENT OF A MASTER'S LIABILITY.

A. GENERAL PRINCIPLES.

- 119. Analysis of the conception of negligence with reference to the knowledge of the person charged therewith.
- 120. Same subject in its special application to the liability of a master.
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A. GENERAL PRINCIPLES.

119. Analysis of the conception of negligence with reference to the knowledge of the person charged therewith.— Before entering upon a detailed examination of the cases which bear upon the subject of this chapter, it will be advisable to insert a few introductory remarks, designed to elucidate the fundamental principles to which the propositions which we shall have occasion to state are referable.

That knowledge is a constituent element of negligence under any of its aspects will be sufficiently obvious to anyone who considers that a want of care can only be manifested in one of two ways, *viz.*, either by a failure to make such inquiries as would have turned partial and merely constructive, into complete and actual, knowledge, or by a failure to act prudently with a full knowledge of the conditions. Any other theory would be inconsistent with that fundamental principle of jurisprudence which makes ignorance of facts a valid excuse for an injurious act, provided such ignorance is justifiable. In the ordinary analyses of negligence, this aspect of the tort is somewhat obscured, for the reason that they lay the chief stress upon the standards by which its existence or nonexistence is determined. In the two following well-known definitions, for instance, the element of knowledge is wholly ignored, so far as the actual words which they contain are concerned.

"Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the

conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."¹

"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion."²

In other definitions the presence of this element is more apparent, but is not very distinctly insisted upon.

"Negligence, in its civil relations, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another. The inadvertency or want of due consideration of duty is the *injuria*, on which, when naturally followed by the *damnum*, the suit is based."³

Negligence is the want of such attention to the natural and probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.⁴

In a third set of definitions the element of knowledge is put prominently forward.

"Negligence is practically synonymous with heedlessness or carelessness,—not taking notice of matters relevant to the business in hand of which notice might or ought to have been taken."⁵

"An actor is negligent who is ignorant of the consequences of his act, if his ignorance proceeds from thoughtlessness, recklessness, carelessness, or want of due attention. Negligence is inadvertence to consequences to which a man might have adverted, and to which he would have adverted had he been desirous to obey the law and perform the obligations which it imposes."⁶

"Of the three gradations of misconduct towards others, fault or negligence (*culpa*) is an unlawful act in ignorance of the subject, the degree, the instrument, the consequences, when it was reasonable to expect the mischief; unlawful intention (*dolus*) is breach of law with knowledge of these elements, but without premeditation; malice or

¹ Alderson, B., in *Blyth v. Birmingham Waterworks Co.* (1856) 11 Exch. 781, 25 L. J. Exch. N. S. 212, 2 Jur. N. S. 333.

² Swayne, J., in *Baltimore & P. R. Co. v. Jones* (1877) 95 U. S. 439, 24 L. ed. 506.

³ Wharton, Neg. § 3.

⁴ N. Y. Penal Code, § 719, subsec. 1. Donnan's Ann. Code, 1884.

⁵ 11 Stephen, History of Criminal Law, p. 122.

⁶ Poste's Gaius, p. 13.

depravity is evinced by the resolution or deliberate intention of violating law."⁷

It can scarcely be said that any of these definitions indicate satisfactorily the true relation which the element of knowledge bears to that absence of care which constitutes the main element in the conception of negligence. The defect in such explanations is that they fail to take account of the case in which negligence is predicated of acts done by one who is fully aware of all the circumstances with reference to which he is called upon to choose a course of action, and who also knows that there is a probability, which in some instances approaches to a moral certainty, that the course of action which he does adopt will prove injurious to some one. Unless the familiar phrase "wilful negligence" is based upon a wholly false conception, no definition which fails to cover an act done by a person in this condition of enlightenment can be termed satisfactory.⁸

120. Same subject in its special application to the liability of a master.—Such expositions as the foregoing are peculiarly defective when considered with reference to the circumstances from which an employer's liability is predicated, for they cannot be made to comprehend the cases of actual or constructive knowledge of the existence of the dangerous conditions. It would be doing violence to common sense to say that the liability in this instance is based upon his blameworthy ignorance of consequences. His fault really consists in non-action or wrong action, with a full appreciation of the probable results of his conduct. In other words, the law requires him to indemnify the injured servant because he knows or is presumed to know that his instrumentalities are in a dangerous condition, and also knows or is presumed to know that this dangerous condition must, in the long run, cause injury to anyone who uses, or is brought into proximity to, those instrumentalities as frequently and as constantly as is the case with a servant.

The inadequacy of the ordinary definitions of negligence, as a measure and test of an employer's liability, results from the fact that the special duty which, above all others, is imposed by the law upon him, is the duty of maintaining the instrumentalities of his business in such a condition that his servants will not be exposed to unnecessary peril. This duty cannot be effectively discharged, unless he ex-

⁷Aristotle's *Eth. Nic.* 3, 5, 8 (translated in Poste's *Gains*, p. 15).

⁸It has been well remarked by the writer of the article on "Negligence" in the *Encyclopædia Britannica*: "Negligence in one respect is the correlative of diligence, in another of intention; it is the absence of diligence, or the absence of intention."

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exercises reasonable care in seeing that the instrumentalities do not fall below a given standard of safety. The primary duty of an employer, therefore, is to obtain such knowledge as is necessary to enable him to decide whether that normal standard is or is not satisfied at any given moment, while his duty to raise the instrumentalities to that standard, after he ascertains that they come short of it, is a secondary duty imposed by the law, for the reason that he must be aware that, if this is not done, his servants will be likely to suffer injury. In short, the very essence of the principle upon which he is held liable is his knowledge, either of existing conditions, or of the probable consequences of the continuance of those conditions. The criticisms of Cotton and Bowen, L. J., upon the comprehensive rule which Brett, M. R., undertook to formulate in an oft-cited case¹ forbid us to lay it down as a universal proposition, applicable to all civil relations, that, as has been declared in a Kansas case, "where any voluntary act may naturally result in the injury of another, the actor must see to it, at his peril, that injury does not follow."² But this doctrine undoubtedly expresses the conception which is the keynote of all the statements which we find in the books, respecting the extent and character of the master's obligations to secure his servant against personal injury; the conception, that is to say, of a duty to exercise a reasonably careful supervision, with a view to eliminating unnecessary perils from the business.³ Or, to view the matter from a somewhat different standpoint, the qualifications ingrafted on the original rule that a servant assumes the ordinary risks of his employment are that a master shall not employ his servant in a work which the master is aware is of such a nature that no man could engage in it without incurring liability to the injury complained of.⁴

121. — to other relations involving analogous responsibilities.—

¹ *Heaven v. Pender* (1883) L. R. 11 Q. B. Div. 503, 52 L. J. Q. B. N. S. 702, 49 L. T. N. S. 357, 47 J. P. 709.

² *Martin v. Levagood* (1891) 47 Kan. 36, 27 Pac. 122.

³ A master must "exercise care and prudence that those in his employment be not exposed to unreasonable risks and dangers." *Noyes v. Smith* (1855) 28 Vt. 59, 65 Am. Dec. 222. "The legal implication is that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and oversight; and if he fails to do so, he is guilty of a breach of duty under his

contract, for the consequences of which he ought, in justice and sound reason, to be responsible." *Snow v. Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720. See also the following chapter.

⁴ In *Potts v. Plunkett* (1859) 9 Ir. C. L. Rep. 290, it was pointed out by Lefroy, Ch. J., that this rational qualification of the rule which exempts the master from liability for injuries resulting from accidents to those in his employment involves the existence of knowledge on the part of the master of the dangerous nature of the employment.

The obligation thus imposed upon the master is, it will be observed, the same in kind and degree as that incumbent upon all individuals or corporations who are under a duty towards a given class of persons to keep certain material substances in a safe condition. The most familiar example of this duty, apart from the relations of master and servant, is that which requires municipal corporations to maintain safe highways, etc., for the benefit of travelers. It is the accepted doctrine that no action can be maintained for a breach of this duty unless the corporation is proved to have had notice, actual or constructive, of the dangerous conditions which caused the injury.¹ The same rule prevails as regards other relations in which a duty resembling that imposed on an employer is imposed on one of the parties, as, where the servant of an independent contractor is injured by defective instrumentalities furnished by the principal employer,² or where the owner of premises is sued for damages by a licensee.³ It also operates as a restriction upon the liability of carriers for injuries to passengers, the extent of their duty, where freight is concerned, being, of course, determined upon the peculiar considerations which render them practically insurers of the safety of the goods conveyed.⁴

122. Actual knowledge; liability inferred from.—It is well settled that a master must respond in damages for an injury resulting from abnormally dangerous conditions, of the existence of which he was ac-

¹ See 2 Dill. Mun. Corp. § 790. This similarity of the principles involved, and of the results to which those principles lead, has not escaped the notice of the courts. As was remarked in *Huffman v. Chicago, R. I. & P. R. Co.* (1883) 78 Mo. 50, "cases of this sort (i. e., where masters are sued by injured servants) are obviously analogous to those where a municipal corporation is sued for an injury arising from a defect in one of its streets, where one of two things must be shown to hold the city liable,—either notice of the defect communicated to the city, or evidence that the defect had continued so long as to allow the inference to be drawn that notice of such defect had been communicated."

² It is observed in a standard work that the established rule in regard to the liability of a carrier to a passenger seems to be that the fact of the carrier's having employed an independent contractor to furnish the appliances or structures used in carrying on the business of transportation will not warrant him in trusting to the external appearance of the materials, or relieve him of the duty of carefully inspecting and testing those materials. *Hutchinson, Carr.* §§ 512 *et seq.* See especially *Roadhead v. Midland R. Co.* (1867) L. R. 2 Q. B. 412, 8 Best & S. 371, 36 L. J. Q. B. N. S. 181, 16 L. T. N. S. 485, 15 Week. Rep. 831, Affirmed (1869) L. R. 4 Q. B. 379, 38 L. J. Q. B. N. S. 169, 17 Week. Rep. 737, 9 Best & S. 519; *Inghalls v. Bills* (1845) 9 Met. 1, 43 Am. Dec. 346.

³ See pp. 45 *et seq.* of the present writer's note in vol. 46 L. R. A., *Cleveland, C. C. & St. L. R. Co. v. Berry*.

⁴ Thus, a person who is injured by the fall of a plank of a roof, which gave way under the weight of a man hired to do some repairs, cannot recover unless he shows, either that the hirer knew, or had the means of knowing, or was

tually aware. This doctrine is immediately deducible from the general principle that knowledge is an essential ingredient of negligence, and that a person is always held liable for the natural and probable consequences of his own want of care.

"If there is personal negligence in the master, he is liable, and if he knows the defects which cause the injury, that is evidence of personal negligence."¹

In estimating the extent of the master's liability the essential point to be settled is not whether he knew that certain conditions existed, but whether he knew that those conditions involved danger to the servant.²

There are many cases in which the master may be held responsible for the reason that he understood the conditions which exposed the

¹The judges were all agreed that the ruling in *Priestley v. Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, was to be taken as being subject to the implied qualification that the master would have been liable if he had known of the unsafe conditions. In reply to the contention of counsel, that to render the master liable there must be actual personal interference on his part, so as to lay a trap for the servant in the particular matter from which he received the injury, Crompton, J., said: "I do not agree to that; I think it is negligence for which the master is liable, if he knows that the machinery or tackle to be used by the persons employed by him is improper or unsafe, and, notwithstanding that knowledge, sanctions its use." *Mellors v. Shaw* (1861) 1 Best & S. 444, 30 L. J. Q. B. N. S. 336, 7 Jur. N. S. 845. The case cited as exemplifying the situation thus designated was *Roberts v. Smith* (1857) 2 Hurlst. & N. 213, 3 Jur. N. S. 469, 26 L. J. Exch. N. S. 319. Other cases recognizing the doctrine stated in the text are: *Horner & H. Coal Min. Co. v. Schmidt* (1900) 43 C. C. A. 532, 104 Fed. 282; *Savannah & S. R. Co. v. Pughley* (1901) 113 Ga. 1012, 39 S. E. 473; *Mahood v. Pleasant Valley Coal Co.* (1892) 8 Utah, 85, 30 Pac. 149; *Henke v. Babcock* (1901) 24 Wash. 556, 64 Pac. 755; *Strauss v. Haberman Mfg. Co.* (1898) 25 App. Div. 623, 48 N. Y. Supp. 1116; *Hancock v. Keene* (1892) 5 Ind. App. 408, 32 N. E. 329; *Chicago Edison Co. v. Morea* (1900) 185 Ill. 571, 57 N. E. 773, affirming 86 Ill. App. 152 (foreman here had been explicitly warned as to the danger).
Where there is evidence showing that the master knows an appliance to be in a defective condition, it is not error to submit to the jury the question whether he was guilty of negligence in not providing suitable appliances. *Glossen v. Gehman* (1892) 147 Pa. 619, 23 Atl. 843; *Essex County Electric Co. v. Kelly* (1897) 60 N. J. L. 306, 37 Atl. 619. Evidence that an employer had directed that only quick and active men should be employed in operating a pair of steel shears weighing 12 tons, so that they might get out of the way in case of accident, is admissible in an action by an employee injured by the breaking of the shears, for the purpose of showing that the employer knew the shears to be dangerous. *Pacheco v. Judson Mfg. Co.* (1896) 113 Cal. 541, 45 Pac. 833.
²*Regan v. Donoran* (1893) 159 Mass. 1, 33 N. E. 702 (steps descending to cellar of house where plaintiff was set to work were known to be movable, but not known to be unsafe, or likely to be unsafely placed by the owner of the premises). Compare the analogous rule by which the material question in cases where the defenses of contributory negligence or assumption of risks are raised is not whether the servant was aware of the abnormal conditions which produced the danger, but whether he comprehended that there was such danger. Chapters XVII.—XXI. *post*. See also Ray, Negligence of Imposed Duties, 134, cited with approval in *Murphy v. Great Northern R. Co.* (1897) 68 Minn. 526, 71 N. W. 662.

servant to unnecessary danger, although, in other aspects of the case, the servant would have been unable to maintain his action. Thus, the action may be maintained on the ground of the master's actual knowledge obtained through any channel, even though he has duly fulfilled the duty cast upon him by the law to see that the instrumentalities of his business are properly examined by competent agents, if not by himself in person.³ So, the rule that a servant, when he accepts a certain employment, impliedly contracts that he possesses a certain degree of skill, does not avail to absolve the master from responsibility for injuries to a servant whose inexperience is put forward as a material ingredient in his right of action, where the master has actual knowledge of the extent of the servant's skill.⁴ Here the governing principle is that it is negligence to set a servant to work at a special task, where the employer knows that he lacks the strength and skill necessary to enable him to do it safely.⁵ So, although a master may have given instructions which would have been sufficient in the case of a servant of average intelligence, his liability remains absolute if he knows that the servant lacks capacity to understand the dangers of the work, however much he may have been instructed.⁶ So, the right of an employee to recover for negligence of a corporation, in hiring an incompetent servant over the protest of some of its officers who are aware of his incompetence, is not affected by the failure of another employee to give notice of subsequent neglect and unfitness of such servant.⁷ So, the servant's breach of a rule formulated for the safety of employees will not be imputed to him as contributory negligence,

³ In *Indiana, I. & L. R. Co. v. Snyder* 122, 20 S. W. 1014, 23 S. W. 917; *Arizona Lumber & Timber Co. v. Mooney* (1893; Ariz.) 33 Pac. 590.

⁴ *Noblesville Foundry & Mach. Co. v. Yeaman* (1892) 3 Ind. App. 521, 30 N. E. 10. It has, however, been held that the mere fact that the agent of the employer, who hired a brakeman, knew him to be inexperienced, will not make the employer liable as for negligence, the special reason assigned being that the employer cannot properly be deemed guilty of greater negligence in hiring him than he is guilty of in soliciting and accepting the employment. *McDermott v. Atchison, T. & S. F. R. Co.* (1896) 56 Kan. 319, 43 Pac. 248.

⁵ See chapter XVI. *post*, on the duty to instruct.

⁶ *Mexican Nat. R. Co. v. Mussette* (1894) 86 Tex. 708, 21 L. R. A. 642, 26 S. W. 1075. Affirming (1894) 7 Tex. Civ. App. 169, 24 S. W. 520.

⁷ *Goins v. Chicago, R. I. & P. R. Co.* (1889) 37 Mo. App. 221; *Missouri P. R. Co. v. King* (1893) 2 Tex. Civ. App.

where such rule has been habitually violated, with the knowledge and consent of the master or his representative.* And, in general, it may be laid down that the law imposes responsibility whenever a master is aware of the existence of the abnormally dangerous conditions, although those conditions may be due originally to some cause, for the operation of which he is *prima facie* not liable. See cases cited in § 129, *post*.

123. Absence of actual notice not always decisive in the master's favor.—Under some special state of the evidence it may be apparent that the master was not negligent unless he had actual knowledge of the defect which caused the injury. The servant's inability to establish the fact of such knowledge will, then, prevent his maintaining the action.¹ Usually, however, the converse of the rule stated in the preceding section does not hold good in all respects; for, as will presently be shown, the employer may be held liable, although no actual knowledge on his part is established, if it appears that, by the use of ordinary care, he could have ascertained that the conditions which caused the servant's injury existed.² The only result of its being proved that the master had no actual knowledge is that the burden of proving that his ignorance was culpable is cast upon the servant.³ It is true that statements of the courts as to the effect of a want of knowledge on the master's part sometimes omit a formal reference to constructive knowledge, but with very few exceptions such statements were not made in cases in which the question whether there was any difference between the legal consequences of actual and constructive knowledge was fairly raised. No special importance, therefore, is to be attached, in the present connection, to the fact that we find in the books such remarks and rulings as those mentioned in the subjoined note.⁴

* *Boess v. Clausen & P. Brewing Co.* (1896) 12 App. Div. 366, 42 N. Y. Supp. 848, and cases cited in § 232, *post*.

¹ *Groth v. Thomann* (1901) 110 Wis. 488, 86 N. W. 178; *Connors v. Elmira, C. & N. R. Co.* (1895) 92 Hun. 339, 36 N. Y. Supp. 926 (railroad company not chargeable with negligence in allowing a team and wagon, used by other parties in drawing coal from its cars, to stand so near the track that there is not sufficient room for a brakeman to stand between the wagon and a car after making a coupling, where such wagon had not previously been left so near the track except on one occasion, two weeks before, of which the company had no actual notice).

² *Paine v. Eastern R. Co.* (1895) 91 Wis. 340, 64 N. W. 1005 (defective blocking of guard rail).

³ See chapter XVIII., *post*.

⁴ "As the declaration contains no charge that the defendant knew any of the defects mentioned, the court is not called upon to decide how far such knowledge on his part, of a defect unknown to the servant, would make him liable." *Priestley v. Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987. "When proper appliances have been supplied by a master to a man they may well become unsafe to the knowledge of the man and without the knowledge of the master, and so it is that each issue must, in such a case, be established by the man when he sues his

124. Constructive knowledge; how related to the master's absolute duties.—The principle that the obligations of the master to the servant can be fulfilled only by the exercise of due care in providing suitable instrumentalities for the operation of his business is applied in a somewhat different manner, according as the plaintiff's theory and the evidence adduced to support it bring into greater prominence the question whether the master was negligent in allowing certain abnormal conditions to remain unremedied, or the question whether he was negligent in remaining ignorant that such abnormal conditions existed.

In cases in which the former is the main issue presented, the essential object of the investigation is to ascertain whether the instrumentality which produced the injury was abnormally dangerous to persons using it or working in proximity to it; and the master's knowledge or ignorance of its dangerous condition is treated as material, only for the reason that the existence of that condition cannot be imputed to him as negligence unless it was known to him, either actually or constructively. To this conception are referable such statements of the extent of the master's liability as those mentioned below.¹

master." *Williams v. Birmingham Battery & Metal Co.* (1899) 2 Q. B. 338, 68 L. J. Q. B. N. S. 918, per Smith, L. J. It is not negligence in the master if a tool or machine breaks, whether from an internal, original fault, not apparent when the tool or machine was first provided, or from an external, apparent one, produced by time and use, and not brought to the master's knowledge. *Baker v. Albion R. Co.* (1880) 95 Pa. 211, 40 Am. Rep. 634. A seaman cannot recover damages from the owner of his ship on the ground of her being unseaworthy, unless he alleges and proves that such owner was aware of her condition. *Couch v. Steel* (1854) 3 El. & Bl. 408, 2 C. L. Rep. 940, 23 L. J. Q. B. N. S. 121, 18 Jur. 515. A verdict for the defendant is rightly directed where there is no evidence of knowledge on the employer's part. *Stellenger v. Chicago & N. W. R. Co.* (1883) 61 Iowa, 714, 17 N. W. 151. The evidence is insufficient to sustain a verdict for the plaintiff, where it does not prove that the defendant knew of the defect. *Arcade File Works v. Juleau* (1896) 15 Ind. App. 461, 40 N. E. 818, 44 N. E. 326. Other examples of a similar want of precision in the phraseology may be found in *Feltham v. England* (1866) L. R. 2 Q. B. 33, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151, 7 Best & S. 676, Reversing (1865) 4 Fost. & F. 460; *Whittaker v. Cumby* (1884) 14 Ill. App. 498; *Mahoney v. Vacuum Oil Co.* (1894) 76 Hun. 579, 28 N. Y. Supp. 196; *Fisk v. Central P. R. Co.* (1887) 72 Cal. 43, 13 Pac. 144; *Johnson v. Armour* (1883) 5 McCrary, 629, 18 Fed. 490; *Illinois Steel Co. v. Paschke* (1893) 51 Ill. App. 456; *Acme Coal Min. Co. v. McLeer* (1894) 5 Colo. App. 267, 38 Pac. 596; *Behm v. Armour* (1883) 58 Wis. 1, 15 N. W. 806; *North Co. v. Fallace* (1880) 4 A. J. R. (Victoria) 109; *Pudson v. Dominion Atlantic R. Co.* (1895) 27 N. S. 498; *Ross v. Cross* (1890) 17 Ont. App. Rep. 29; *Black v. Ontario Wheel Co.* (1890) 19 Ont. Rep. 578.

The only cases, now of no authority whatever, in which it has been explicitly held that the master cannot be found liable unless he is shown to have had actual knowledge of the conditions, are *McMillan v. Saratoga & W. R. Co.* (1855) 20 Barb. 450; *Anderson v. New Jersey S. B. Co.* (1867) 7 Robt. 611; and, perhaps, *Kunz v. Stuart* (1865) 1 Daly. 431.

¹The master is bound to use ordinary care in providing suitable struc-

In another class of cases the essence of the negligence imputed to the master is his failure to adopt such measures as a man of ordinary prudence would have adopted under the circumstances, for the purpose of keeping himself protected with the condition of the instrumentalities of his business. The main problem to be then solved is whether the master has discharged his duty of inspection, and his duty to maintain in safe condition is relegated to the background. See the following chapters.

"Ignorance itself is negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative."²

Confining our attention for the present to the first class of cases,

structures and engines and proper servants to carry on his business, and is liable to any of their fellow servants for his negligence in this respect. This care he can and must exercise, both in procuring and in keeping or maintaining such servants, structures, and engines. If he knows, or in the exercise of due care might have known, that his servants are incompetent, or his structures or engines insufficient, either at the time of procuring them, or at any subsequent time, he fails in his duty.³ *Gilman v. Eastern R. Co.* (1866) 13 Allen, 433, 440, 90 Am. Dec. 210. The legal implication is that "railroad companies will have and keep a safe track, and adopt suitable instruments and means with which to carry on their business. They can provide all these by the use of the requisite care and foresight, and, if they fail to do so, they are guilty of a breach of duty, and are liable for the consequences. . . . Under this rule it is held that the companies are liable for the existence of all defects which they knew, or by reasonable care and diligence might have known." *Lewis v. St. Louis & I. M. R. Co.* (1875) 59 Mo. 495, 21 Am. Rep. 385. The liability of an employer for defective machinery does not depend on the fact that the defects are latent or patent, but on the question of proper care in selecting the machinery and keeping it in repair. *Gunter v. Graniteville Mfg. Co.* (1881) 15 S. C. 443. Compare the statements that the employer is not liable for an injury caused by a "latent" defect; that is to say, one which is not discoverable by a reasonable inspection (*Essex County Electric Co. v. Kelly* [1894] 57 N. J. L. 100, 29 Atl. 427; *Throckmor-*

ton v. Missouri, K. & T. R. Co. [1896] 14 Tex. Civ. App. 222, 30 S. W. 171), and that the duty of a master to provide for the safety of his servant includes the obligation to protect him from latent or unseen defects, so far as that end can be attained by a reasonable care (*Edward Hines Lumber Co. v. Ligan* [1896] 68 Ill. App. 523); and that a master owes his servants the duty "to place them under no risks from imperfect or inadequate machinery, or other material means or appliances known, or which, but for their negligence, would have been known, to them" (*Salter v. Delaware & H. Canal Co.* [1874] 3 Hun, 338, approved in *Ellis v. New York, L. E. & W. R. Co.* [1884] 95 N. Y. 546).

² *Davis v. Detroit & M. R. Co.* (1870) 20 Mich. 124, 4 Am. Rep. 361, per Cooley, J. The same learned jurist has laid it down in his work on torts, p. 550, that "the master may also be negligent in not exercising ordinary care to provide suitable and safe machinery or appliances, or in making use of those which he knows have become defective, but the defects in which he does not explain to the servant, or in continuing ignorantly to make use of those which are defective, where his ignorance is due to a neglect to use ordinary prudence and diligence to discover defects" (quoted with approval in *Louisville & N. R. Co. v. Orr* [1882] 84 Ind. 50). Compare the statements to the effect that the plaintiff must show that the master knew of the circumstances which created danger, or was "culpably ignorant" thereof (*Huffman v. Chicago, R. I. & P. R. Co.* [1883] 78 Mo. 50), and that ignorance of a defect, in a case

riz., those in which the knowledge which the master ought, as a prudent man, to have acquired, is treated merely as a factor of the comprehensive duty to use proper care in providing reasonably safe instrumentalities, we find that the cases turning upon the existence or absence of constructive notice stand on lines very nearly parallel to those involving actual notice.

125. Constructive knowledge; liability inferred from.—The doctrine that knowledge of abnormal dangers, which a master might have acquired by the exercise of reasonable care, stands, as an element of liability, upon precisely the same footing as actual knowledge, is well established.

"It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows, or ought to know, that it is not so, and if, from any negligence in this respect damage arises, the master is responsible."¹

The question is not whether the master believes that the materials furnished by him are free from defects, but whether he is justified in such a belief.²

It is the duty of the employer to "furnish appliances free from defects discoverable by the exercise of ordinary care."³

"The master is chargeable, not only with such knowledge as he actually has, but also with that which he ought to have, by the exercise of reasonable care and diligence on his part in the performance of his duties as master."⁴

"Where knowledge is essential to charge the master, negligent ignorance is equivalent to knowledge."⁵

The implied agreement of a master is that the implements and machinery furnished for the use of his servants "are sound and fit for the purpose intended, so far as ordinary prudence can discover."⁶

"Knowledge may be established by showing actual cognizance of the defect, or knowledge imputed from the opportunities for actual

where there was a duty to inquire, and proper inquiry would have procured information, constitutes negligence, *Chesapeake & N. R. Co. v. Venable* (1901) 23 Ky. L. Rep. 427, 63 S. W. 35.
¹ *Peterson v. Wallace* (1851) 1 Macq. H. L. Cas. 748, 751 (quoted as "recognized law" in *Hurdler v. Buck's Store & Range Co.* [1896] 136 Mo. 3, 37 S. W. 115).

² *Roberts v. Smith* (1857) 2 Hurlst. & N. 213, 26 L. J. Exch. N. S. 319, 3 Jur. N. S. 469.

³ *Texas & P. R. Co. v. Archibald* (1897) 170 U. S. 663, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777.

⁴ *Houston v. Brush* (1894) 66 Vt. 331, 29 Atl. 380.

⁵ *Schmidt v. Block* (1880) 76 Ga. 823, referring to 2 Thomp. Neg. p. 994; *Shearn & Redf. Neg.* § 93; *Occ. in S. S. Co. v. Matthews* (1890) 86 Ga. 418, 12 S. E. 632.

⁶ *Lake Shore & M. S. R. Co. v. McCormick* (1881) 74 Ind. 440.

knowledge, arising from the duty to observe its machinery and appliances for the safety of its workmen."

- Eransville & T. H. R. Co. v. Ducl* (1866) 13 Allen, 433, 90 Am. Dec. 210; (1892) 134 Ind. 156, 33 N. E. 355. See also the following cases, to the same effect: *Feltham v. England* (1865) 4 Fost. & F. 460; *Webb v. Rennie* (1865) 4 Fost. & F. 608; *Union P. R. Co. v. Daniels* (1893) 152 U. S. 684, sub nom. *Union P. R. Co. v. Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; *Northern P. R. Co. v. Herbert* (1885) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Union P. R. Co. v. O'Brien* (1896) 161 U. S. 451, 49 L. ed. 766, 16 Sup. Ct. Rep. 618. Affirming (1892) 1 C. C. A. 354, 4 U. S. App. 221, 49 Fed. 538; *Louisville & N. R. Co. v. Johnson* (1897) 27 C. C. A. 367, 53 U. S. App. 381, 81 Fed. 679; *Jones v. Yeager* (1872) 2 Dill. 64, Fed. Cas. No. 7,510; *Ocean S. S. Co. v. Matthews* (1890) 86 Ga. 418, 12 S. E. 632; *Chicago & A. R. Co. v. Shannon* (1867) 43 Ill. 338; *Illinois Steel Co. v. Schymanski* (1896) 162 Ill. 447, 44 N. E. 876; *Whitney & S. Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242. Affirming (1896) 68 Ill. App. 487; *Pioneer Coal & Lumber Co. v. Romanowicz* (1899) 85 Ill. App. 407. Affirmed in (1900) 186 Ill. 1, 57 N. E. 864; *Consolidated Coal Co. v. Hucani* (1893) 146 Ill. 614, 35 N. E. 162; *Goff v. Toledo, St. L. & K. C. R. Co.* (1887) 28 Ill. App. 529; *Lake Shore & M. S. R. Co. v. Conway* (1896) 67 Ill. App. 155; *Western Tube Co. v. Polobinski* (1900) 94 Ill. App. 640; *Chicago & A. R. Co. v. Merriman* (1900) 95 Ill. App. 628; *Louisville, N. A. & C. R. Co. v. Buck* (1888) 116 Ind. 566, 2 L. R. A. 520, 19 N. E. 453; *Linton Coal & Min. Co. v. Persons* (1894) 11 Ind. App. 264, 39 N. E. 214; *Salem Stone & Lime Co. v. Tipps* (1894) 10 Ind. App. 516, 38 N. E. 229; *Indiana Natural & Illuminating Gas Co. v. Marshall* (1898) 22 Ind. App. 121, 52 N. E. 232; *Locke v. Sioux City & P. R. Co.* (1877) 46 Iowa, 109; *Chicago, K. & W. R. Co. v. Blerins* (1891) 46 Kan. 370, 26 Pac. 687; *Ashland Coal & I. R. Co. v. Wallace* (1897) 101 Ky. 626, 42 S. W. 744. Rehearing reported in (1897) 101 Ky. 644, 43 S. W. 207; *Kentucky C. R. Co. v. Carr* (1897) 19 Ky. L. Rep. 1172, 43 S. W. 193; *McGhee v. Bell* (1897) 19 Ky. L. Rep. 267, 38 S. W. 702; *Shaunty v. Androscooggin Mills* (1876) 66 Me. 420; *Norfolk & W. R. Co. v. Hauser* (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994; *Gilman v. Eastern R. Co.* (1866) 13 Allen, 433, 90 Am. Dec. 210; *Holden v. Fitchburg R. Co.* (1880) 129 Mass. 268, 37 Am. Rep. 343; *Arkerson v. Dennison* (1875) 117 Mass. 407; *Davis v. Detroit & M. R. Co.* (1870) 20 Mich. 105, 4 Am. Rep. 364; *Cook v. St. Paul, M. & M. R. Co.* (1885) 34 Minn. 45, 24 N. W. 311; *Thiel v. Kennedy* (1901) 82 Minn. 142, 84 N. W. 657; *Doyle v. Missouri, K. & T. Trust Co.* (1897) 140 Mo. 1, 41 S. W. 255; *Bullmaster v. St. Joseph* (1897) 70 Mo. App. 60; *Loring v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417; *Benzing v. Steinway* (1886) 101 N. Y. 547, 5 N. E. 449; *Hesketh v. New York C. & H. R. R. Co.* (1899) 37 App. Div. 78, 55 N. Y. Supp. 898; *Dunn v. Co. ach* (1897) 21 Misc. 295, 47 N. Y. Supp. 185. Affirming (1897) 20 Misc. 727, 46 N. Y. Supp. 684; *Cielfield v. Browning* (1894) 9 Misc. 98, 29 N. Y. Supp. 710; *Chesson v. John L. Rep. Lumber Co.* (1896) 118 N. C. 59, 23 S. E. 925; *Huntsinger v. Trexler* (1897) 181 Pa. 497, 37 Atl. 574; *Texas & P. R. Co. v. McAtee* (1884) 61 Tex. 695; *Texas & P. R. Co. v. Wisenor* (1886) 66 Tex. 674, 2 S. W. 667; *Bertha Zinc Co. v. Martin* (1895) 93 Va. 791, 22 S. E. 869; *Missouri P. R. Co. v. Henry* (1889) 75 Tex. 220, 12 S. W. 828; *Texas & N. O. R. Co. v. Echols* (1897) 17 Tex. Civ. App. 677, 41 S. W. 488; *Paine v. Eastern R. Co.* (1895) 91 Wis. 340, 64 N. W. 1005; *Pursell Mill & Elevator Co. v. Kirkland* (1898) 2 Ind. Terr. 169, 47 S. W. 311; *Alabama & F. R. Co. v. Waller* (1872) 48 Ala. 459; *New Orleans, J. & G. N. R. Co. v. Hughes* (1873) 49 Miss. 258; *Texas & P. R. Co. v. Harrington* (1884) 62 Tex. 597; *Texas & P. R. Co. v. Mallon* (1885) 65 Tex. 115; *American Wire Nail Co. v. Connelly* (1893) 8 Ind. App. 398; *N. E. 721; Neilon v. Kansas City, St. J. & C. B. R. Co.* (1885) 85 Mo. 599; *Kerlin v. Chicago, P. & St. L. R. Co.* (1892) 50 Fed. 185, and the cases generally which are cited in the following subdivisions of the present chapter.
- The cases dealing with the master's constructive knowledge of the servant's incompetency are collected in chapter XIII, post.
- It has been expressly determined that where the instrumentality which causes the servant's injury is a vicious animal belonging to the category known as "do-

The instructions to the jury, in an action for injuries caused by abnormal dangers, should be in conformity with this doctrine.⁸

The boundary line between the constructive knowledge which may be attributed to the master from the standpoint adverted to in the foregoing paragraph, and from the standpoint of his duty in regard to the actual examination of the instrumentalities, is not always easy to define. But the exigencies of a logical classification seem to render it expedient that the duty to observe the daily operation of the instrumentalities, and to estimate the relation of certain extraneous, scientific facts to that operation, should be distinguished from the duty to institute a minute investigation into the actual condition of those instrumentalities with a view to ascertaining whether they are efficient or are not efficient. The necessity for some such differentia-

tion, "domestic," the master cannot avail himself of the rule which disables strangers from recovering damages from the owner of such an animal unless he is shown to have had actual knowledge of its evil propensities. That rule is based on the fact that the owner was not instrumental in placing the injured party in danger, and does not apply to a servant, because he is not a mere volunteer. He is required by his master to assume the danger which the existence of vicious and uncured propensities implies, and if the master could, by the exercise of reasonable care, know of the existence of such propensities, his actual ignorance of them is no excuse in law. *George H. Hammond Co. v. Johnson* (1893) 38 Neb. 244, 56 N. W. 967.

⁸An instruction is erroneous which absolves an employer from liability "unless he knew of the defects" which caused the injury. *Bier v. Standard Mfg. Co.* (1889) 130 Pa. 446, 18 Atl. 637; *Houston v. Brush* (1894) 66 Vt. 331, 29 Atl. 380; *Wedgwood v. Chicago & N. W. R. Co.* (1878) 44 Wis. 44; *Chicago & A. R. Co. v. Shannon* (1867) 13 Ill. 33. A requested charge, to the effect that negligence cannot be inferred from the existence of a defect "not brought to the notice" of the defendant, should not be given without informing the jury that this is only true if "notice" is meant to include "constructive" as well as "actual" notice. *Newton v. Vulcan Iron Works* (1901) 199 Pa. 646, 49 Atl. 339. It is not error to refuse an instruction asked by the defendant, that he was entitled to reasonable notice of the existence of the defect complained of, and an opportunity aff-

er such notice to repair the same, inasmuch as such an instruction entirely omits to refer to the liability of the defendant, supposing that the latter might, by the exercise of reasonable care, have known of the defect. *Sargent v. Boston & A. R. Co.* (1892) 156 Mass. 284, 31 N. E. 296. The following instructions have been held correct: That a servant has a right to recover on proof that the injury was occasioned by the use of defective machinery, and that the master was aware of the defect, or that the exercise of reasonable care would have disclosed it. *Elliott v. St. Louis & I. M. R. Co.* (1878) 67 Mo. 272. That, if the jury "believe from the evidence that the defendant knew of such defects, if any existed, and approved by the evidence, and that the existence of such defects constituted negligence on the part of the defendant, and in the exercise of ordinary care and diligence the defendant could have known of and repaired them, then the defendant is liable therefor." *Peoria, D. & E. R. Co. v. Hardwick* (1892) 48 Ill. App. 562. That, if the jury find that the injuries were the result of the defects in question; that the employer knew of such defects, or might have known of them by the use of such care as a person of ordinary prudence would have used under similar circumstances; and that deceased did not know of such defects and could not have known of them by the use of ordinary care and prudence,—the plaintiff is entitled to recover. *Missouri P. R. Co. v. Henry* (1889) 75 Tex. 220, 12 S. W. 828; *Hendler v. Buck's Store & Range Co.* (1896) 136 Mo. 3, 37 S. W. 115.

tion is shown by the fact that the law will sometimes deduce an obligation to make an inspection from the fact that the employer, availing himself of the sources of information to which the former duty requires him to have recourse, has arrived at the knowledge of certain matters which would put a careful man upon further inquiry.⁹ An attempt has accordingly been made in this chapter and the next to distribute the decisions reviewed, with due reference to the distinct obligations just mentioned.

126. Absence of constructive knowledge; liability negatived by.—

The correlative of the proposition stated in the preceding section is that a servant cannot recover for injuries caused by abnormally dangerous conditions, unless he proves that the existence of those conditions was either actually known to the master, or would have been known to him if he had exercised that degree of watchfulness which he was bound, as a prudent man, to exercise under the given circumstances.¹ Manifestly, this is merely one of the forms in which it is

*Take, for example, such statements as the following: "Where it is proved that there was a defect, and that defect was obvious, and on its face showed that it had existed long enough before the injury to have been discovered by the master in the exercise of ordinary diligence, it is at once apparent that, if the master did not know of it, he might have known, and that he failed in his duty to inspect and know." *Ocean S. S. Co. v. Matthews* (1890) 86 Ga. 418, 12 S. E. 632. It is not error to refuse to direct a verdict for a defendant, when the plaintiff has offered evidence to the effect that the timbers of a bridge which gave way were decayed on the surface to such an extent that a reasonably careful inspection ought to have discovered the weakness. *Chicago G. W. R. Co. v. Healy* (1898) 30 C. C. A. 11, 57 U. S. App. 513, 86 Fed. 245. See also, as illustrating this aspect of the subject, *St. Louis, I. M. & S. R. Co. v. Higgins* (1890) 53 Ark. 458, 14 S. W. 653.

¹To support an allegation of negligence on the part of the employer with reference to sustaining strength or construction of some portion of a machine, and its being unskillfully applied to the purpose of sustaining a weight, "it would be necessary, not only to show that this machine had been insufficient, but to show that this deficiency did not arise from any inherent, secret defect,

but that it was known, or might by the exercise of due skill and attention have been known, to the "defender." *Woods v. Mathieson* (1861) 4 Macq. H. L. Cas. 215 (p. 222). If the injury arises from a defect or insufficiency in the machinery or implements furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same, through his own negligence and want of proper care; in other words, it must be shown that he either knew or ought to have known of the defects which caused the injury. *Wright v. New York C. R. Co.* (1862) 25 N. Y. 562. "It is not negligence in the master if the tool or machine breaks, whether from an internal, original fault not apparent when the tool or machine was at first provided, or from an external, apparent one produced by time and use, not brought to the master's knowledge. These are the ordinary risks of the employment which the servant takes upon himself." *Baker v. Allegheny R. Co.* (1880) 95 Pa. 211, 40 Am. Rep. 634. "If the servant claims damages from the master for injuries received on account of defective premises, buildings, machinery, or appliances, he must allege and prove that the unfitness or the defect which caused the injury was known to the master, or was such as, with reasonable diligence and attention to his business, he ought

possible to state the comprehensive principle that the master is not liable if the instrumentality which caused the injury would have been

to have known." *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187. "When there is no notice to the master of defects, and no blame imputable in not discovering them, he is not liable if injury results to his employee therefrom." *St. Louis, I. M. & S. R. Co. v. Harper* (1884) 44 Ark. 524.

It is unnecessary to attempt to make out a complete list of all the cases in which a principle of this elementary character has been recognized. In those cited below, it has been applied in statements relating to dangerous instrumentalities of an inorganic nature. *Honner v. Illinois C. R. Co.* (1854) 15 Ill. 559 (iron bar used to operate turntable broken); *Chicago & A. R. Co. v. Platt* (1878) 89 Ill. 141 (defective ladder on railway car); *Chicago & N. R. Co. v. Scheuring* (1879) 4 Ill. App. 533; *Louisville, E. & St. L. Consol. R. Co. v. Allen* (1893) 47 Ill. App. 465 (defective tool, originally in good condition); *Peoria, D. & E. R. Co. v. Hardwick* (1893) 53 Ill. App. 161 (loose plank in crossing struck footboard of engine); *Myers v. American Steel Barge Co.* (1896) 64 Ill. App. 187; *Chicago & E. R. Co. v. Binkowski* (1897) 72 Ill. App. 22 (defective roadbed); *Pittsburgh, C. & St. L. R. Co. v. Adams* (1885) 105 Ind. 151, 5 N. E. 187 (defective rail); *Kitteringham v. Sioux City & P. R. Co.* (1883) 62 Iowa 255, 17 N. W. 585 (use of a certain oil caused the formation of a substance on the brass work of wheel); *Atchison, T. & S. F. R. Co. v. Wagner* (1885) 33 Kan. 660, 7 Pac. 204 (defective spring in drawbar); *Atchison, T. & S. F. R. Co. v. Swarts* (1897) 58 Kan. 245, 48 Pac. 953; *Cherokee & P. Co. & Min. Co. v. Britton* (1896) 3 Kan. App. 292, 45 Pac. 100 (rock fell from roof of mine tunnel); *Nason v. West* (1886) 78 Mo. 253, 3 Atl. 911 (recently built oven fell in); *Coran v. Unhappig Pulp Co.* (1897) 91 Mo. 26, 39 Atl. 540; *O'Neil v. O'Leary* (1895) 164 Mass. 387, 41 N. E. 6 (master not liable for injuries to an employee from an explosion of a blast which he was justified in believing had been before exploded, because he sent the employee to work about the hole

which was being excavated, and sent another employee, who had supervision of the work, to another place, although the latter was apparently reluctant to leave the hole, the defendant having no reason to suppose that the safety of anyone was dependent on his continuing the work); *Johnson v. Holmes* (1899) 173 Mass. 514, 53 N. E. 1000 (remedy applied to a sailor's frostbite proved ineffective; ship owner not chargeable with knowledge that there was a superior one); *Girard v. Griswold* (1900) 177 Mass. 57, 58 N. E. 179 (water gauge on boiler burst); *Doule v. St. Paul, M. & M. R. Co.* (1889) 42 Minn. 79, 43 N. W. 787 (employee's foot caught by a splinter on the inside of a railroad track or rail); *Murphy v. Great Northern R. Co.* (1897) 68 Minn. 526, 71 N. W. 662 (servant's foot caught by loose block in an angle of the track braces); *Doule v. St. Paul, M. & M. R. Co.* (1889) 42 Minn. 79, 43 N. W. 787 (defective rail); *Memphis & C. R. Co. v. Thomas* (1875) 51 Miss. 637 (defective switch); *Coran v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 635; *Ellis v. St. Louis & I. M. R. Co.* (1878) 67 Mo. 272; *Hollenbeck v. Missouri P. R. Co.* (1897) 141 Mo. 97, 38 S. W. 723, 41 S. W. 887 (small ditch in track, dangerous to couplers); *Kranpe v. St. Louis Brewing Assn.* (1894) 59 Mo. App. 277; *Essex County Electric Co. v. Kelly* (1894) 57 N. J. L. 100, 29 Atl. 427 (electric light pole broken); *Faulkner v. Erie R. Co.* (1867) 49 Barb. 324 (defective bridge); *Hoskins v. Stewart* (1890) 57 Hun. 380, 10 N. Y. Supp. 833 (contractor for the building of a sewer is not liable for the death of a workman, caused by the caving-in of a bank, which resulted from the bursting of one or other of two water pipes running parallel with and within 2 feet of the sewer, filling the trench with water, where the existence of one of such pipes was altogether unknown to the defendant, and he was not aware that the other, although laid by him, was defective, and there was no negligence in the manner of bracing the bank); *Moran v. Racine Wagon Co.* (1893) 74 Hun. 454, 26 N. Y. Supp. 852 (defective elevator); *White v. Edlitz* (1897) 19 App. Div. 256, 46 N. Y. Supp. 184 (ele-

considered by a careful man a proper one to use at the time when the accident happened.² A master, accordingly, is said not to be liable

vator fell, owing to fact that planks were lying across the well); *Riker v. New York, O. & W. R. Co.* (1901) 64 App. Div. 357, 72 N. Y. Supp. 168 (telegraph pole fell); *Schorning v. Knickerbocker Ice Co.* (1891) 38 N. Y. S. R. 27, 13 N. Y. Supp. 434 (slat in wooden ladder gave way); *Stuber v. McEntee* (1892) 47 N. Y. S. R. 294, 19 N. Y. Supp. 900; *Prentice v. Wellsville* (1893) 50 N. Y. S. R. 557, 21 N. Y. Supp. 820 (composition of explosive changed by manufacturer); *Geoghegan v. Atlas S. S. Co.* (1893) 3 Misc. 224, 22 N. Y. Supp. 749 (want of proper appliance to close opening in ship's side); *Maitland v. Cleveland, L. & W. R. Co.* (1896) 3 Ohio Legal News, 289 (injuries caused by poisonous gases); *Waddell v. Simson* (1886) 112 Pa. 567, 4 Atl. 725 (defective construction of gangway in mine); *Clough v. Hoffman* (1890) 132 Pa. 626, 19 Atl. 299 (well-hole left uncovered); *Mister v. Imperial Coal Co.* (1893) 152 Pa. 395, 25 Atl. 587 (defective brake); *Moore v. Pennsylvania R. Co.* (1895) 167 Pa. 495, 31 Atl. 734 (timber of trestle which plaintiff was taking down gave way); *Tooley v. Equitable Gas Co.* (1897) 179 Pa. 437, 36 Atl. 314; *Corcoran v. Wamaker* (1898) 185 Pa. 496, 39 Atl. 1108 (proprietor of a laundry is not liable for the damages accruing to a servant for loss of her sight by poisoning from fumes of acids used in the laundry, where he did not know that the use of the acids would produce such results); *Houston & T. C. R. Co. v. Dunham* (1878) 49 Tex. 181 (defective road-bed); *Pippin v. Sherman, S. & S. R. Co.* (1900; Tex. Civ. App.) 58 S. W. 961 (lever of turntable broke); *Schultz v. Chicago & N. W. R. Co.* (1887) 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321 (railway company not bound to discontinue a certain method of loading a tender, when there is no reason to regard it as unsafe); *Hobbs v. Stauer* (1885) 62 Wis. 108, 22 N. W. 153; *Loonam v. Brockway* (1864) 3 Robt. 74, 28 How. Pr. 472; *Goltz v. Milwaukee, L. S. & W. R. Co.* (1889) 76 Wis. 136, 44 N. W. 752; *Klupp v. United Ice Lines* (1891) 39 N. Y. S. R. 782, 15 Supp. 597; *Myers v. American Steel Barge Co.* (1896) 64 Ill. App. 187; *Bannon v. Sanden* (1896) 68 Ill. App. 164; *Columbus, C. & I. C. R. Co. v. Troesch* (1873) 68 Ill. 545, 18 Am. Rep. 578; *Ohio Valley R. Co. v. McAllely* (1895) 17 Ky. L. Rep. 1028, 33 S. W. 186; *Wells v. Coc* (1886) 9 Colo. 159, 11 Pac. 50; *Doig v. New York, O. & W. R. Co.* (1893) 73 Hun. 27, 26 N. Y. Supp. 405; *Prentiss v. Karp* (1886) 63 Mich. 478, 30 N. W. 109; *Smully v. Glasgow & L. Steam Packet Co.* (1868) 16 Week. Rep. 483; *North Shennandoah Co. v. Fallor* (1873) 4 A. J. Rep. (Victoria) 109; *Dugal v. People's Bank* (1899) 34 N. B. 581.

The cases in which the subject-matter was a servant are collected in chapter XIII., post.

Cases are not wanting in which the principle that fault cannot be imputed to the master unless he had notice of the existence of the conditions from which the servant's injury resulted seems to have been ignored, and liability imposed upon evidence which merely showed that those conditions existed. See, for example, the following: *McCrory v. Galveston, H. & S. A. R. Co.* (1896) 89 Tex. 168, 34 S. W. 95; *Bonner v. Glenn* (1891) 79 Tex. 531, 15 S. W. 572; *Taylor, B. & H. R. Co. v. Taylor* (1890) 79 Tex. 104, 14 S. W. 918; *Texas P. R. Co. v. White* (1891) 82 Tex. 543, 18 S. W. 478; *Texas & P. R. Co. v. Crow* (1893) 3 Tex. Civ. App. 266, 22 S. W. 928; *Engstrom v. Land Iron & S. Co.* (1894) 87 Wis. 166, 58 N. W. 241; *Kennedy v. Lake Superior Terminal & Transfer R. Co.* (1896) 93 Wis. 32, 66 N. W. 1137; *Darling v. New York, P. & B. R. Co.* (1892) 17 R. I. 708, 16 L. R. A. 643, 24 Atl. 162; *Gorham v. Kansas City & S. R. Co.* (1892) 113 Mo. 408, 20 S. W. 1060.

But doubtless the language used in these cases is to be explained by the fact that no question was raised as to the master's possession of the knowledge demanded by the law, and the attention of the court was therefore fixed more particularly upon the material results of his negligence.

²See *McCrory v. Pennsylvania Woolen Co.* (1891) 140 Pa. 1, 21 Atl. 246.

where the defect was "secret,"³ or "latent,"⁴ or "occult,"⁵ or "not apparent,"⁶ or "not visible,"⁷ or "not discoverable on inspection,"⁸ or "not visible on examination."⁹ It has also been laid down that no culpability is predicable, "where the most careful scrutiny would not have disclosed the defect;"¹⁰ or "where the appliance was apparently in sound or good condition;"¹¹ or "where no weakness was apparent to ordinary observation;"¹² or "where there were no indications of danger;"¹³ or where there was nothing to "suggest a suspicion" of unsoundness;¹⁴ or "to lead the master to suppose that there was any abnormal danger."¹⁵ Injuries due to conditions of this character

³ *Weems v. Mathieson* (1861) 4 Macq. H. L. Cas. 215.

⁴ *Prebst v. Delamater* (1885) 100 N. Y. 266, 3 N. E. 181; *McClain v. Henderson* (1898) 187 Pa. 283, 40 Atl. 985; *Kinney v. Corbin* (1890) 132 Pa. 341, 19 Atl. 141; *Sanden v. Bannan* (1899) 85 Ill. App. 17 (concealed knot in timber); *Martin v. Highland Park Mfg. Co.* (1901) 128 N. C. 264, 38 S. E. 876 (sliver of steel flew off a hammer); *Jones v. Chicago, St. P. M. & O. R. Co.* (1900) 80 Minn. 488, 49 L. R. A. 640, 83 N. W. 446. According to one court, "latent defects are such as the master, by the exercise of care, might have discovered, and must not be confounded with hidden defects, which even great care on the part of the master would not disclose to him." *Floren v. Union Bridge Co.* (1890) 42 Mo. App. 531. But this seems to be a wholly unnecessary, and perhaps unwarrantable, refinement.

⁵ *Walden v. Finch* (1872) 70 Pa. 460.

⁶ *Nelson v. Allen Paper Car-Wheel Co.* (1886) 29 Fed. 840.

⁷ *Bradburn v. Kingston Coal Co.* (1893) 157 Pa. 231, 27 Atl. 400 (recovery denied where the breaking of a wire pin caused an engineer to lose control of the throttle of his engine, resulting indirectly in an injury to a miner descending the shaft of a mine; but the wire pin had for seven years continuously and successfully served its use without any change, repair, substitution, or visible defect, and it gave no external indication of defect up to the time of the accident, and no defect therein was visible or known to the engineer, the mine inspector, or the employer. *Quintana v. Consolidated Kansas City Smelting & Ref. Co.* (1896) 14 Tex. Civ. App. 347, 37 S. W. 369 (breaking of the cable was due to a defect

which could not be seen either before or after the cable was placed in the socket).

⁸ *Texas & P. R. Co. v. Patton* (1894) 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. 259 (step of locomotive turned, when fireman was alighting); *Lyons v. Knowles* (1893; Cal.) 32 Pac. 883 (hook broke, owing to crystallization of iron).

⁹ *McAroy v. Pennsylvania Woolen Co.* (1891) 140 Pa. 1, 21 Atl. 246 (defect caused the handle of a fork on which plaintiff was leaning to break). As to the sufficiency of the inspection or examination which will absolve the master, see next chapter.

¹⁰ *Essex County Electric Co. v. Kelly* (1894) 57 N. J. L. 100, 29 Atl. 427 (pole broke).

¹¹ *The Flourgate* (1887) 31 Fed. 762 (eye-bolt countersunk in the deck of a ship gave way owing to a fracture below the surface of the deck); *Kelley v. Forty-Second Street, M. & St. N. Ave. R. Co.* (1890) 58 Hun. 93, 11 N. Y. Supp. 344 (defective force pump).

¹² *Doyle v. White* (1899) 159 N. Y. 548, 54 N. E. 1090. Affirming (1896) 9 App. Div. 521, 41 N. Y. Supp. 628.

¹³ *McIntyre v. Reily* (1859) 22 Sc. Sess. Cas. 2d series, 347 (brick work connected with a boiler fell); *South-west Virginia Improv. Co. v. Andren* (1889) 86 Va. 270, 9 S. E. 1015 (rock in mine fell).

¹⁴ *Erskine v. China Valley Beet-Sugar Co.* (1895) 71 Fed. 270 (rope); *Kelley v. Forty-Second Street, M. & St. N. Ave. R. Co.* (1890) 58 Hun. 93, 11 N. Y. Supp. 344; *Indianapolis, B. & W. R. Co. v. Toy* (1879) 91 Ill. 474, 33 Am. Rep. 57.

¹⁵ *Wright v. I. Top* (1893) 20 Sc. Sess. Cas. 4th series, 363 (scaffold). Simpler phraseology is found in *Regan*

are sometimes described as "unforeseen accidents."¹⁶ As to the conception implied in this and similar epithets, see, further, subdivision C of this chapter.

A similar doctrine is, of course, also available in the master's favor, where the negligence alleged is in regard to the mere use or management of the instrumentalities by any coservant for whose default the master is responsible in the jurisdiction where the cause of action arose.¹⁷

As to the rule that an employer cannot be held liable as for a breach of his duty to instruct unless he knew, actually or constructively, that the servant was unable to comprehend the danger of his work without instruction, see the cases cited in chapter xvi., *post*. The propriety of refusing to predicate a breach of the duty to warn a servant of a danger in a case where no notice of the existence of that danger can be imputed to the master or his representative results from the very nature of this duty.¹⁸

Other decisions illustrating the universality of the doctrine that negligence cannot be charged unless knowledge of the conditions, actual or constructive, is established, will be found in that part of the treatise which relates to the master's statutory duties. See, especially, chapter xxxvii., *post*.

No instruction which takes due account of the doctrine just explained is subject to exception.¹⁹ On the other hand, it is a misdirec-

v. Donoran (1893) 159 Mass. 1, 33 N. E. 702 (movable steps on premises where servant was sent to work were insecurely placed); *Consolidated Street R. Co. v. Maier* (1893) 9 Ohio C. C. 268 (horses became excited; no notice that this was likely to occur); *O'Donnell v. Baum* (1889) 38 Mo. App. 245 (unsuit proper where the defendants, on learning that a machine needed repairing, acted promptly in securing a competent machinist to put it in order, and there was no reason to suppose that he had not done his work effectively).

¹⁶ *Kellen v. Forty-Second Street, M. & St. N. Ave. R. Co.* (1890) 58 Hun. 93, 11 N. Y. Supp. 344; *Kellen v. Cable Co.* (1889) 8 Mont. 440, 20 Pac. 669 (injuries received by a miner through striking his pick against a piece of giant powder in the loose rock thrown down by a blast). A master is not liable for an injury sustained by a servant while oiling a machine which suddenly started owing to the unexplainable and sudden displacement of a bolt,

where reasonable inspection could not have guarded against the accident, since such contingency is one of the risks assumed by a servant in his employment. *Coyle v. A. A. Griffin Iron Co.* (1898) 62 N. J. L. 540, 41 Atl. 680, Affirmed in (1899) 63 N. J. L. 609, 47 L. R. A. 117, 44 Atl. 665, on the ground that the defect was obvious.

¹⁷ *Illinois C. R. Co. v. Stewart* (1901) 23 Ky. L. Rep. 637, 63 S. W. 596 (where the question was whether an engineer saw or ought to have seen that a switchman had fallen from the running board); *Knorr v. Southern R. Co.* (1898) 101 Tenn. 375, 47 S. W. 491 (where it was held that the foreman of a gang of engine wipers was not negligent in ordering to work under an engine before giving the order to move it out of the roundhouse, the consequence being that a wiper was run over).

¹⁸ See *Moulton v. Delaware & H. Canal Co.* (1891) 141 Pa. 632, 21 Atl. 733.

¹⁹ *Hall v. Hall* (1886) 78 Me. 111, 2 Atl. 38. A charge is not erroneous

tion to tell the jury that the master is liable for the injury if it was caused by the abnormally dangerous condition of the instrumentalities in question, unless it is at the same time made perfectly clear to them that the servant cannot recover unless it is a reasonable deduction from the evidence that the master knew, or ought to have known, of those conditions.²⁰ Compare § 25, *ante*.

No complaint which alleges in substance that the servant received an injury owing to the existence of conditions which exposed the servant to extraordinary risks, and that these conditions were known, either actually or constructively, to the master, can be successfully demurred to.²¹ But the authorities are not entirely unanimous as to the question whether a complaint is formally sufficient where it merely alleges an injury resulting from a breach of duty, and does not specifically aver notice on the master's part. See chapter XLV., *post*.

127. Relation of this doctrine to that which declares the master not to be an insurer.—The doctrine that a master cannot be held liable unless it is shown that he had knowledge of the defect which caused the injury is sometimes treated as being deducible from the doctrine (see §§ 24, 25, *ante*) that he does not insure the servant against injury from the perils of the employment.¹ The scope of the latter

which states that, in determining the question whether the master has exercised the care of an ordinarily prudent man under like circumstances, the jury must consider whether there was a defect in the machinery, of which the superintendent had notice, and which caused the injury (*Wiedeman v. Everett*) [1900] 56 App. Div. 358, 67 N. Y. Supp. 738; or that a master is not liable for injuries to a servant, resulting from a latent defect in an appliance (*Throckmorton v. Missouri, K. & T. R. Co.* [1896] 14 Tex. Civ. App. 222, 39 S. W. 174). In *Durgin v. Munson* (1864) 9 Allen, 396, 85 Am. Dec. 770, the following charge was objected to: "But beyond this the plaintiff must prove that it was gross negligence in the defendant to employ such an engine. If not, no action lies. If the employer is careful and does his duty, if he employs skilful men to buy and run his machinery, if he is not negligent in learning whether that machinery is safe or not, if in all things he does his duty, then he is not liable for the consequences if unsafe machinery is employed without his fault." The court, however, said: "We do not think that there was any such error or insufficiency in the charge of the judge as would give a reason for

setting aside the verdict; although the important considerations that, to entitle the plaintiff to recover, he was bound to show that the engine was defective, and that the defendant knew, or in the exercise of ordinary care would have known, that it was defective, might, perhaps, have been more distinctly presented to the jury."

¹ *National Enameling & Stamping Co. v. Brady* (1901) 93 Md. 646, 49 Atl. 845; *Chicago & A. R. Co. v. Merriam* (1899) 86 Ill. App. 454; *Hester v. Jacob Dold Packing Co.* (1900) 84 Mo. App. 451.

²⁰ *Indiana Stone Co. v. Stewart* (1893) 7 Ind. App. 563, 34 N. E. 1019; *Miller v. Husca Cotton Seed Oil Co.* (1897) Tex. Civ. App.) 41 S. W. 366.

²¹ *Gutridge v. Missouri P. R. Co.* (1887) 94 Mo. 468, 7 S. W. 476; *Nelson v. Allen Paper Car-Wheel Co.* (1886) 29 Fed. 840; *Flinn v. Union Bridge Co.* (1890) 42 Mo. App. 531; *O'Donnell v. Baum* (1889) 38 Mo. App. 245; *Couch v. Steel* (1854) 3 El. & Bl. 402. "The rule is settled that, while a railway is bound to use the degree of diligence just stated (*i. e.*, ordinary) in furnishing to the public a safe roadbed yet it is not an absolute insurer, and cannot be held liable for defects of

doctrine, however, is obviously much wider than that of the former, and it seems preferable, in a logical point of view, to regard the necessity of proving the existence of actual or constructive knowledge on the master's part as being an evidential requirement which is the consequence of the fact that, as explained in the earlier sections of the chapter, such knowledge is one of the essential elements in the conception of negligence, irrespective of the relations of the parties by whom and to whom it is charged.

128. Doctrine considered with reference to the burden of proof.—The doctrine that knowledge, actual or constructive, must be brought home to the master is also treated in some cases as an offshoot or corollary of a doctrine which will be referred to in a later chapter (XLIII., *post*), *viz.*, that negligence cannot be inferred from the mere fact that the servant was injured.¹ The connection thus traced is less open to ex-

which such diligence would not inform it. Actual knowledge of the defect is not necessary. It is sufficient if the company might have been informed by the use of such diligence as the law imposes upon it; but where it did not know and could not have informed itself of the defect, we do not see how it can be held responsible." *Toledo, P. & W. R. Co. v. Conroy* (1871) 61 Ill. 162. "An employer does not undertake absolutely with his employees for the sufficiency or safety of the implements and facilities furnished for their work, but only for the exercise of reasonable care in that respect; and where injury to an employee results from a defect in the implements furnished, knowledge of the defect must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it." *Berlin v. Smith* (1882) 89 N. Y. 470, 42 Am. Rep. 11. "The imperfect connection of the track might have existed in consequence of internal and invisible defects in the materials employed, which had escaped the closest scrutiny, and set at naught the exercise of the utmost care and diligence of the company." *Indianapolis & C. R. Co. v. Lore* (1858) 10 Ind. 554. "When there is no actual notice of defects in an engine of that character, and no personal blame exists on the part of the master, there is no implied obligation or contract on his part that the engine is free from defects, or that it can safely be used by the servant." *Noyes v. Smith* (1856) 28 Vt. 59, 65 Am. Dec. 222.

¹ *Reilly v. Campbell* (1894) 8 C. C.

A. 438, 20 U. S. App. 334, 59 Fed. 920; *Ocean S. S. Co. v. Matthews* (1890) 86 Ga. 418, 12 S. E. 632; *Sack v. Deles* (1890) 35 Ill. App. 636; *De Gray v. New York C. & H. R. R. Co.* (1879) 70 N. Y. 125; *Hooper v. Soud Iron Works* (1890) 12 Ky. L. Rep. 483, 14 S. W. 542; *Chicago Edison Co. v. Warr* (1899) 86 Ill. App. 152. Admitted (1900) 185 Ill. 571, 57 N. E. 773, but this point was not referred to; *Klapp v. United Ice Lines* (1891) 39 N. Y. S. R. 782, 15 N. Y. Supp. 597 (wooden tower fell, owing to rotten condition of sill); *Dillon v. Sixth Ave. R. Co.* (1882) 16 Jones & S. 283. In *The France* (1894) 8 C. C. A. 185, 20 U. S. App. 212, 59 Fed. 479, reversing 1893, 53 Fed. 843, a steamship was held not liable for injuries to a fireman engaged in filling and hooking bags of ashes to a chain for removal from the stoked by from the giving way of the handle of an ash bag, where the bag was new, apparently sufficiently strong, and no defects had been observed in it by anyone, but which was fastened to the chain by passing one of its two handles through the other and hooking that handle to the chain, without any reason why the hook should not be passed through both; and the chain slipped off the drum of the winch, jerking the bag violently so that the handle gave way. The court based its decision on (1) the general principle that the existence of a defect is not necessarily inferable from the failure of the appliance; (2) the failure of the plaintiff to prove that the defendant knew that there was any danger; and (3) that the cause of the

ception than that noticed in the last section, as the doctrine which is thus taken as the starting point is merely one of the forms in which it is possible to state the principle that the servant has the burden of establishing the requisite knowledge, for the reason that it is one of the essential elements of negligence.²

129. Abnormal conditions originally created by causes for which the master is not responsible; application of foregoing principles to.— Where the abnormal conditions which caused the injury are shown to have been originally produced by a cause for which the master was not responsible, the action is or is not maintainable, according as it may appear that he was or was not guilty of a subsequent and distinct breach of duty in having failed to ascertain the existence of those conditions, or in having omitted after discovering them, to take such steps as might be appropriate for the protection of his servants. This principle is applicable where the abnormal conditions resulted from the act of a stranger;¹ or of a fellow servant who is not a vice prin-

accident was apparently the unnecessary strain upon the appliance by the plaintiff servants.

²The rule that the servant's action cannot be maintained unless he produces evidence which goes to show that the failure to discover the defect was due to the master's want of proper care is recognized in *Garin v. Rogers* (1889) 17 So. Sess. Cas. 4th series, 206; *Jones v. Chicago, St. P. M. & O. R. Co.* (1900) 80 Minn. 488, 49 L. R. A. 640, 83 N. W. 146; *Ohio & M. R. Co. v. Dunn* (1893) 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; *Heed v. Argonaut Cotton Mill Co.* (1901) 23 Ky. L. Rep. 460, 62 S. W. 1043; *Columbus & V. R. Co. v. Webb* (1861) 12 Ohio St. 475; *Purdy v. Westinghouse Electric & Mfg. Co.* (1900) 197 Pa. 257, 51 L. R. A. 881, 47 Atl. 237; *Atchison, T. & S. F. R. Co. v. Taylor* (1899) 60 Kan. 758, 57 So. 973; *Atchison, T. & S. F. R. Co. v. Lebetter* (1885) 34 Kan. 326, 8 Pac. 411; *O'Donnell v. Baum* (1889) 38 Mo. App. 245; *McClain v. Henderson* (1898) 187 Pa. 283, 40 Atl. 985 (so far as evidence went, chain which broke might have given way owing to latent defects); *Artis v. Buffalo, R. & P. R. Co.* (1896) 3 App. Div. 1, 37 N. Y. Supp. 977, 28 N. Y. Supp. 42; *Jarris v. May* (1876) 26 U. C. C. P. 523. In one case it was held that, where plaintiff was injured while he and three other employees of the defendant railway company were attempting to load a heavy timber under the directions of a boss, and there was

no evidence that the defendant knew, or ought to have known, that the timber was too heavy to be loaded by them, or that they would attempt to load it, the defendant cannot be considered negligent. *Bryan v. Southern R. Co.* (1901) 128 N. C. 387, 38 S. E. 914. But the inability to maintain the action under such circumstances seems to be preferably based upon the consideration, adverted to in the opinion, that the servant understood the conditions.

¹The servant was allowed to recover in the following cases: *Chicago & I. R. Co. v. Russell* (1878) 91 Ill. 298, 33 Am. Rep. 54 (dangerous structure left close to track); *Ersler v. New Orleans & N. E. R. Co.* (1896) 49 La. Ann. 86, 21 So. 153 (railway company held negligent in permitting an electric street car company to construct and maintain over its tracks a guy wire in such a position that it endangered the lives of the former's servants and employees); *Burnes v. Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 41, 31 S. W. 347 (obstruction in walk, placed there by independent contractor); *Kirk v. Scully* (1898) 79 Ill. App. 67 (defective floor). In *Chicago, B. & Q. R. Co. v. Acery* (1880) 8 Ill. App. 133, the court, waiving the question of a railroad company's liability "for the negligent acts of another company in the occupancy or use of its road, or of its liability for the negligence of appellee's fellow servants, it seems plain to us that, no matter whose duty it was to keep the car in

repair or to prevent its coming into appellant's yard in a damaged and dangerous condition, if these duties were neglected, and the car permitted to come into appellant's yard for so many consecutive days that appellant, in the exercise of a high degree of care, might have known of its damaged and dangerous condition in time to avoid any injury therefrom, then appellant would be liable to its employees for any damage occasioned thereby without any fault of their own."

In the following cases the action failed: *Atchison, T. & S. F. R. Co. v. Slattery* (1896) 57 Kan. 499, 46 Pac. 941 (railroad company is not liable for the unlawful acts of third parties in placing obstructions upon its track without its knowledge or consent, unless its negligence has in some way induced the placing of obstructions on the track); *Richmond v. New York C. & H. R. R. Co.* (1896) 8 App. Div. 382, 40 N. Y. Supp. 812 (railroad company not subject to an action by a brakeman injured by coming in contact with a sagging wire maintained by a third person over its tracks, where it has not consented to nor taken any part in the stringing of the wire across its property, and there is no evidence sufficient to charge it with notice that the wire had been insecurely strung in the first instance, or that it was in such a position at the time of the accident as to be dangerous to travelers); *Mercom v. Raleigh & A. Air Line R. Co.* (1900) 126 N. C. 200, 35 S. E. 423 (defect in track caused by malicious act of trespasser); *Connors v. Elmira, C. & N. R. Co.* (1895) 92 Hun. 339, 36 N. Y. Supp. 926 (wagon left by shipper close to railway track); *Martin v. Louisville & V. R. Co.* (1894) 95 Ky. 612, 26 S. W. 801 (cars left by engineer of another company on a siding close to main track); *Houston & T. C. R. Co. v. Gaither* (1897; Tex. Civ. App.) 43 S. W. 266 (charge properly refused which simply told the jury that the defendant was not liable if the misplacement of a switch was due to the act of a stranger); *Gulf, C. & S. F. R. Co. v. Wittig* (1896; Tex. Civ. App.) 35 S. W. 857 (signal flag removed). A railroad company is not liable for injury to an employee, due to the faulty construction of a cattle pen built by a third person owning land adjoining the right of way, in consequence of which cattle escaped upon the track and caused the wrecking of a train, although such pen projected a little upon its right of way by

the mistake of the person building it, and without his knowledge or that of the company. *Newson v. Kimball* (1897) 23 C. C. A. 669, 35 L. R. A. 135, 42 U. S. App. 282, 78 Fed. 94, rejecting the contention that it was the duty of the railroad company to provide and maintain a safe roadway, and a safe place to work in, as well as safe instruments to work with, and that, by permitting the use of a defective pen, and by hauling cattle thereto, and allowing them to be unloaded therein, the company failed in its duty to its employee. A railway company is not liable for personal injuries which a man employed to assist in laying a railway track received, in consequence of an attack upon the servants of such company, made by the employees of a hostile company in an attempt to prevent it from laying its tracks, where the employing company did not know, or have reason to believe, that any such attack was contemplated. *Kelly v. Shelby R. Co.* (1893) 15 Ky. L. Rep. 311, 22 S. W. 445. A railroad company is not negligent in leaving an ordinary push car a safe distance from the track, and blocking it there in the ordinary method to prevent its moving towards the track, although some boys not connected with the company afterwards attempted to put it on the track, and left it so close to the track that an employee riding on a switch engine was injured by a collision therewith. A push car is not an object specially attractive to children, in such a sense that the company is bound to take precautions against their meddling with it. *Atchison, T. & S. F. R. Co. v. Slattery* (1896) 57 Kan. 499, 46 Pac. 941.

Where a servant is suing for injuries received through the collapse of a staging, the supports of which have been weakened by a collision with a wagon driven by a person for whose acts the employer is not responsible, it is error to give an instruction authorizing the jury to find for the plaintiff if they believe the staging to have been improperly constructed, and that such improper construction contributed in any degree to his injuries. Such an instruction ignores the principle that the employer is not liable for the consequences resulting from the acts of third persons in breaking down the platform, unless these consequences naturally follow from the manner in which the platform was constructed, and ought to have been foreseen in the light of attending cir-

principal (see chapters XXVIII. to XXXII., *post*);² or to the operation of extraordinary physical force;³ or to some circumstance which is left wholly unexplained by the evidence.⁴

B. CIRCUMSTANCES BEARING UPON THE QUESTION WHETHER NOTICE OF THE CONDITIONS SHOULD BE IMPUTED TO A MASTER.

129a. Character of danger as being a normal incident of the business.—It is well settled that an employer is presumed to be familiar

with the circumstances, *Sellock v. Langdon* (1889) 35 Hun. 19, 8 N. Y. Supp. 573.

Loranger v. Lake Shore & M. S. R. Co. (1895) 104 Mich. 80, 62 N. W. 137; *Baldwin v. St. Louis, K. & N. R. Co.* (1885) 68 Iowa, 37, 25 N. W. 918; *Crocker v. Marston* (1891) 126 N. Y. 568, 27 N. E. 952; *Crowell v. Thomas* (1897) 18 App. Div. 520, 46 N. Y. Supp. 137; *Page v. Naughton* (1901) 63 App. Div. 77, 71 N. Y. Supp. 503; *Cooper v. Hamilton Mfg. Co.* (1867) 14 Allen, 193; *Robinson v. Houston & T. C. R. Co.* (1877) 46 Tex. 540; *Texas & P. R. Co. v. Hahn* (1892) 1 Tex. Civ. App. 26, 21 S. W. 912; *Mansfield Coal & Coke Co. v. McEnery* (1879) 91 Pa. 185, 36 Am. Rep. 662; *Rice & B. Manufacturing Co. v. Paulsen* (1893) 51 Ill. App. 123; *Romona Golithic Stone Co. v. Phillips* (1894) 11 Ind. App. 118, 39 N. E. 96; *Hood v. Argonaut Cotton Mill Co.* (1901) 23 Ky. L. Rep. 460, 62 S. W. 1043; *Kelly v. Davidson* (1900) 31 Ont. Rep. 521; *North v. Fallover* (1880) 4 A. J. Rep. (Victoria) 109. A corporation is liable for personal injuries sustained by an employee by the fall of a shed in which he was at work, because of the weight of debris and snow which its agents, with knowledge, allowed to remain upon the roof, although such debris was originally placed there by its servants. The master is not relieved in such a case by the fact that the shed was well built, or that he exercised no supervision over its construction, and employed good materials and skilled workmen in erecting it. *Johnson v. First Nat. Bank* (1891) 79 Wis. 114, 48 N. W. 712. A jury may properly find that a railway company is bound to supervise the work of its servants in repairing tracks so as to see that a pile of sleepers 3 or 4 feet wide is not left within 18 inches of the rails in the freight yard of an important station. *Babcock v. Old Colony R. Co.* (1890) 150 Mass. 467, 23 N. E. 323.

The manner in which iron castings are loaded on a truck being presumably a condition for which the servants themselves are responsible, a servant injured by their falling off cannot recover in the absence of proof, not only that they were in a dangerous position, but that the defendant knew it, or that they had remained so long in this position that he ought to have known of it. *Reed v. Boston & A. R. Co.* (1895) 161 Mass. 129, 41 N. E. 64.

A railroad company is not relieved from liability for personal injuries to an employee, occasioned by the defective condition of a bridge, by the fact that such condition was caused by an unusual flood, which could not have been ordinarily and reasonably anticipated, when it has had time, in the exercise of reasonable care and diligence, to discover the injury to the bridge and to prevent the accident. *Knabttla v. Oregon Short Line & U. N. R. Co.* (1891) 21 Or. 136, 27 Pac. 91.

Murphy v. Great Northern R. Co. (1897) 68 Minn. 526, 71 N. W. 662 (loose block between rails caught servant's foot); *Elgin, J. & E. R. Co. v. Maloney* (1894) 59 Ill. App. 114 (absence of signal light held not to import culpability, where a proper light had been placed in position, and had unexpectedly and without fault been extinguished when it was apparently in good order). A street railway company owes no duty to the driver of a car to keep a man constantly watching a switch leading towards the stable, but only while the switches are in use to take the cars out of and into the stable. *Donnelly v. New York & H. R. Co.* (1896) 3 App. Div. 408, 38 N. Y. Supp. 709 (the plaintiff had been thrown off by the sudden turning of the car, and there was no evidence to show how the switch became open, or that the track and car were not in good order).

with the dangers, latent as well as patent, ordinarily accompanying the business in which he is engaged.¹ Such knowledge is imputed to him on the ground that a person who combines with the ordinary measure of intelligence which the law assumes every responsible citizen to possess the special requirements of persons engaged in the given occupation cannot, supposing him to have made a reasonably careful use of his faculties, fail to understand the extent and nature of the peril normally incident to that occupation. This doctrine requires him to take notice of the normal characteristic properties of the material substances which he uses, and the physical and mechanical laws which operate upon them. See § 110, *post*.

130. Notoriety of defect.— The principle that evidence of the notoriety of the fact that an instrumentality was unfit for the use of a servant is admissible against the master presents itself in the case under two aspects. One of these exhibits the master in the position of a person who still retains as a part of his plant some appliance which has been abandoned by all or nearly all the other employers in the same line of business. The obligations deducible from this sort of notoriety are virtually identical with those which are referable to the conception that a master may be found guilty of negligence if he does not conform to general usage. See § 52, *ante*. Another sort of notoriety is that which is predicated from the common knowledge of the servants themselves who have to handle the instrumentality, the question that it is an improper one for the purposes for which it is furnished.¹ The admissibility of such evidence, it should be observed, is limited to the function of establishing notice on the employer's part. It is not competent to prove the ultimate fact that the instrumentality was actually an unsuitable one.²

Most of the cases which illustrate both the general principle and its limitation, as above stated, relate to the master's duty in regard to

¹ *Wagner v. H. W. Jayne Chemical Co.* (1892) 147 Pa. 475, 23 Atl. 772; *Smith v. Peninsular Car Works* (1886) 60 Mich. 501, 27 N. W. 662; *Consolidated Coal Co. v. Haenni* (1893) 146 Ill. 614, 35 N. E. 162 (rule applied where the work to be done was the raising of a large smokestack). The master must keep pace with scientific development and knowledge as it affects his business, and must keep himself informed of latent danger, even though it be scientific information, if it be readily attainable. *Husell v. Sulist* (1899) 78 Mo. App. 39.

² *Toledo, W. & W. R. Co. v. Fidler* (1874) 71 Ill. 294 (radical defects in construction of coupling); *Chesapeake & A. R. Co. v. Shannon* (1867) 43 Md. 338, 339 (reputation of a certain locomotive among employees for unsafety competent as evidence to charge master mechanic with notice of its condition). *Louisville & N. R. Co. v. Holt* (1889) 87 Ala. 708, 4 L. R. A. 710, 6 So. 277 (whether a certain low bridge over a railway track had ever been the means of killing a train had cannot be proved by general notoriety).

employment of servants, and will be collected in the chapter on that subject (XIII. *post*).

131. Obvious nature of defect.—The courts have frequently had occasion to recognize the principle that a master is chargeable with notice of defects which may be described as "obvious," or by some equivalent term which embodies the conception that they ought to have been observed by anyone making even a casual examination of the defective instrumentality.¹ The standard applied in cases where the evidence shows that he ought, at some time prior to the accident, to have subjected the instrumentality to one of those formal periodical inspections which, as will presently be shown, the law requires him to make, is, of course, much higher. See next chapter.

132. Length of time during which defect has existed.—In considering whether the dangerous condition of an instrumentality should have been discovered, the length of time during which that condition had existed is obviously a material question, and is constantly adverted to in cases of the type under review, as a fact tending to show that the master's ignorance was excusable or culpable. His liability, in this point of view, frequently, but not invariably, resolves itself into the determination of the question whether he had inspected the instru-

¹ *Stille v. St. Louis & R. F. R. Co.* (1895) 127 Mo. 336, 30 S. W. 125 (defective handhold on a railway car); *Holton v. Fitchburg R. Co.* (1880) 129 Mass. 268, 37 Am. Rep. 343 (overhang on bank of earth fell; danger might have been readily seen by anyone who had "casually examined" the place of work on the day before the accident); *Ellidge v. National City & O. R. Co.* (1893) 100 Cal. 282, 291, 34 Pac. 720 (crack in bank which was being excavated; danger, upon any proper examination, was "conspicuous"); *Crawell v. Thomas* (1897) 18 App. Div. 520, 43 N. Y. Supp. 137 (superintendent negligent in failing to observe that a plug had been inserted in a pipe from which steam escaped from a barrel, where such plug is in plain view); *Wedgwood v. Chicago & N. W. R. Co.* (1878) 44 Wis. 44 (bolt in brake beam projecting to an unnecessary extent); *King v. Allen & H. R. Co.* (1882) 11 Biss. 362, 14 Fed. 277 (deadwood worn so short as to be dangerous); *The Para* (1893) 26 Fed. 241 (vessel held liable to an employee of a stevedore for injuries caused by the giving way of a shackle holding a block used in unloading the vessel, because of its unsafe condition

from a previous excessive strain, where its unsafe character was evident). In *Eiskine v. China Valley Beet Sugar Co.* (1895) 71 Fed. 270, the court used some language which would, if taken literally, justify the inference that it supposed that the converse of the principle stated in the text also held good, for it denied the right of the plaintiff to recover, on the ground that the defect in the appliance (a rope) was not "open to visual observation." Such a doctrine can scarcely be reconciled with the rule which imposes on the master the duty of active inspection. But presumably the decision was rendered upon the theory that this duty had actually been discharged a reasonable time before the rope gave way. In *Kearney Electric Co. v. Laughlin* (1895) 45 Neb. 391, 63 N. W. 941, it is said that it cannot be asserted that the master is liable on the ground that the danger was obvious, where the evidence on behalf of a defendant company is to the effect, not only that the support made in a tunnel which collapsed was not obviously defective or imperfect, but that, in the opinion of the superintendent, it was amply sufficient, and that it was skilfully and mechanically constructed.

mentality which caused the injury as frequently as a prudent person would have done. The section (156), which deals with that question should, therefore, be read in connection with the present one.

The positive branch of the rule, which expresses the significance of the fact that the abnormal conditions had existed previously to the accident, may be stated as follows: Where the instrumentality which caused the injury was in an unsafe condition so long before the accident happened that the master would have discovered such unsafety if he had been in the exercise of reasonable care, he stands, as regards liability, in the same predicament as if he had actually known of the defects.¹ The servant's right to recover is, therefore, a question for the jury to decide wherever the evidence fairly tends to show that the machinery which caused the injury was defective, and that the defect had existed so long that the employer should have known of it.² For the purposes of this rule it is manifestly immaterial by whose negligence the defective condition was originally produced.³

Viewed as embodying a principle which is exculpatory in its operation, the rule is sometimes stated in the form that the master is not liable for an injury caused by defects, unless he had actual knowledge of such defects, or they had existed for such a length of time that knowledge might be inferred.⁴ This way of stating the situation, however, is not strictly accurate, inasmuch as the existence of the de-

¹*Ocean S. S. Co. v. Matthews* (1890) 86 Ga. 418, 12 S. E. 632; *Lake Erie & W. R. Co. v. McHenry* (1894) 10 Ind. App. 525, 37 N. E. 186; *Rice v. King* (1887) 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101; *Pittsburgh, C. & St. L. R. Co. v. Adams* (1885) 105 Ind. 151, 5 N. E. 187; *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149; *Burns v. Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 41, 31 S. W. 347; *Clough v. Hoffman* (1890) 132 Pa. 626, 19 Atl. 299; *Ashman v. Flint & P. M. R. Co.* (1892) 90 Mich. 567, 51 N. W. 645; *McDonald v. Chicago, St. P. W. & O. R. Co.* (1889) 41 Minn. 439, 43 N. W. 380; *Monmouth Min. & Mfg. Co. v. Erling* (1894) 148 Ill. 521, 36 N. E. 117, Affirming (1892) 45 Ill. App. 411; *Murphy v. Great Northern R. Co.* (1887) 68 Minn. 526, 71 N. W. 662; *O'Melia v. Kansas City, St. J. & C. B. R. Co.* (1893) 115 Mo. 205, 21 S. W. 503. Evidence of defective condition of car prior to date of an accident alleged to have been due to such defect is admissible for the purpose of showing knowledge of the condition of the car by the company operating it. *Denver Tramway Co. v. Crumbaugh* (1897) 23 Colo. 363, 48 Pac. 503.

²*Radmann v. Chicago, M. & St. P. R. Co.* (1890) 78 Wis. 22, 47 N. W. 97; *Oberfelder v. Doran* (1889) 26 Neb. 118, 41 N. W. 1094. In *Paine v. St. Bern R. Co.* (1895) 91 Wis. 340, 64 N. W. 1005, the case was held to be one for the jury, the evidence being that the blocking of a frog had become defective by wear, the reasonable inference being that the defect had existed for some time. In *Wabash & W. R. Co. v. Morgan* (1892) 132 Ind. 430, 31 N. E. 601, an instruction to the jury as to notice on the part of the defendant, that they might find such notice to be proved if it might be rightfully and reasonably inferred from the evidence given in the case, although there might be no direct testimony as to such notice, was held proper where there was an averment in the complaint that the defendant had long known of the defect. See also cases cited in notes 6 to 11, *infra*.

³*Chicago, B. & Q. R. Co. v. Aaron* (1880) 8 Ill. App. 133. See also cases cited in § 129, *ante*.

⁴*Atchison, T. & S. F. R. Co. v. Swarts*

fect for a certain period is obviously not the only circumstance from which constructive notice may be inferred. In any categorical enunciation of the rule, this alternative possibility should not be ignored.⁵ How long a defect must have existed before a master can be charged with a knowledge of it is primarily a question of fact for the jury, to be determined with reference to the character of the instrumentality, the difficulty of discovering the conditions constituting the defect, and the master's opportunities for observation, due account being taken of the nature and extent of the obligations which the law imposes on him with respect to regular periodical inspections in the case of the particular instrumentality. See next chapter.⁶ In some cases, where the period which elapsed between the accident and the earliest moment when the instrumentality was proved to have been in an unsafe condition was quite brief, the courts have deemed themselves warranted in saying, as matter of law, that notice could not be imputed to the master.⁷ The essence of such rulings is that the master cannot be ex-

(1897) 58 Kan. 235, 48 Pac. 953; *Loranger v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 80, 62 N. W. 137; *Red v. Boston & A. R. Co.* (1895) 164 Mass. 129, 41 N. E. 64; *Cough v. Hoffman* (1890) 132 Pa. 626, 19 Atl. 299; *Baldwin v. St. Louis, K. & N. R. Co.* (1885) 68 Iowa, 37, 25 N. W. 918; *Carruthers v. Chicago R. I. & P. R. Co.* (1895) 55 Kan. 600, 40 Pac. 915; *Haskins v. New York C. & H. R. R. Co.* (1894) 79 Hun. 159, 29 N. Y. Supp. 274. In *Chicago, B. & Q. R. Co. v. Terry* (1884) 109 Ill. 314, 322, a requested instruction that a railroad company is not responsible for injuries to its employees, caused by the ordinary wear and tear of cars, until it has been notified of the defects caused thereby, or has had time and opportunity to learn thereof and to have the same repaired, was modified by adding "or such defects shall have existed for such a length of time as to give the proper authorities opportunity to learn of such defects in the due discharge of their duties." It was said this merely enlarged on the effect of the time of the continuance of the defect, in implying notice, and expressed the idea in the instruction as drawn, in a more wordy form.

See *Union P. R. Co. v. James* (1895) 163 U. S. 485, 41 L. ed. 236, 16 Sup. Ct. Rep. 1109; *McCauley v. Southern R. Co.* (1897) 10 App. D. C. 500.

⁵ "There is no arbitrary rule of law that charges the master with construct-

ive notice of the negligent omissions of duty on the part of a coservant, after the lapse of a certain time, under all circumstances. The doctrine of constructive notice is founded upon reasonable and just considerations, and the mere lapse of time is not always the test of negligence on the part of the master." *Cameron v. New York C. & H. R. R. Co.* (1895) 145 N. Y. 400, 40 N. E. 1.

⁷ *Martin v. Louisville & N. R. Co.* (1894) 95 Ky. 612, 26 S. W. 801 (railway company not liable for injuries caused by cars left by another company too close to its track, where the accident occurred a few minutes after they came to a stand-still); *Schaub v. Hannibal & St. J. R. Co.* (1891) 106 Mo. 74, 16 S. W. 924 (railway company not presumed to know of position of cars dangerously near another track, where they could not have been in that position until a late hour in the evening of one day, and the accident occurred at daylight the next morning. *Chicago & A. R. Co. v. Stites* (1886) 20 Ill. App. 648 (knowledge of the defective condition of a switch not imputed to a railway company, when it was, to all appearance, safe for the passage of trains about one hour before it caused the derailment of a train; *Gulf, C. & S. F. R. Co. v. Pettis* (1888) 69 Tex. 689, 7 S. W. 93 (railway company held not liable for injuries caused to a servant on one train by the spreading of the track, which resulted from the passage

pected, as a reasonably careful man, to supervise his business so closely or make such frequent inspections that he ought to discover the dangerous conditions within the given period. Proof that the appliance which caused the injury had been properly examined a short time before the accident and found secure is regarded as being conclusive in his favor unless the servant can show that something had occurred since the inspection to put him on inquiry.⁸ But the limits of the power of a court to interfere with the finding of a jury are extremely ill-defined, and a verdict in favor of the servant has been sustained in at least one instance where the period available for acquiring knowledge of the conditions was shorter than in some of the cases just cited.⁹ All that can, with safety, be affirmed in this connection is that the longer the period, the more conclusive will the

of the next preceding train); *Central R. & Bkg. Co. v. Kent* (1889) 84 Ga. 351, 355, 10 S. E. 965 (knowledge of a washout, due to a sudden and unprecedented rainfall, not necessarily imputed to railway company within two hours after the storm); *Goodrich v. Kansas City, C. & S. R. Co.* (1899) 152 Mo. 222, 53 S. W. 917 (railway company held not liable for the derailment of a train, caused by its collision with a horse which had strayed on the track through a gap in the fence at a place about 1 mile from the nearest station, the evidence being that one of the planks had been gone about fifteen hours before the accident); *Welch v. New York C. & H. R. R. Co.* (1892) 43 N. Y. S. R. 958, 17 N. Y. Supp. 342 (railroad company not liable to an employee for injuries received in attempting to make a coupling, by stumbling over a pile of cinders on its track, or from a defective drawhead, where both the cinders and the defect are of recent existence); *Murphy v. Great Northern R. Co.* (1897) 68 Minn. 526, 71 N. W. 662 (constructive notice of the presence of a block of wood on a rail upon which a transfer table travels cannot be inferred from evidence which tends to show that it had been placed there by some unknown person a few hours before it caused an injury); *Mickey v. Walter A. Wood Mowing & Reaping Mach. Co.* (1894) 77 Hun. 559, 28 N. Y. Supp. 918 (employer not liable for an injury to a servant caused by the falling of a post, where the post had been put in place only two days before, and was well stayed and secured in its position. On the former appeal

([1893] 70 Hun. 456, 24 N. Y. Supp. 501) it had been held that, as there was no evidence to show that the post had been guyed or secured in any way, it was error to nonsuit the plaintiff); *Hansen v. Schneider* (1890) 58 Hun. 60, 11 N. Y. Supp. 347 (absence of safety clutch on elevator not one of those obvious defects of which a tenant who has recently moved into a building will be held to be aware from the examination usually made by a tenant about to move into a building); *United Coal Co. v. Scheller* (1891) 42 Ill. App. 619 (that a mining company must have known that the roof of one of its tunnels was in a dangerous condition, held not to be a necessary inference from the fact of its having been in that condition for two weeks before the accident). It is not error to permit defendant's foreman to testify as to what he knew of the condition of a scaffold three hours before it gave way, for, in the absence of evidence to the contrary, the presumption must be indulged that it remained in the same condition up to the time of the accident. *Doyle v. Missouri, K. & T. Trust Co.* (1897) 140 Mo. 1, 41 S. W. 255.

⁸ *McCauley v. Southern R. Co.* (1897) 10 App. D. C. 560.

⁹ *Chicago & N. W. R. Co. v. Delaney* (1897) 169 Ill. 581, 48 N. E. 476. Affirming (1896) 68 Ill. App. 307 (railway company not, as matter of law, free from negligence towards an employee riding on the pilot of an engine, in failing to discover that a drawbar has been broken and is lying on the track, until six and a half hours after the break occurs).

finding a jury be deemed.¹⁰ The right of the jury to infer negligence from the length of the period during which the defect has existed is, of course, conditional upon the defect in question being one which a proper inspection would have disclosed.¹¹

133. Repairs and alterations; inference from.— The fact that all the appliances of a pattern similar to that which caused the injury were being altered at the time of the accident tends to show that the master was aware of the fact that they were dangerous to servants.¹ But evidence that repairs or alterations were made after the accident, al-

¹⁰ In the cases cited below, the action was held to be maintainable on the ground that the defendant had constructive notice of the conditions; *Richmond & D. R. Co. v. Moore* (1883) 78 Va. 93 (ladder handle on railway car had been broken so long that the break was weather-beaten); *St. Louis, I. M. & S. R. Co. v. Higgins* (1890) 53 Ark. 458, 14 S. W. 653 (car repeatedly condemned and marked "out of repair"); *Bridges v. St. Louis, I. M. & S. R. Co.* (1879) 6 Mo. App. 389 (period described here as "considerable"); *Consolidated Coal Co. v. Muhl* (1888) 31 Ill. App. 252 (attention of the corporate officers had been called to the defect "some time previous" to the accident); *Scuse v. Northern P. R. Co.* (1889) 39 Fed. 48 (defect in drawhead was "old"); *Bradshaw v. Chicago, R. I. & P. R. Co.* (1897) 58 Kan. 618, 50 Pac. 876 (coupler had been broken for a month or more, in such a manner as to allow it to push past the projections of the castings on the tender to which the car was coupled); *Chicago, B. & Q. R. Co. v. Avery* (1880) 8 Ill. App. 133 (foreign car was permitted to come into a yard in a damaged condition on several consecutive days); *Chicago & E. R. Co. v. Brangan* (1894) 10 Ind. App. 570, 37 N. E. 190 (evidence was that the floor of a car had been in an unsafe condition for several years, and that a reasonably careful inspection would have disclosed the defect); *Chicago & I. R. Co. v. Russell* (1878) 91 Ill. 298, 33 Am. Rep. 54 (telegraph pole which has stood for three years within 18 inches of a passing car); *Bessex v. Chicago & N. W. R. Co.* (1878) 45 Wis. 477 (obstruction which remained near a railroad track for more than a year previous to the accident); *Coughlin v. Brooklyn Heights R. Co.* (1901) 59 App. Div. 126, 68 N. Y. Supp. 1105 (where street railway track at the point where a conductor was thrown from his

car and injured was dangerously out of alignment, and three former conductors each testified that he had been thrown from his car at the same point between one and two years before, and that he had verbally reported the occurrence to defendant's predecessor, the question of defendant's negligence was for the jury); *Monmouth Min. & Mfg. Co. v. Erling* (1894) 148 Ill. 521, 36 N. E. 117 (nut which kept an eyebolt in place had been missing two weeks); *Mcner's Sons v. Falk* (1901) 99 Va. 385, 38 S. E. 178 (elevator had been continuously defective for six months); *Stapp v. Locrer's Gambrinus Brewing Co.* (1896) 1 App. Div. 405, 37 N. Y. 5 pp. 256 (crack in kettle for heating pitch had existed for six or eight weeks); *Mooney v. Connecticut River Lumber Co.* (1891) 154 Mass. 407, 28 N. E. 352 (foreman knew, several days before the accident, that the carriage of a sawing machine had started up when no one was near it).

¹¹ In *Fay v. Minneapolis & St. L. R. Co.* (1883) 30 Minn. 231, 15 N. W. 241, it was held proper to find constructive knowledge of a defect in couplings of foreign car, where it had been in defendant's yard about one week. But in *Chicago, St. L. & P. R. Co. v. Fry* (1891) 131 Ind. 319, 28 N. E. 989, the court refused to accept the contention of plaintiff's counsel that that case was an authority for the doctrine that the fact of a defective foreign car's being in the possession of a railway company for nearly two weeks was of itself sufficient to charge the company with notice, and pointed out that the defect was spoken of as "readily discernible upon proper inspection." Compare the ruling in *Chicago & E. R. Co. v. Brangan* (1894) 10 Ind. App. 570, 37 N. E. 190, cited in the last note.

¹ *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497.

though competent to show that a defect existed at the time of the accident,² is not admissible to prove that the defendant had notice of the defect before the accident.³

134. Failure of servant himself to observe the dangerous conditions.—

In later chapters (XVII.—XXII.), the effect of evidence showing that the servant had or had not the same means or opportunities as the master of knowing the risks to which he was exposed will be discussed, in so far as it bears upon the defenses of assumption of risks and contributory negligence. But there is another aspect of such evidence which is material in the present connection.

There are numerous cases which proceed upon the theory that, in certain states of the testimony, the master's nonliability may be deduced, as a conclusion of law, from the fact that the servant himself, especially where he possessed special skill and experience in regard to the subject-matter, was ignorant of the risk in question.¹ In other

¹ *Harter v. Atchison, T. & S. F. R. Co.* (1895) 55 Kan. 250, 38 Pac. 778. 94 Fed. 73. An employer is not liable for an injury to an employee, caused by the falling of a brick from the top of a

² *Harter v. Atchison, T. & S. F. R. Co.* (1895) 55 Kan. 250, 38 Pac. 778; *St. Louis & S. F. R. Co. v. Weaver* (1886) 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; *Missouri, K. & T. R. Co. v. Young* (1896) 4 Kan. App. 219, 45 Pac. 963; *O'Donnell v. Baum* (1889) 38 Mo. App. 245; *Cherokee & P. Coal & Ice Co. v. Britton* (1896) 3 Kan. App. 202, 45 Pac. 100. As to the inference which it is permissible to draw, in actions by third persons, from the making of repairs or the taking of precautions after the accident, see, generally, 3 Elliott, Railroads, § 1177.

³ If the defect [in a car] was such as to deceive human judgment, the company, as well as himself [i. e., the plaintiff], stands excused for not discontinuing the use of the car on account of it. Whatever diligence he exercised in seeing to the apparent safety of the vehicle goes to the credit of the company, as well as to his own credit." *Central R. & Bkg. Co. v. Kenney* (1877) 58 Ga. 485. A master is not bound to anticipate the danger of bolts projecting from a fly wheel coming in contact with a pipe running near the wheel, which vibrated when the machinery was in motion, so as to break it and cause injury to an employee, if the employee, an engineer of experience, knowing the condition of the machinery, has worked about it for fourteen months without anticipating such danger. *Detroit Crude-Oil Co. v. Grable* (1899) 36 C. C. A. 94, 131 N. Y. 603, 30 N. E. 196. In *Stiles v. Rich* (1896) 8 Colo. App. 393, 46 Pac. 694, the owner of a mine was held not liable for the death of an experienced miner in its employ, caused by the caving in of a shaft while sinking it, where such shaft was at the time only 12 feet deep, and the former, on being informed that the shaft needed timbering, immediately began to place the timber, which was being done when the injury occurred. There, in order to negative in advance the defense of contributory negligence, the following peculiar allegation was inserted in the complaint: "That at the time deceased was killed as aforesaid, he thought, and any man of ordinary prudence, with the knowledge which deceased had of the ground

cases the point in view is perhaps essentially the same, but the precise effect of the judgments is not clearly defined for the reason that the

he was working in, would have thought, that said shaft could be timbered before it would cave in." The court commented upon the averment as follows: "If such was the conclusion of an experienced miner who had done the work, and would have been the conclusion of any man of 'ordinary prudence,' how could defendants be charged with negligence, and made liable for failing to exercise extraordinary and prophetic prudence previous to the preceding Friday? It is clear beyond controversy that deceased had greater knowledge of the shaft and the character of the ground than Hook could have had, and that deceased, a practical miner of years, possessed of all knowledge that could be obtained, voluntarily prosecuted the work, and incurred the risk incident to the employment." In *Bal-lou v. Chicago, M. & St. P. R. Co.* (1882) 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. 559, one of the grounds upon which the plaintiff's right to recover was denied was that he had the same means of knowledge as the company. "It appears from the testimony," said Judge Cassoday, "that the ladder in question was almost in constant use, not by the engineer, nor so much by the conductor, but by the brakeman. The straining test was necessarily applied whenever the brakeman ascended or descended the ladder in question. . . . His inspection and testing was the company's inspection and testing. His failure to discover any visible indications of insufficiency, while so inspecting and testing, was no more culpable in the company than in himself." In *Kelly v. Abbot* (1885) 63 Wis. 309, 53 Am. . . . 23 N. W. 890, the court argued: "The difference in the elevation of the coupling irons of this foreign car and the caboose or other cars of the defendant's road would not have been very easily or readily observed when they were distant from each other, and yet the company is sought to be held liable for its want of ordinary care in not knowing this difference when consenting to take this foreign car into its train. When the car and the caboose were brought nearly together, this difference could have been at least much more readily seen and observed by comparison. . . . Did not the intestate have the same, if not superior,

means of knowing this difference as or to that of the company? . . . the negligence of the intestate and that of the company in this respect are equally balanced, ought the plaintiff to recover?" In *Ray v. Jeffries* (1887) 86 Ky. 367, 5 S. W. 867, the court, after remarking that there was no proof that the appliance which caused the injury (nitroglycerin) was defective, said: "Consequently, the simple question is, whether the employer is bound in every case to know, not merely the dangerous character of implements or agencies used in his business, but also the peculiar construction and mode of handling each part so as to make it most efficient, and to avoid injury to his employee, whether the latter is, or professes and undertakes to be, skilled in that branch of the business or not. To require of an employer such knowledge and skill, and impose upon him such obligation, would, in many cases, put a stop to business." It was accordingly held error to instruct the jury that, if the plaintiff did not know of the dangerous character of the appliance, the defendant could not be excused for his failure to know and inform plaintiff of the danger, unless he used reasonable care in obtaining and imparting such information. This was regarded as a misdirection because it might be understood by the jury as requiring the defendant to know and inform the plaintiff, not merely of the dangerous character of the appliance, but of the manner of using it so as to prevent injury. The true doctrine was declared to be that, where an employee represents and undertakes that he possesses the knowledge and skill requisite to operate or use machinery or implements of a dangerous character, which, if not properly used, are liable to cause injury, he, and not the employer, is responsible for consequences resulting to himself from his unskillful or negligent handling of it. In *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, one of the circumstances relied upon in the master's favor was the admission of the plaintiff that he had not complained of the machine during the thirteen years he had worked with it, because it had "never entered his head that it was dangerous."

ignorance of coemployees of the plaintiff, or other persons concerned in the work, is adverted to as an evidential factor.²

There seems to be no little difficulty in finding a rational ground upon which these decisions can be reconciled with the well-recognized principle that, as a general rule, the master and servant are not on the same footing as regards the obligation of observing the quality of the instrumentalities of the business. See chapter XXI., *post*. The statements of the cases cited are at least compatible with the inference that, under the circumstances mentioned, the abnormal conditions would have been discovered if the master had properly discharged his duty of active inspection. See next chapter. Due weight has been given to this consideration by some courts.³ Another objection to treating the servant's ignorance of the risk as a sufficient basis for a conclusion of law respecting the master's nonpossession of knowledge

² A nonsuit was held to have been properly granted, where, so far as the testimony showed, the rope furnished to the plaintiff for the purpose of cleaning out a well was a good rope, and it was also in evidence that it was carefully examined by both the plaintiff and the overseer of the road, that there was no defect in it which would be discovered by the use of ordinary care, and that both parties pronounced the rope good. *Reid v. Central R. & Bkg. Co.* (1888) 81 Ga. 694, 8 S. E. 629. The fact that only one out of ten employees engaged in handling a chain noticed any defect in it was declared to be in itself evidence that the defect was not such an apparent one as to put them or their employers on their guard. *Kinney v. Corbin* (1890) 132 Pa. 341, 19 Atl. 141. The fact that miners had been riding up and down on a car every day for several years, exposed to any danger which might arise from the failure of a certain simple unhitching apparatus to perform its proper work, and never complained of it or protested against its use, has been considered to have a material bearing upon the question whether the mine owner was negligent in not adopting some other contrivance. *Burke v. Witherbee* (1885) 98 N. Y. 562. There can be no recovery for the death of a miner, caused by a clod falling on him from the roof of a room in the mine into which he went of his own accord to work, when both he and others tested the roof and thought it safe. *Consolidated Coal Co. v. Young* (1889) 31 Ill. App. 417. Where an employee of a city, injured by the caving of a trench

in which he was working, had been engaged in that work for three or four years, and neither he nor his coemployees, nor the engineer in charge, nor his foreman, saw any apparent danger until the accident occurred, negligence was not imputable to the city, though sheathing might have prevented the accident, and though one of the aldermen, a hatter by trade, told the foreman that sheathing was needed. *Farrall v. Middletown* (1900) 56 App. Div. 525, 67 N. Y. Supp. 483.

³ In *Eddy v. Aurora Iron Min. Co.* (1890) 81 Mich. 548, 46 N. W. 17, it was explicitly laid down that the master is not, as a matter of law, excused for maintaining his instrumentalities in an unsafe condition, merely for the reason that the servant himself thought they were in a safe condition. The servant, it was said, might or might not have had the requisite knowledge or skill to decide whether they were really safe; but whether he had or not, it was, ordinarily, no part of his business to look after their condition. This case seems inconsistent with the Michigan case cited in note 1, *supra*. In *Alban Lime & Cement Co. v. Culpey* (1892) 47 Ill. App. 343, the defendant's foreman testified that if the plaintiff had been careful he might have seen the dynamite before he struck the rock, which caused the explosion. The court's comment upon this evidence was that, if it was true, the company, whose duty it was not to allow any dynamite to remain in the quarry which, by the exercise of proper diligence, could have been discovered, should have had it removed.

is, in most, if not all, the situations which can suggest an appeal to this test, that there must be some facts presented which will be reasonably susceptible of the construction that the system of work and the measures taken to safeguard the servant were not satisfactory. It is manifestly unjustifiable to take the case from the jury, or to override a verdict, under these circumstances.⁴ Upon the whole, therefore, the present writer ventures to express the opinion that the standard of comparison is wholly out of place in this class of cases, and that the preferable analysis is rather one which treats as two entirely separate subjects of investigation the question whether the master, and the question whether the servant, ought respectively to have known of the risk which caused the injury in suit. What a prudent man would have discovered in each instance must be determined with reference to obligations so distinct in their character and extent that any process of ratiocination which involves placing them side by side and arguing from one to the other is more apt to obscure the true issues than to lead to an equitable conclusion.

135. Manner in which instrumentalities discharged their functions prior to the accident; inferences from, generally.—The fact that the instrumentality in question had or had not operated in a satisfactory manner prior to the time when it caused the injury in suit has been admitted as competent evidence to establish either that it was or was not a suitable one to be used as a part of the master's plant, or that the master was or was not excusably ignorant of its abnormally dangerous condition, as disclosed by the accident. The cases which relate

⁴In *O'Driscoll v. Faxon* (1892) 156 Mass. 527, 31 N. E. 685, the defendant contended that, upon the whole evidence, no want of due care on his part was shown; and in support of this view it is urged that no notice was given to him that the bank was dangerous; that the plaintiff and his witnesses did not regard it as dangerous; and that if the plaintiff, with his experience, was not guilty of carelessness in failing to anticipate that earth from the bank might fall upon him, and that the cutting of the bank was such as to cause no reasonable apprehension of danger, then the falling of the earth was a mere accident. The court said: "We think the jury might be allowed to take a broader view of the defendant's responsibility. The duty rested upon him of using reasonable care in providing a safe place for the masons to do their work in building the wall, and the jury

might hold him bound to use reasonable care to guard against accidents which, at the moment of their occurrence, a workman might not anticipate, though himself in the exercise of reasonable care, under the circumstances in which he was placed. . . . There was some evidence tending to show that the general plan which was adopted for protecting the bank from falling was inadequate. If the jury were of opinion that it was so, and that the defendant failed to use reasonable care in making it safe against accidents, they might lawfully hold him responsible to one who was himself in the exercise of due care at the time of the injury. Such seems to have been the view taken by the jury, and we cannot say, upon the evidence, that it was the duty of the presiding justice to withdraw the case from their consideration."

to the bearing of this fact from the former of these standpoints will be collected in a subsequent chapter (XLIII.). At present we have to deal with it merely under the second aspect.

136. Previous satisfactory operation of the instrumentality which caused the injury.—The courts have used language which, if taken literally, would commit them to the unqualified doctrine that the use of an instrumentality which has been in daily use for a long time, and has uniformly proved safe and efficient, may be continued without imputation of negligence.¹ But such a doctrine can easily be shown to be altogether too favorable to the master. Manifestly, it is impossible, in view of that tendency to deterioration which is characteristic of all the inorganic agencies of business, to affirm as a universal principle that an employer is entitled to infer, from the previous efficient operation of his instrumentalities, that such operation will continue.² Indeed, it is evident that all the decisions cited in the next chapter are based on the theory that he is bound to take notice that the chances of his instrumentalities remaining in a safe condition steadily diminish in proportion to the period during which they have been used. The true doctrine applicable in this connection seems to be rather this,—that the previous safe and successful operation of the instrumentality is conclusive in the master's favor, provided it appears that he has not been derelict in regard to his duty of active inspection at reasonably frequent intervals (see next chapter), and no circumstance which would have put a prudent man on inquiry has come to his knowledge. This proviso is recognized in the language used by the courts in several of the cases in which the satisfactory operation of the instrumentality before the accident in suit is not

¹ *Sappenfield v. Main Street & Agricultural R. Co.* (1891) 91 Cal. 48, 27 Pac. 590. Sweeping expressions are also found in the following cases: *Przybilski v. Northwestern Coal R. Co.* (1898) 98 Wis. 413, 74 N. W. 117 (coal bucket had operated satisfactorily till within fifteen minutes of the accident); *Kaye v. Rob Roy Hosiery Co.* (1889) 51 Hun, 519, 4 N. Y. Supp. 571 (elevator had been in constant successful operation up to the time of the accident); *Hoskins v. Stewart* (1890) 57 Hun, 380, 10 N. Y. Supp. 833 (trench caved in which had been safe till the time of the accident); *Richardson v. Cooper* (1878) 88 Ill. 270 (hoisting apparatus had raised stones of ten times the weight of that which caused it to give way). The mere fact that an injury to a railroad

semaphore had been put up in a different place does not render the railroad company liable for the injury, when the semaphore had always before proved sufficient, and would have done so at the time of the accident but for the accountable failure of the air brakes to work. *Whalen v. Michigan C. R. Co.* (1897) 114 Mich. 512, 72 N. W. 32.

² *Bruce v. Beall* (1897) 99 Tenn. 303, 41 S. W. 445 (holding that the trial judge had properly refused an instruction to the effect that "as a general rule, when an appliance, machine or structure not obviously dangerous has been in daily use for years and has uniformly been found adequate, safe, and convenient, it may be continued without the imputation of negligence"); *Goodsell v. Taylor* (1889) 41 Minn. 207, 4 L. R. A. 673, 42 N. W. 873.

tioned as an exculpatory element,³ and it is probably implied in all the other cases in which phraseology of an unqualified description is used.

137. Previous unsatisfactory operation of the instrumentality which caused the injury.— In some states of the evidence the employer's nonliability, when considered with relation to a previous accident not known to him, is deducible, as a matter of law, from the general principle enunciated in § 126, *ante*.¹ But it is recognized in a large number of cases that the fact of such an accident's having occurred is itself competent evidence tending to show that the master should have been aware of the conditions to which it was due.² A jury, therefore,

¹*Southwest Virginia Improv. Co. v. Andrus* (1889) 86 Va. 270, 9 S. E. 1015 (roof of a tunnel in a coal mine fell, without the warning signs that usually precede it, and the evidence showed that the usual tests had been made without disclosing any unsafe conditions); *Bradbury v. Kingston Coal Co.* (1893) 157 Pa. 231, 27 Atl. 400 (pin controlling throttle of hoisting engine had for seven years continuously and successfully served its use without any change, repair, substitution, or visible defect, and gave no external indication of defect up to the time of the accident). In *Thiel v. Kennedy* (1901) 82 Minn. 142, 84 N. W. 657, where a belt slipped and started a machine, it was held that its successful operation up to that time did not conclusively prove that the defect could not have been discovered by due care. In *Watt v. Neilson* (1888) 15 Se. Sess. Cas. 4th series, 772, it was held that a master is not responsible for injuries caused by the fall of a simple hoisting apparatus which his workmen have been rigging up for themselves during several years, whenever it happened to be needed, without any suspicion of danger, or any suggestion that some other appliance should be used.

²The principle applied in the above-cited cases seems to be ignored in a ruling to the effect that a brewer, to whom no notice is shown to have been given of the previous bursting or exploding of bottles, is not chargeable with knowledge of the actual fact of such exploding, and of the latent danger thereof to his employees. *Melchert v. Robert Smith India Pale Ale Brewing Co.* (1891) 140 Pa. 448, 21 Atl. 755. *Sullivan v. Poor* (1900) 32 Misc. 575, 66 N. Y. Supp. 409, where it was observed

that previous accidents not known to defendant were immaterial as evidence, exemplifies a similar conception.

³*Louisville, N. A. & C. R. Co. v. Wright* (1888) 115 Ind. 378, 16 N. E. 145 (trainmen had previously been injured by coming into collision with the same overhead bridge as that which injured the plaintiff). Where the employer is charged with negligence in maintaining a structure so close to a tramway as to be dangerous to employees, it is not error to admit evidence to the effect that, prior to the occurrence of the accident to the plaintiff, another servant had been caught between the structure and the tram cars. *Salem Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141, 38 N. E. 411 (servant previously caught between tram car and structure close to track). See also cases cited in the next note. It has been said that the true ground on which such evidence is admitted or rejected in actions for negligence is that it is competent for the purpose of showing that the defendant had knowledge of the probability of the recurrence of similar accidents, but not for the purpose of proving that a specific danger existed at the time the plaintiff was injured. *Malone v. Hawley* (1873) 46 Cal. 409, where evidence that an elevator had previously fallen from the same cause as that to which the plaintiff's injury is traceable was admitted to show that the employer knew it might at any time fall again. This distinction, however, seems to be of very dubious soundness, for if, in any particular case, such evidence is deemed to warrant the conclusion that the master should have known that there was a probability of similar accidents, the constructive knowledge thus imputed to him becomes, according to the principles

is always warranted in inferring from evidence of the previous defective operation of an instrumentality that the master was negligent in not seeing that the instrumentality was properly constructed and adjusted, so as to be safe when it was originally put in use, or in not discovering its dangerous condition and making it safe before the accident.³

explained in § 125, *ante*, one of the circumstances which charge him with negligence in allowing the abnormal conditions to continue up to the time of the accident. In the last analysis, therefore, such evidence must be one of the elements involved in the conclusion arrived at.

³ *Mooney v. Connecticut River Transfer Co.* (1891) 154 Mass. 407, 28 N. E. 352 (machine had "run away" several days before the accident). To the same effect see *Bonahue v. Dropp* (1891) 154 Mass. 21, 27 N. E. 675 (machine shown to have had a tendency to start automatically); *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149 (railroad company held liable for injury caused by sudden starting of engine, where it had frequently done so automatically and without warning, the jury having specially found want of care in not ascertaining its condition); *Knickerbocker Ice Co. v. Finn* (1897) 25 C. C. A. 579, 51 U. S. App. 256, 80 Fed. 483 (on two separate occasions shortly before the accident, a horse had, viciously and without provocation, kicked in a very dangerous manner); *Krepsstad v. Northern P. R. Co.* (1891) 46 Minn. 18, 48 N. W. 409 (appliance had given way prior to the accident, under the same circumstances as when the plaintiff was injured); *Stecher v. St. Louis, I. M. & S. R. Co.* (1887) 91 Mo. 511, 4 S. W. 389 (1891) 105 Mo. 192, 16 S. W. 591 (track had several times been overflowed owing to the inadequacy of the culverts); *Ousley v. Central R. & Bkg. Co.* (1890) 86 Ga. 539, 12 S. E. 938 (drawbar had failed in its proper functions twice out of three attempts at using it); *Knickerbocker Ice Co. v. Bernhardt* (1900) 95 Ill. App. 23 (cakes of ice occasionally fell off the runway at an ice house); *Bartley v. Trouticht* (1892) 49 Mo. App. 214 (elevator did not work well, and was shown to have various specific defects); *Illinois C. R. Co. v. Reardon* (1894) 56 Ill. App. 542 (timbers on car had shifted so as to project over the end several times before an accident caused by their projecting in this

manner); *St. Louis Bridge Co. v. Fellows* (1893) 52 Ill. App. 504 (identical comment on sharp curve where such accidents had frequently happened); *Bowling v. Brooklyn City R. Co.* (1894) 6 Mich. 141, 26 N. Y. Supp. 760 (portions of a bank in course of excavation had fallen from time to time); *Bartley v. Atchison, T. & S. F. R. Co.* (1895) 55 Kan. 250, 38 Pac. 778 (question whether a railroad company had notice of the dangerous condition of a switch is for the jury, where one of the switchmen has testified that it was out of repair, whether that an engine always made a quick turn when it passed the point between the movable and the stationary rails, and another, that the switch had worked hard on the morning of the day when the accident occurred); *The Columbia* (1886) 30 Fed. 199 (held by district judge that, as a hoisting rope had broken the day before the accident, the officers of the ship were chargeable with knowledge of its unfitness); *Buckley v. Norolty Mfg. Co.* (1899) 121 Vt. 115, 79 N. W. 1108 (press had continuously giving trouble in the way as that which caused the injury); *Mulreny v. Rhode Island Land Works* (1885) 14 R. I. 204 (telephone chain had broken about six weeks before, when, according to some of the evidence, the person immediately in charge of the men using it notified the superintendent and asked for a new chain, but that, as none was supplied, he had the old one mended and used it again, though some of the links were worn); *Mannum v. Bullion, R. & C. Min. Co.* (1897) 15 Utah, 534, 50 P. 834 (elevator cage had been rattling and shaking and was loose in its guides); *Chicago v. Edson* (1891) 23 Ill. App. 417 (frames of windows had been loosened on other occasions of the same kind of work). Where it was discovered on the first day that a pile driver was put into operation, that the wire rope supporting the hammer was slack when slack, to get out of its place under the drum, it is for the jury to say whether the master's representative in

The cases illustrating the proposition just enunciated³ should be carefully distinguished from those in which the knowledge, actual or constructive, of the previous unsatisfactory operation of the instrumentality is established by evidence apart from, and independent of, the unsatisfactory operation itself. Cases of the latter class virtually assert nothing but the doctrine that a master is liable for injuries caused by a defective instrumentality the condition of which was, or ought to have been, known to him (§ 125, *ante*), and do not involve an inquiry into the evidential significance of a previous accident, as an element which itself tends to establish constructive knowledge.⁴

charge of the work should not have ascertained that the rope had become ragged, and a dangerous object to touch with a mittened hand when liable to be set in motion without warning. *Stein v. St. Paul & D. R. Co.* (1887) 37 Minn. 310, 34 N. W. 113. Where several witnesses have testified that they had heard steam escaping from a boiler for a considerable period before it exploded, and there is evidence that an employee had been engaged several times in caulking the seam from which the steam escaped, and that the defendant's officers had been frequently in and about the boiler room, the jury is justified in finding that the defendant knew of the existence of the defect, and was aware that the seam had been caulked on different occasions. *Ballard v. Hitchcock Mfg. Co.* (1893) 71 Hun. 582, 24 N. Y. Supp. 1101. Affirmed without opinion in (1895) 145 N. Y. 619, 40 N. E. 163. In *Findlay Brewing Co. v. Bauer* (1893) 50 Ohio St. 560, 35 N. E. 55, the court, in holding that evidence as to how an elevator by which an employee was injured behaved on former occasions,—that, at other times, when being operated by other persons, barrels being lifted had fallen and injured those operating it, or had simply fallen back, the conditions remaining substantially the same,—tended to prove some vice in its construction that rendered its operation dangerous, and that the employer knew, or should have known, the fact, said: "Inspection itself may indicate some defect in a machine, affecting its safety or usefulness; but, as is most usually the case, its defective character, whatever it may be, is more clearly observed in its operation. Experiment is the final and most conclusive test of its safety, as well as of its usefulness; and the fact that the carefulness of the party operated the machine may be involved

in each instance may affect the weight of the evidence, but not its admissibility, as such a limitation would exclude the result of every experiment offered in evidence, which would amount to a *reductio ad absurdum*." In *Moffatt v. Bateman* (1869) L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore P. C. C. N. S. 369, the doctrine in the text was assumed to be correct (buggy had been overturned by runaway horses which had bolted on several previous occasions), but the evidence was held insufficient to sustain this theory of the case.

⁴The action was held maintainable in the following cases on the ground that the master was chargeable with notice of the previous accidents: *Spaulding v. Forbes Lithograph Mfg. Co.* (1898) 171 Mass. 271, 50 N. E. 543 (seat had tipped up several times previously); *Beardsley v. Minneapolis Street R. Co.* (1893) 54 Minn. 504, 56 N. W. 176 (jury justified in finding that the defendant was guilty of negligence in causing a car to be used, where it had frequently "bucked" before); *Euerher v. T. B. Scott Lumber Co.* (1893) 86 Wis. 226, 56 N. W. 745 (accident resulted from collapse of slab burner owing to the same cause as on a previous occasion some years before); *Leland v. Hearn* (1900) 49 App. Div. 111, 65 N. Y. Supp. 204 (error to direct a verdict for defendant where the injury was caused by the fall of an elevator which had fallen before, and was known by defendant to be out of repair); *Johnson v. Bellingham Bay Improv. Co.* (1896) 13 Wash. 455, 43 Pac. 370 (master is liable for injuries caused by the giving way of a decayed plank in a platform, at the very place where it joined a new piece inserted by him after a previous break); *Chicago & A. R. Co. v. Shannon* (1867) 43 Ill. 338 (defects pre-

The unsatisfactory operation of an instrumentality because of one specific kind of defect is not evidence that the master should have known of another and distinct defect, with which that unsatisfactory operation had no connection.⁵

It has been laid down that the general principle stated above is subject to the limitation that proof of a single defective or imperfect operation of machinery or instrumentalities, resulting in injury, will not of itself be sufficient evidence, nor any evidence, that the master had previous knowledge or notice of any defect, imperfection, or insufficiency in such machinery or instrumentalities.⁶ But this gen-

erally reported): *Asch v. Erie R. Co. v. Weaver* (1895) 61 Ill. App. 111, 112, evidence that an employee of defendant had told its superintendent of some excursions, shortly before the accident, to plaintiff from the breaking of a car, that he was afraid to get under it, and that such employee was not on the second occasion, in which he failed to show notice of its unsatisfactory condition, although no particular defect was pointed out). In *Gates v. Chicago & N. P. R. Co.* (1892) 2 S. D. 422, 50 N. W. 907, the court, in holding that the knowledge of a railroad company that a derrick constructed by it was sometimes left unfastened, so as to swing over the track in a manner dangerous to employees, makes it liable for injury caused thereby to a trainman, although it did not know that it was unfastened at the time of the accident, and it had remained unfastened for a short time only, remarked that the negligence for which the defendant was held liable consisted, not in the precise condition of the derrick at the time of the accident, but in its failure to use care to keep it fastened after constructive notice of what usually occurred when it was not in use. An employer whose attention is called to a clicking noise made by a machine used by an employee, which would not have been made if the machine had been in proper condition, owes such employee the duty of carefully inspecting the machine to determine if it is defective, and of repairing it in case it is found to be defective. A mere casual examination by the foreman is not a fulfillment of the duty. *Kaplan v. New York Biscuit Co.* (1896) 5 App. Div. 60, 38 N. Y. Supp. 1049.

⁵ *James v. Northern P. R. Co.* (1891) 46 Minn. 168, 48 N. W. 783 (notice to a railroad company that cars on passing

over a certain place in its track had a jumping or jarring motion is not notice to it of a latent internal seam in a rail at that place, which subsequently caused the rail to split and break). *People v. Jughard* (1900) 50 App. Div. 100, 64 N. Y. Supp. 108 (bearings of a machine known to be worn so that it did not work easily; accident caused by a sudden and unexpected movement). *Green v. Unper* (1900) 64 N. J. L. 596, 10 A. 593 (defective action of machine on previous occasions was proved, but it was of a different kind from that which caused the accident); *Schultz v. Kohn* (1896) 149 N. Y. 132, 43 N. Y. 420 (employer's knowledge that the operation of a machine is defective, owing to the fact that the piston bends and so sticks in the cylinder, does not charge him with liability for another defect of which he has no knowledge, consisting of the tilting back of the cylinder of its own accord while the employee was filling it, and the descent of the piston into it). Compare also the ruling in *Richardson v. Great Eastern R. Co.* (1875) L. R. 10 C. P. 486, 13 L. T. N. S. 248, *Reversing* (1876) 1 C. P. Div. 342, 24 Week. Rep. 29, that a railway company is not under the duty—here, as respects a passenger,—of making a minute examination of the whole car "because defects have been discovered in some part of the cars, which have no connection with the probable existence of defects in any other part of the cars."

⁶ *Atchison, T. & S. F. R. Co. v. Wagner* (1885) 33 Kan. 666, 7 Pac. 204, cited with approval in *Missouri, K. & T. R. Co. v. Young* (1896) 4 Kan. App. 219, 45 Pac. 963. "In order to charge a master with negligence in permitting the use by a minor servant of a machine, the ordinary danger of which is obvious, something more must be shown

eralization is, plainly, altogether too sweeping. The circumstances of the single accident which is shown to have occurred may be such as to certainly indicate that the abnormal conditions would have been discovered if the master had discharged his duty of inspection with reasonable care. Compare § 198, *post*.

138. Previous unsatisfactory operation of other instrumentalities of the same kind.—One case seems to embody the conception that the fact that appliances of the same sort as the one in question had proved defective never tends to charge the master with constructive notice of its defective properties.¹ But it seems impossible to argue with any show of reason that evidence of this sort is to be wholly rejected, and its competency has been more than once recognized. Manifestly, it is a reasonable inference that, where several out of a number of appliances modeled upon the same pattern or a closely similar pattern fail to perform their functions properly, the master is put upon inquiry as to the suitability of all the others.²

139. Province of court and jury, where the master's constructive knowledge is in question.—If the plaintiff introduces any evidence which fairly tends to show that the master had either actual or constructive knowledge of the abnormal conditions which caused the injury, the case must be submitted to the jury.¹ In the absence of such

than the fact that the machine, by its unusual and unaccountable behavior upon a single occasion, injured the plaintiff in a way that was not obvious. Something in the nature of *scienter* must be proved, from which it may be inferred that the master, by the exercise of reasonable caution, could have apprehended such an occurrence." *Carrington v. Mueller* (1900) 65 N. J. L. 244, 17 Atl. 564.

¹*Georgia R. & Bkg. Co. v. Nelms* (1889) 83 Ga. 70, 9 S. E. 1049 (evidence that other hammers broke at the same work and at the same time does not show negligence in the selection of the hammer which caused the injury).

²*Battery v. Walker & P. Mfg. Co.* (1901) 179 Mass. 307, 60 N. E. 782 (bursting of a check valve of certain dimensions under a certain pressure charges master with notice that it is not safe to put in another valve of that size); *Painton v. Northern C. R. Co.* (1889) 83 N. Y. 7 (chains like the one which gave way had frequently broken). It cannot be charged, as a matter of law, that the purchaser of a railroad, which has notice that one abutment of a bridge is so poorly built as to require

it to be partially taken down to repair it, has the right to assume that the other abutment, constructed at the same time and by the same contractor, is free from defects. *Bogart v. Debaunre, J. & W. R. Co.* (1895) 145 N. Y. 283, 40 N. E. 17. In *Doule v. White* (1896) 9 App. Div. 521, 35 N. Y. Supp. 760, 41 N. Y. Supp. 628, it was denied that the breaking of a single eyebolt was evidence of the defective quality of the lot to which it belongs. But the rationale of the ruling was that the weakness resulted from an imperfect welding and that this is not a defect of manufacture which would necessarily or probably run through the whole lot.

This doctrine is explicitly stated or assumed to be correct in all the cases cited in this chapter. See, especially, *Mollers v. Shaw* (1861) 1 Post & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845; *Cumberland & P. R. Co. v. State use of Moran* (1875) 44 Md. 283; *Ledridge v. Hathaway* (1898) 170 Mass. 348, 49 N. E. 656; *Nord Deutscher Lloyd S. S. Co. v. Imbregsten* (1894) 57 N. J. L. 462, 31 Atl. 619; *Essex County Electric Co. v. Kelly* (1897) 60 N. J. L. 306, 37 Atl. 619;

evidence the proper course is for the trial judge to declare, as a matter of law, that the action cannot be maintained.² Otherwise, a verdict for the plaintiff is subject to reversal by a court of review.³ Such

Harter v. Atchison, T. & S. F. R. Co. (1895) 55 Kan. 250, 38 Pac. 778; *Correy v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 635; *Coontz v. Missouri P. R. Co.* (1894) 121 Mo. 652, 26 S. W. 661. A finding that defendant knew of the presence of a solution of potash in a waste pipe from which he directed plaintiff to remove an obstruction is sustained by evidence that defendant was present before and at the time of the accident to plaintiff, caused by coming in contact with such solution, and had been personally concerned in directing the removal of the obstruction, even though he denies having had any knowledge of its presence. *Dunn v. Connell* (1897) 21 Misc. 295, 47 N. Y. Supp. 185. Affirming 20 Misc. 727, 46 N. Y. Supp. 684.

² Plaintiff nonsuited. *Clough v. Hoffman* (1890) 132 Pa. 626, 19 Atl. 299; *Melchert v. Robert Smith India Pale Ale Brewing Co.* (1891) 140 Pa. 448, 21 Atl. 755; *Simpson v. Pittsburgh Locomotive Works* (1890) 139 Pa. 245, 21 Atl. 386; *Corcoran v. Wanamaker* (1898) 185 Pa. 496, 39 Atl. 1108; *Fenderson v. Atlantic City R. Co.* (1894) 56 N. J. L. 708, 31 Atl. 767; *Hobbs v. Stauer* (1885) 62 Wis. 108, 22 N. W. 153.

Complaint dismissed. *Painton v. Northern C. R. Co.* (1880) 83 N. Y. 7; *Warner v. Erie R. Co.* (1868) 39 N. Y. 468; *Martin v. Cook* (1891) 37 N. Y. S. R. 733, 14 N. Y. Supp. 329; *Schorning v. Knickerbocker Ice Co.* (1891) 38 N. Y. S. R. 27, 13 N. Y. Supp. 434; *Nelson v. Dubois* (1882) 11 Daly. 127.

Denial to evidence sustained. *Caruthers v. Chicago, R. I. & P. R. Co.* (1895) 55 Kan. 600, 40 Pac. 915; *Burnes v. Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 41, 31 S. W. 347; *Humphreys v. Newport News & M. V. Co.* (1889) 33 W. Va. 135, 10 S. E. 39.

Verdict directed for defendant. *Melchert v. Robert Smith India Pale Ale Brewing Co.* (1891) 140 Pa. 448, 21 Atl. 755; *Murphy v. Great Northern R. Co.* (1897) 68 Minn. 526, 71 N. W. 662.

³ *Felltham v. England* (1866) L. R. 2 Q. B. 33, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151, 7 Best & S. 676; *White v. Edlitz* (1897) 19 App. Div. 256, 46 N. Y. Supp. 184; *Essex County Electric Co. v. Kelly* (1894) 57 N. J. L. 100,

29 Atl. 427; *St. Louis, I. M. & S. R. Co. v. Gaines* (1885) 46 Ark. 555; *D. Graff v. New York C. & H. R. R. Co.* (1879) 76 N. Y. 125. In the last case where a brake chain gave way, the court said: "Upon the next proposition, that the exercise of ordinary care would have discovered the defect, and that the defendant neglected to exercise such care, a careful examination has failed to satisfy me that the evidence was sufficient to warrant a verdict. In the first place, assuming a defect, there is no evidence what it was, or the nature of it. The car was in a train going west, and it does not appear that anyone ever saw the chain afterwards, except the person who took the plaintiff's place after the accident, and he only looked at it with a lantern at a station, and saw that it was broken. There is some evidence, although slight, that the car did not belong to the defendant. There was an entire absence of evidence as to the nature and character of the defect, or the cause of the breaking. We may imagine several causes,—(1) from an original defect in the iron, or (2) in its manufacture, or (3) by reason of weakness and ordinary decay by use, or (4) by getting misplaced on the trip on which the accident occurred. There is no evidence that ordinary care and observation would have discovered all of these defects if they had existed, and they must have so found, as they could not have singled out a defect which ordinary care would have discovered, because the particular defect was entirely unknown." Evidence which merely shows that one of the defendants supervised the work of putting into place a steam pipe from which the plaintiff's injury resulted is insufficient to support a finding that he knew the condition in which the pipe was left. *Hobbs v. Stauer* (1885) 62 Wis. 108, 22 N. W. 153. In *Cherokee & P. Coal & Min. Co. v. Britton* (1896) 3 Kan. App. 292, 45 Pac. 100, a general verdict for plaintiff, injured by the fall of the roof of a tunnel, was held to be inconsistent with a special finding (1) that there was no evidence to show that the rock was known to be loose, and (2) that the miners and other employees considered the place safe. In *Atchison, T. & S. F. R. Co. v. Swarts* (1897) 58 Kan. 235, 43

a verdict will also be reversed where the trial judge has given instructions which are inconsistent with the principle that proof of the master's knowledge, actual or constructive, is an essential prerequisite to recovery,⁴ or has refused instructions embodying that principle.⁵

C. WHAT DEGREE OF FORESIGHT IS IMPUTED TO A MASTER.

140. General principles.—The typical prudent man, whose conduct furnishes the standard to which a master is bound to conform, is supposed to exercise a proper degree of care, not merely in observing existing conditions, but also in forecasting future occurrences. Under one of its aspects, therefore, the question whether he has been guilty of a breach of duty in respect to the quality of the instrumentalities of his business may be appropriately discussed with reference to the fact that negligence is a wrong the substance of which is a failure to act with due foresight.¹ A consideration of the subject from this

Pac. 953, it was contended that the evidence failed to establish negligence upon the part of the railroad company, and also that, by two special findings of the jury, it was acquitted of negligence. These findings are as follows: *Q.* Did it not (referring to the hole), by its appearance, indicate that it had been in that condition for a considerable time? *A.* We cannot determine how long. *Q.* Did defendant have any knowledge of defect in the track or hole, if any there was, at the time of the accident? *A.* We do not know. The court, however, declared that these answers, under former decisions construing others of a like kind, were to be taken as negating the existence of the facts necessary to charge the company with liability, and were therefore equal in effect to an affirmative finding that the company had no knowledge of the hole in its track, and also that such hole had not been there for such length of time as to charge the company with negligence in allowing the same to remain.

¹As, where they are not explicitly in form that such knowledge must be established. *Chicago & A. R. Co. v. Platt* (1878) 89 Ill. 141; *Lincoln Street R. Co. v. Cox* (1896) 48 Neb. 807, 67 N. W. 740; *East St. Louis Pkg. & Provision Co. v. Hightower* (1879) 92 Ill. 139; *Toledo, P. & W. R. Co. v. Conway* (1871) 61 Ill. 162; *Fordyce v. Yarborough* (1892) 1 Tex. Civ. App. 260, 21 S. W. 421 (error to instruct a jury that, "if the defect in the car was latent

and not known to plaintiff, and could not be known by the exercise of ordinary care, then the duty was on the master to acquaint him with the defect, if any existed"). *A fortiori* a verdict for the servant cannot stand where an instruction is given to the effect that a master impliedly warrants the fitness of his appliances. *Columbus, C. & I. C. R. Co. v. Troesch* (1873) 68 Ill. 545, 18 Am. Rep. 578. Compare § 25, *ante*. Where the negligence alleged is that defendant company allowed a ditch under the track, 6 inches square, to remain uncovered, and the testimony is conflicting whether it was more dangerous than a covered ditch would have been, it is error to instruct the jury that if they found the ditch to be more dangerous than if covered the defendant was guilty of negligence, even though he had made due inquiry as to the safest kind of ditch, and adopted the uncovered one because he believed it to be safer. *De Forest v. Jewett* (1880) 19 Hun. 509, Affirmed in (1892) 88 N. Y. 264. Here, however, the aspect of the evidence on which stress was laid was that the servant had assumed the risk, and could not call upon the master to make alterations.

²*Louisville & N. R. Co. v. Kelly* (1891) 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407; *Warner v. Erie R. Co.* (1868) 39 N. Y. 468.

³See Pollock on Torts, p. 36. That foresight is one of the elements of adequate care is also noticed in *Gibson v.*

point of view leads us to two principles, each of which possesses a special applicability of its own in the solution of the problems suggested by certain phases of the evidence presented in cases of this class.

On the one hand, the master is charged with knowledge that, if he allows the instrumentalities of his business to fall below a certain standard of efficiency, the servants who use or are brought into proximity with them in the course of their employment will probably be injured. He does not conduct himself as a prudent man, therefore, if, in carrying on his business, he fails to take due notice of the fact that machinery and other inanimate appliances, after the lapse of a certain period of time, longer or shorter according to the nature of the material, will certainly deteriorate in quality, as the normal result of wear and tear incident to their use; and that animate appliances undergo a similar deterioration in a sufficient number of cases to render it his duty to conduct his business with a view to the probability that danger will occasionally arise from this cause. The obligations which his assumed possession of this information entails, as regards the maintenance and inspection of his instrumentalities, are dealt with in chapters IX., *ante*, and XI., *post*.

On the other hand, the conception may be entertained that the master's liability is dependent upon whether the event which caused the injury was or was not one which a prudent man would have anticipated when he furnished the instrumentality or made the arrangements which he is alleged to be negligent in furnishing or making. The question thus presented is, it should be observed, essentially different from another, in the decision of which the assumed capacity of the defendant to forecast the future is the criterion of his responsibility,—the question, namely, whether the necessary juridical connection can be established between the thing done and the hurt suffered. In the one case, the test of anticipation is applied for the preliminary purpose of ascertaining whether any negligence is imputable to the defendant.²

Pacific R. Co. (1870) 46 Mo. 163, 2 Am. Rep. 49. "An essential element of negligence is a knowledge of facts which render foresight possible, and the circumstances necessary to be known before the liability for the consequence of an act or omission will be imposed must be such as would lead a prudent man to apprehend danger. All are bound to foresee what experience will teach them is likely to follow from the existence of a given state of facts. In a given case, action must be dictated by expe-

rience." *Hope v. Fall Brook Coal Co.* (1896) 3 App. Div. 70, 38 N. Y. Supp. 1040, citing *McVish v. Peckskill* (1895) 91 Hun. 327, 36 N. Y. Supp. 1022, to the point that "where there is no knowledge of facts which would lead to an apprehension of danger, there can be no imputation of foresight or blameworthiness, and these two ingredients are necessary to constitute negligence."

²The logical connection is apparent from the language used in a ruling that, where a servant is injured by such an

The unexpected character of an occurrence is a feature which serves to differentiate an accident from an event which implies a want of care.³

In the other case, the law makes use of this test as the appropriate means of determining whether, supposing the defendant to have been negligent, his negligence was the efficient cause of the injury. The latter predicament, so far as it is material in the present treatise, will be discussed in chapter XLII., *post*. The former now claims our attention.

The results of applying the test of imputed anticipation will be brought out most clearly by stating them both from a negative and a positive standpoint.

141. Liability imputed because accident should have been anticipated. Operation of natural laws.—It is the duty of the master having control of the times, places, and conditions under which the servant is required to labor, to guard against probable danger in all cases in which that may be done by the exercise of reasonable caution.¹ He is, therefore, negligent, if, in the ordering of his business and the selection of his plant, he fails to provide for contingencies which are likely, or not unlikely, to occur.² He is bound to take into account the limits of the mental and physical capacity of his employees.³ This

occurrence as the caving in of a ditch, the question for the jury is not whether the employer omitted to do something which would have prevented the accident, but whether he exercised ordinary care and prudence in conducting the excavation, in view of the probable consequences which would result from the falling of the overhanging earth while the servant was in the ditch. *Leonard v. Collins* (1877) 70 N. Y. 90. See also *Kelly v. Forty-Second Street R. & St. N. Ave. R. Co.* (1890) 58 Hun, 93, 11 N. Y. Supp. 344, where it was remarked, in regard to the place of work, that under the circumstances there was no cause for apprehension, and therefore no negligence in not taking precautions.

³ See *Crutchfield v. Richmond & D. R. Co.* (1877) 76 N. C. 320, where the court remarked: "An accident is 'an event from an unknown cause,' or 'an unusual and unexpected event from a known cause;' 'chance; casualty.' As, if a railroad bed be in good order, and the engine and cars be in good order, and the engineer and other attendants be skillful and careful, and yet a rail breaks, the train is crushed, and the em-

ployees and passengers are killed,—that is an unusual and unexpected event from a known cause, an accident. But if the track be out of order, and the engine worn and unmanageable, and on account thereof there be the like result as above stated on the good road, that is not an unusual and unexpected event, but a usual and expected event from such a cause. It is not accident, but it is negligence."

¹ *McGovern v. Central Vermont R. Co.* (1890) 123 N. Y. 280, 25 N. E. 373.

² A motion for a nonsuit on the ground that the injury resulted from a risk assumed by the servant is properly denied when the evidence is conflicting as to whether the event which caused the injury could have been foreseen and guarded against by the exercise of proper care on the part of the master. *Pantzar v. Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 368, 2 N. E. 24.

³ The danger of having the cage of a freight elevator so hung that when it has reached the level of the highest floor of the building its top is within an inch of the beam from which the cable is suspended is obvious, and the employer is, under such circumstances,

obligation, in some instances, can only be discharged adequately by properly instructing the servant. See chapter xvi., *post*. He is also deemed to fall short of the required standard of care if he leaves fixed objects in such a position that, although not ordinarily dangerous, some particular class of employees would be injured if a certain conjunction of circumstances, reasonably to be anticipated in the course of their employment, should intervene.⁴ So, also, he must take into account the properties of such substances as he employs for the purposes of his business, and the operation of familiar physical laws upon these substances.

Under this head he is chargeable with knowledge of the following facts: That all instrumentalities of the organic class deteriorate, more or less rapidly, while they are being used;⁵ that certain materials will

bound to foresee that an engineer operating the hoisting machinery from a position in which he is unable to observe accurately the height to which the cage has ascended will sooner or later make a miscalculation and allow it to strike the beam, and, as a probable consequence, break the cable. *Stringham v. Stewart* (1885) 100 N. Y. 516, 3 N. E. 575. Reversing (1882) 27 Hun. 562. It is a catastrophe to be expected, that brakemen, called, as they often are, to their brakes on the top of the train on dark and stormy nights, when they have no means of determining exactly the portion of the road over which the train is passing, will be injured by a bridge so low that a man cannot pass under it in a standing posture. *Louisville, N. A. & C. R. Co. v. Wright* (1888) 115 Ind. 378, 17 N. E. 584 (this reasonable consideration is, however, not treated by all courts as a controlling element in this class of cases. See § 71, *ante*). In *Ryan v. Los Angeles Ice & Cold Storage Co.* (1896) 112 Cal. 244, 32 L. R. A. 524, 44 Pac. 471, the plaintiff had been injured by the explosion of a gas generator while he was tightening the nuts of the belt in it, a kind of work which he was not hired to perform, and in which he had had no experience. The defendant contended that it was not liable unless such result should reasonably have been foreseen, but the court said: "There was evidence tending to show that it was unsafe for a skilled engineer or machinist to tighten up these nuts while the pressure was on, though it may be conceded that the preponderance of the evidence was that it could be done by skilled men with reasonable

safety; but there was little conflict in the evidence tending to show that it was dangerous for unskilled or inexperienced men to do it. In order to fix the liability of the master, it is not necessary that he should know that injury will inevitably follow, for that would exhibit express malice or intent to injure; nor that he knew or believed that it would probably occur, for that would be recklessness, scarcely less criminal."

'Failure of a railway company to place a wire strung across a side track high enough to avoid a mechanic making repairs on the roof of a passenger car is negligence, if it can be reasonably anticipated by the company that at some time a passenger car may pass under the wire while such repairs are being made, even though the position of the wire may not be negligence as regards brakemen. *Stollenberg v. Pittsburgh & L. E. R. Co.* (1895) 165 Pa. 377, 30 Atl. 980. A master is liable for injuries to a servant from the falling of an elevated footway which he used in his work, the support of which had been forced out of place by a passing wagon, when it was so constructed that such accidents were reasonably and fairly to be expected. *Sellock v. Landon* (1889) 55 Hun. 19, 8 N. Y. Supp. 573.

⁵ Negligence of the master is shown in respect to the use of a chain, where the evidence is that the chain had been used for eight years; that the life of such a chain was four or five years; that it had become weakened by long usage, some of the links being worn a quarter off; and that the master's superintendent had been notified of its imperfect and unsafe condition. *Honijus v.*

not support more than a certain weight;⁶ that ropes and cables will break if subjected to a certain tensional strain;⁷ that a certain kind of timber is not suitable for use in the manufacture of some particular tool;⁸ that a certain kind of coal is unfit for use in a steam boiler;⁹ that timber which is constantly kept in a damp condition will be apt to grow rotten;¹⁰ that certain kinds of strains crystallize iron;¹¹ that structures will be endangered if subjected to vibratory movements by the operation of heavy machinery;¹² that banks of earth disinte-

Chambersburg Engineering Co. (1900) 196 Pa. 47, 46 Atl. 259. The jerkings of a bucket used for hoisting coal may be so frequent as to charge the master with knowledge that, after a given period, the chain which supports it has become materially weakened. *McClain v. Henderson* (1898) 187 Pa. 283, 40 Atl. 285. In *Bruce v. Beall* (1897) 99 Tenn. 363, 41 S. W. 145, it was held to be erroneous to tell the jury that the liability or nonliability of the defendants depended upon whether cables like the one in question would last for a limited or an unlimited time; that, if the former should be found true, and the defendants used them beyond the limit, they were absolutely, and without more, liable; and that, if the alternative proposition were correct, then they were not liable. The court said that the jury should have been instructed that, if they found that this life was limited, and that the defendants knew, or by the exercise of reasonable care could have known, this fact, and continued to use them for a greater length of time than was safe, then they should find for plaintiff, if they, at the same time, found that the plaintiff was in the exercise of ordinary care. The bearing of this doctrine on the master's obligation to inspect the various parts of his plant from time to time will be discussed in the next chapter.

⁶ *Tromm v. Swift* (1895) 163 Mass. 273, 39 N. E. 1013 (hemlock boards which readily become brittle in cold weather used for scaffold in winter; verdict for plaintiff sustained); *Flynn v. Harbor* (1892) 46 N. Y. S. R. 872, 19 N. Y. Supp. 705 (floor gave way when piled with materials of more than twice the weight necessary to bring the strain up to a breaking point); *Flynn v. Union Bridge Co.* (1890) 42 Mo. App. 531 (bridge gave way under excessive strain); *Johnson v. First Nat. Bank* (1891) 79 Wis. 414, 48 N. W. 712 (roof

of shed gave way under an excessive weight).

⁷ A railroad company is liable for injuries sustained by an employee caused by the breaking of a cable by which a plow was drawn over cars to unload gravel therefrom while the train was standing on a curve, where additional appliances should have been employed on account of the unusual strain on the cable when used in that position. *Cincinnati, I. St. L. & C. R. Co. v. Roesch* (1891) 126 Ind. 445, 26 N. E. 171.

⁸ *Daly v. Lee* (1901) 167 N. Y. 537, 60 N. E. 1109, Affirming (1899) 39 App. Div. 188, 57 N. Y. Supp. 293 (green elm wood used for the head of a maul in combination with a hard wood handle).

⁹ *Missouri, K. & T. R. Co. v. Walker* (1894) Tex. Civ. App.) 26 S. W. 513 (condition of coal so inferior that it causes flames to burst through the furnace door is not a latent defect that cannot be discovered by ordinary diligence).

¹⁰ See *Malone v. Hathaway* (1875) 6 Thomp. & C. 1, 3 Hun, 553, where the supports of a wash tub gave way (judgment Reversed in [1876] 64 N. Y. 5, 21 Am. Rep. 573, but only on the ground that the man charged with the duty of looking after the supports was a fellow servant of the plaintiff).

¹¹ *Mogulshan v. Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574.

¹² *Bowen v. Chicago, B. & K. C. R. Co.* (1888) 95 Mo. 268, 8 S. W. 230 (railway company chargeable with knowledge of the danger to a bridge caused by the vibrations incident to operating a pile driver upon it); *Ryan v. Fowler* (1862) 24 N. Y. 410, 82 Am. Dec. 315 (factory owner required to take notice of the effect which the vibrations communicated by a water wheel to a wall near which it is running may have in loosening the support of a small privy built out from the wall).

grate if exposed alternately to a freezing and a thawing temperature;¹³ that structures must be so planned as to be capable of withstanding the pressure of high winds;¹⁴ and also such shocks as they may be exposed to from the ordinary operations of the business;¹⁵ that conditions which produce a jolting or other unexpected movement of a vehicle are apt to be dangerous in various ways to persons on or near it;¹⁶ that climatic influences will occasionally produce certain conditions which are apt to endanger the safety of instrumentalities which are reasonably secure in normal weather;¹⁷ that the putrefaction of blood and flesh generate bacteria which are dangerous when brought into contact with the eye;¹⁸ that the fumes given off by various substances used in industrial processes are poisonous to persons

¹³ *Holden v. Fitchburg R. Co.* (1880) 129 Mass. 268, 37 Am. Rep. 313; *De-weese v. Meramec Iron Min. Co.* (1893) 54 Mo. App. 476, Affirmed (1895) 128 Mo. 423, 31 S. W. 110.

¹⁴ If a master erects a novel kind of structure, which will be peculiarly exposed to wind pressure, it is his duty to supplement the theoretical needs of safety by a liberal margin of safeguards against mistakes or underestimates. *Hesketh v. New York C. & H. R. R. Co.* (1899) 37 App. Div. 78, 55 N. Y. Supp. 898 (where a signal house spanning a railway was blown down). The contention that, when the requisite amount of care was known by the company to be unknown, the company used all that was requisite, was rejected. "It may be," said the court, "that the company used all that it knew to be requisite. But the company knew that it did not know what was actually requisite, and hence it knew that, if it only used all that it knew to be requisite, it was liable to fall short in respect to the unknown quantity. Hence, it was its duty to do more than its actual knowledge of what was requisite suggested, and to make reasonable provision against the unknown. If it did not do this, it failed in reasonable care. Whether it so failed was a question for the jury."

¹⁵ *Snitzel v. Odunah Iron Co.* (1898) 116 Mich. 149, 74 N. W. 488 (plank of platform in mine so loosely fastened that it was moved by a blast).

¹⁶ A street railway company is bound to know that, with a low dasher in front, the almost inevitable result of bucking would be to suddenly hurl the motoneer upon the ground in front of the car, and thus to greatly imperil his

life. *Beardsley v. Minneapolis Street R. Co.* (1893) 54 Minn. 504, 56 N. W. 176. A jury may properly find an employer guilty of negligence if the evidence shows that workmen moving heavily loaded trucks across a platform were unnecessarily endangered by being required to wheel them over a slight jog, which was apt suddenly to stop their progress. *Nelson v. Allen Paper Car-Wheel Co.* (1886) 29 Fed. 840.

¹⁷ The case is for the jury where a railroad company allowed a depression to exist on its road, in which water accumulated which flooded the track and froze. *Bulhoff v. Michigan C. R. Co.* (1895) 106 Mich. 606, 65 N. W. 592. A railway company which constructs a line skirting a mountain range and crossing numerous gulches and ravines is bound to know that sand, gravel, and other materials will be washed down these channels during the rainy season, and will probably accumulate on the upper side of the track to such an extent as to cover it, unless openings are provided for the purpose of allowing the debris to pass under the roadbed. *Union P. R. Co. v. O'Brien* (1892) 1 C. C. A. 354, 4 U. S. App. 221, 49 Fed. 538, Affirmed (1896) 161 U. S. 451, 46 L. ed. 766, 16 Sup. Ct. Rep. 618. A railroad company is liable for the death of an employee by the breaking of an engine through a bridge the piers of which have been displaced by ice driven against them by a storm greater than usual, but no greater than a person acquainted with the climatic conditions of the country might have expected. *Carney v. Caraque R. Co.* (1890) 29 N. B. 425.

¹⁸ *Hysell v. Swift* (1899) 78 Mo. App. 39.

who inhale them;¹⁹ that fire is a casualty peculiarly incident to, and reasonably to be anticipated in the prosecution of, some particular kinds of business;²⁰ that the contact of water with molten metal, or other substance which is heated to a sufficiently high temperature, will generate steam suddenly, and so cause an explosion;²¹ that certain inflammable substances will ignite under certain circumstances;²² that special precautions must be taken where the business involves the

¹⁹ *Wagner v. H. W. Jayne Chemical Co.* (1892) 147 Pa. 475, 23 Atl. 772 (plaintiff here was a common laborer who was temporarily taken from outside work and assured by the superintendent that the fumes would not hurt him). Whether a malting company was negligent in permitting the fumes of sulphur and salt to escape from the kiln room in its malting house to another floor, where they overcame an employee working there, so that he fell into a machine and was injured, is a question for the jury. *Deisenrieter v. Kraus-Merkel Malting Co.* (1896) 92 Wis. 164, 66 N. W. 112. In *O'Keefe v. National Folding Box & Paper Co.* (1895) 66 Conn. 38, 33 Atl. 587, the court, while conceding that the defendant was chargeable with knowledge that poisons are volatilized by the action of steam, held, on demurrer, that plaintiff could not recover for injuries received in steaming the colored paper in question, the reasons assigned being that there was an averment that it wore the appearance of being poisoned, or was of a kind in the manufacture of which poison was commonly used; that, so far as the complaint showed, the servant's means of determining whether the paper was poisoned was as good as the defendant's; and that, if this were not so, the complaint should have stated the facts which constituted the difference between the positions of the parties in this regard. Considering that the plaintiff here was a youth of only nineteen years of age, this decision seems to be an unwarrantably strict application of the rules of technical pleading. Even assuming that it was excusable for the master to be ignorant of

the properties of the paper,—a very dubious point, if the doctrine stated at the beginning of this section is to be adopted,—it was surely a question for the jury, whether a person of the plaintiff's age and presumable education had the same means of ascertaining the danger as the master. The knowledge here ascribed to him is, we suspect, not possessed by a large number of persons much older than he was, and better educated than a workman in a factory usually is.

²⁰ *Jones v. Granite Mills* (1878) 126 Mass. 84, 30 Am. Rep. 661, *arguendo*.

²¹ *Smith v. Peninsular Car Works* (1886) 60 Mich. 501, 27 N. W. 662; *New Albany Forge & Rolling Mill v. Cooper* (1892) 131 Ind. 363, 30 N. E. 294; *Mellon v. La Plata Min. & Smelting Co.* (1882) 9 Fed. 861; *Western Tube Co. v. Polobinski* (1900) 94 Ill. App. 640.

²² The fact that turpentine, into which the servant of a manufacturer of household utensils is required to plunge spoons just taken out of boiling grease, has never caught fire will not relieve the master from liability, as the danger of ignition is one which should have been anticipated by a person having the technical knowledge which the manufacturer must have possessed. *Latorra v. Central Stamping Co.* (1896) 9 App. Div. 145, 41 N. Y. Supp. 99. A master is liable for the death of a servant, caused by an explosion of escaping gas, where the place is unsafe and the event absolutely certain on account of the absence of the necessary appliances. *Nichols v. Brush & D. Mfg. Co.* (1889) 53 Hun, 137, 6 N. Y. Supp. 601.

production or use of things of the imminently dangerous class, such as an explosive;²³ or a current of electricity.²⁴

For injuries caused by his failure to foresee the results of the operation of the natural laws which he is presumed to comprehend the master is liable, even though such results may be of an unusual character.²⁵ Compare case cited in notes 17 and 22, *supra*, and § 116, *post*.

²³ *Bertha Zinc Co. v. Martin* (1895) 93 Va. 791, 22 S. E. 869; *Smith v. Oxford Iron Co.* (1880) 42 N. J. L. 467, 36 Am. Rep. 535. The explosive nature of dynamite, and the constant danger of its explosion, either through heat or collision, is a continuing admonition to an employer who uses it to take every precaution to guard against explosions. *Hather v. Rillston* (1895) 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464. In *Tissue v. Baltimore & O. R. Co.* (1886) 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 667, where the plaintiff was injured by the explosion of a dynamite magazine, the court said: "Ought the company's superintendent to have known that in placing the magazine where it was placed he was exposing the men engaged in operating the road, as well as others, to a danger to which they ought not to have been exposed? The question is not whether he did have knowledge of the peculiar properties of the material which he was intrusted to handle, for his ignorance in this particular would be no excuse for the company, but whether the agent thus intrusted ought to have been one who knew that dynamite was, from its nature, liable to accidental explosions such as could not be ordinarily foreseen or provided against. We would, indeed, be unwilling to assume that either Yardley or Armstrong knew that he was subjecting these laboring men to a danger so frightful. They may, like the men themselves, have entertained the common idea that dynamite could not be exploded but by the ordinary method of percussion. But, as we have said, this ignorance, if ignorance it was, will not excuse the company, for there was a duty resting upon it to know, as far as it was possible to know, the character of the material which it placed in the hands of its agents."

²⁴ *Myhan v. Louisiana Electric Light & P. Co.* (1889) 41 La. Ann. 964, 7 L. R. A. 172, 6 So. 799. In *Moran v. Corliss Steam Engine Co.* (1899) 21 R. I.

386, 45 L. R. A. 267, 43 Atl. 874, the court stated the question to be answered, as follows: "Was the defendant reasonably bound to have anticipated the influx to its premises of a current of electricity sufficiently powerful to dangerously charge the metallic portions of its crane, and did it take reasonable precautions for the protection of its servants employed in the handling of the crane?" and proceeded thus: "The accidental crossing or contact of wires, caused by their sagging or breaking, or by high winds and other causes, and the consequent charging of a wire carrying a light current with a dangerous current from a more heavily charged wire is, in our opinion, a sufficiently frequent occurrence to have suggested to the defendant the liability to accident from that cause, and to have required it to take precautions against injury to its employees thereby. The testimony shows that light shocks have been received from time to time by the men from the lifting chain, and the defendant had supplied rubber gloves to be used by the pourers on that account. These shocks were notice to the defendant of the leakage of electricity from the motor to the chain, and were notice that, if, from any cause, a sufficient current of electricity was brought to the motor, the leakage might be sufficient, not only to charge the lifting chain, but also the hauling chain or other metallic portions of the crane, unless properly insulated, with a dangerous current."

²⁵ *Seagull v. Chicago, M. & St. P. R. Co.* (1891) 83 Iowa, 380, 49 N. W. 990 (railroad company liable to an employee killed through its negligence in failing to guard against the danger of ice being forced upon its track at a point where the stream has several times risen to the top of the tracks in floods, and where the track has once been washed away, although no ice had previously been washed upon to track).

142. Liability denied because accident could not have been anticipated.—The negative form of the doctrine under discussion may be stated in its most general form as follows: "A person is not . . . answerable at law for a failure to avert or avoid peril that could not have been foreseen by one in like circumstances, and in the exercise of such care as would be characteristic of a prudent person so situated."¹ In other words, it is not negligence to fail to provide against an accident of such a nature that nobody could have foreseen it, and that no prudence could have anticipated the need of guarding against it.² After an accident has occurred it may be easy to see what would have prevented it; but that, of itself, does not prove nor tend to prove that reasonable or ordinary care would have anticipated and provided against it.³ This rule, like the one stated in § 126, *ante*, is sometimes rather illogically associated with another which is of much wider scope, viz., that a master does not insure his servant's safety.⁴

¹*Turner v. Goldsboro Lumber Co.* (1896) 119 N. C. 387, 26 S. E. 23.

²*Kern v. De Castro & D. Sugar Ref. Co.* (1890) 125 N. Y. 50, 25 N. E. 1071. Employers are not "liable for accidents occurring by which injury ensues, when skill and experience are not able to foresee and avoid them." *Toledo, P. & W. R. Co. v. Conroy* (1873) 68 Ill. 560. A railroad company "is not required to provide against all such unforeseen accidents or misfortunes as could not be averted by the utmost diligence in the management of the road." *Louisville & N. R. Co. v. Filburn* (1869) 6 Bush, 574, 99 Am. Dec. 690; to the same effect see *Sjoogren v. Hall* (1884) 53 Mich. 274, 18 N. W. 812; *Richards v. Rough* (1884) 53 Mich. 212, 18 N. W. 785; *Trinity County Lumber Co. v. Denham* (1892) 85 Tex. 56, 19 S. W. 1012; *Huffer v. Herman* (1896) 66 Ill. App. 481; *Del Schiore v. Hallinan* (1897) 153 N. Y. 274, 47 N. E. 309; *Hoskins v. Stewart* (1890) 57 Hun. 380, 10 N. Y. Supp. 833; *Easton v. Houston & T. C. R. Co.* (1889) 39 Fed. 65. It is error to charge a jury that a master who might have known, by the use of ordinary care and diligence, that a tool furnished his servant for use was defective is liable for the injury resulting from its use, "irrespective of any probability of harm or danger in using it." *Little Rock & Ft. S. R. Co. v. Duffey* (1880) 35 Ark. 602. Compare the statement that there may be defects, and these may have been known, and yet they may have been such as no amount of

care and caution on the part of the employer would have disclosed to be dangerous, and that should have been guarded against as dangerous. *Morris v. Gibson* (1877) 1 Ill. App. 510.

³*Consolidated Coal Co. v. Scheller* (1892) 42 Ill. App. 619. In *Nolan v. Shickle* (1877) 3 Mo. App. 300, the theory of plaintiff was that a plank in a scaffold slid or worked off from its supports, and that the injury was thus caused; and it was reasoned that if the plank had been nailed to the scantlings, it would not have worked off. The court, however, said: "There is a plain distinction between the suggestion of a possible precaution by which an injury might probably have been avoided, and the adducing of evidence which shows that the injury was caused by negligence of the defendants. Probably, scarcely a mishap occurs where the wisdom which comes after the event cannot suggest some expedient by which, through the exercise of a more abundant caution, the accident might have been prevented."

⁴In *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312, it was said of a hazardous employment that the employer does not insure against accident, or those unforeseen perils which due and proper care and diligence cannot provide against. Injuries from accidents which the utmost stretch of human skill and foresight cannot provide against are incident to all situations and conditions in life. So, in *Cherokee & P. Coal & Min. Co. v. Britton* (1896) 3 Kan. App. 292, 45

The cases in which excusable nonanticipation of the event which caused the accident has been inferred, as a matter of law, may be classified under several different heads, indicative of the special element of improbability suggested by the facts in evidence.

The conception of an excusable nonanticipation of the event which ultimately caused the injury has been relied on, as a ground for denying the master's liability, in several cases where he had no knowledge, actual or constructive, of the conditions which created the abnormal perils.⁵ In a logical point of view, this mode of dealing with such

Pac. 100, it was said that the master is not an insurer against "unforeseen accidents."

⁵ *Elgin, J. & E. R. Co. v. Maloney* (1894) 59 Ill. App. 114 (unexpected failure of appliance, apparently in good order); *Nelson v. Allen Paper Car-Wheel Co.* (1886) 29 Fed. 840 (defect not apparent till after accident); *Finlayson v. Utica Min. & Mill Co.* (1895) 14 C. C. A. 402, 32 U. S. App. 143, 67 Fed. 507 (mine owner is not guilty of negligence toward an employee engaged in timbering an entry, in respect to a mass of gouge which its foreman and another employee have, but an hour before its fall, vigorously endeavored to bring down. The dissent of Caldwell, J., was merely on the ground that the foreman was bound to use something more than a pick to test the condition of the roof); *Cherokee & P. Coal & Min. Co. v. Britton* (1896) 3 Kan. App. 292, 45 Pac. 100 (no liability for "unforeseen accidents" from the action of the weather, or the unanticipated slipping of earth, etc., from the walls or roof of a mine); *Daly v. Alexander Smith & Sons Carpet Co.* (1893) 69 Hun, 77, 23 N. Y. Supp. 269 (weaver injured by a wire flying out of a carpet loom cannot recover of her employer, where it appears that there was no lack of inspection and no defects in the wire, and that, in spite of the greatest care, wires would fly out, to the knowledge of such weaver, whose duty it was to watch and replace them). *Independent Tug Line v. Jacobson* (1898) 84 Ill. App. 684 (fireman on a tug, injured by a line which, after being pulled tight, slipped loose and struck him, was held unable to recover, in the absence of evidence that when he was directed to take up the position where he was at the time of the accident, the captain had any reason to suppose he would be exposed to danger); *Whalen v. Michigan C. R. Co.* (1897) 114 Mich. 512, 72

N. W. 323 (engineer held to have assumed the risk of an unexpected, unusual, and unexplained failure of the air brakes to work); *Mancuso v. Contract Constr. Co.* (1895) 87 Hun, 519, 34 N. Y. Supp. 273 (unexploded charge in a rock in which plaintiff was ordered to drill holes, the fact that the charge is there not being due to any negligence on the employer's part); *In Del Signore v. Hallinan* (1897) 153 N. Y. 274, 47 N. E. 308, *Reversing* (1895) 36 N. Y. Supp. 1124, the plaintiff was killed by the fall of a mass of earth which slipped into a trench he was engaged in digging for a contractor. The mass was part of a strip of material a few feet in width between the trench where he was working and one which had been excavated for the construction of a sewer some years before, but the existence of which was not known to the defendant, except in so far as he might be deemed to have had constructive notice from the fact that there were several catch basins next the curb from which pipes led into the sewer. Defendant had provided appliances for shoring up the trench, and had instructed his employees to use them at once upon their discovering any crack in the sides of the trench showing a tendency to collapse. A careful watch had also been kept, and nothing had been observed which indicated the approaching catastrophe. Nor had the civil engineer appointed to superintend the contractor's work seen anything which indicated that the banks were liable to cave in. It was held that the defendant was not liable, as, under the evidence, the accident was of such a character that prudent men, proceeding with reasonable caution, would not ordinarily have foreseen or anticipated it. For a similar ruling, in a case where the facts were almost identical, see *Burns v. Pithcol* (1894) 75 Hun, 437, 27 N. Y. Supp. 499. In an action against a city

cases as those cited in the note is doubtless permissible. But it seems simpler to refer the master's liability directly to the fundamental principle explained in § 126, *ante*.

143. Master not bound to anticipate infliction of injuries by simple instrumentalities.— In one case the position taken was that a master has no reason to anticipate injury as the result of the use of a simple appliance by an experienced workman.¹ Under such circumstances, however, the preferable conception seems rather to be that the master's freedom from liability should be referred to the obvious character of the danger, and the servant's presumed acceptance of the risk, or capacity for protecting himself. See chapters iv. and vii., *ante*.

144. Master not bound to anticipate accidents resulting from the unusual mental or physical defects of employees.— In the absence of something to put him on his guard, an employer is entitled to conduct his business on the assumption that the mental, nervous, and other physical characteristics of his employees are not materially different from those of ordinary persons of their age and sex.¹

145. Exceptional character of accident, how far an element negativ-

for injuries caused to an employee engaged in digging a trench, the fact that an alderman, who was chairman of the sewer committee, and by trade a hatter, told the foreman before the accident that the trench needed sheathing, did not show that the trench did need sheathing, or that there was any apparent danger; the engineer and foreman having charge of the work being competent and experienced in the construction of such trenches. *Farrell v. Biddeford* (1900) 56 App. Div. 525, 67 N. Y. Supp. 483. In *Quinn v. Baird* (1900) 49 App. Div. 270, 63 N. Y. Supp. 235, it was held (three judges dissenting) that the defendant was, as a matter of law, not negligent in omitting to shore a trench, where the evidence was that his superintendent and the engineer of the city for which he had contracted to dig the trench had both examined it and pronounced shoring to be unnecessary; that, in the opinion of all the witnesses who had any experience in such work, no shoring was necessary; and that there was nothing in the nature of the soil which suggested the danger of a collapse of the sides of the trench; and that, up to the time of the accident, there were no indications of the existence of the conditions which really caused it, viz., the disintegration of the soil, produced by the moisture which had sweated from an

old water pipe, 3 feet away from the trench.

Plaintiff, an assistant to the operator of a machine used for cutting iron, was standing at the machine pulling scrap iron out of a heap, and placing it so as to be conveniently reached by the operator. While doing this the operator passed behind plaintiff and started the machine. Within two seconds after the operator passed behind him, plaintiff stumbled and placed his hands between the shears of the machine, thereby losing his fingers. Held, that it was not negligence on the part of the operator to start the machine without notice to plaintiff. *Glover v. Kansas City Bolt & Nut Co.* (1900) 153 Mo. 327, 55 S. W. 88.

¹*Borden v. Daisy Roller Mill Co.* (1898) 98 Wis. 407, 74 N. W. 91 (jury wrongly told that a ladder without spikes to prevent it from slipping was defective).

¹*Purkin v. Finfrouck* (1895) 65 Ill. App. 174 (owner of a blast furnace is not liable for injuries to an employee from the inhalation of gas not sufficient in quantity to affect an ordinary man, because the lungs of such employee were oversensitive from previous illness); *Burke v. Syracuse, B. & N. Y. R. Co.* (1893) 69 Hun. 21, 23 N. Y. Supp. 458 (railway company not liable where a youth seventeen years of age, who

ing a duty to anticipate it.—(See also conclusion of § 141, *ante*.)

A principle frequently applied is that, in certain states of the evidence, a court is entitled to declare, as a matter of law, that the catastrophe in question, though a natural and possible result of the condition which existed, was so "rare and peculiar,"¹ or so far "outside the range of ordinary experience,"² or "out of the common course,"³ that the master could not reasonably be expected to conduct his business in such a manner as to eliminate the risk of its occurrence. His nonliability is assumed to be a conclusive inference from the principle that "ordinary care does not require that every possible contingency may be anticipated and guarded against, but only such as are likely to occur."⁴ It seems fairly open to question, whether at least some of the particular applications of this principle do not overstep the proper limits of the power of a court to draw inferences of fact.⁵ It is, of

had managed a switch for two and a half months, was suddenly seized, on an occasion when a train was approaching which should have been kept on the main track, with the mistaken idea that the switch was set wrong, and, on the impulse of the moment, turned the lever so as to send the train onto a siding; *Montreal Steam Laundry Co. v. Demers* (1896) Rap. Jud. Quebec, 5 B. R. 191 (employer who surrounds his servants with all the precautions which human foresight can naturally suggest is not liable for an injury resulting from physical weakness,—as, where the hand of a girl drops into an opening and comes in contact with a heated roller, because she became unconscious while her hand was resting over such opening, through having gone to work without food).

¹ Phrase used in *McNally v. Savannah, F. & W. R. Co.* (1890) 86 Ga. 262, 12 S. E. 351.

² Phrase used in *Allison Mfg. Co. v. McCormick* (1888) 118 Pa. 519, 12 Atl. 273.

³ Phrase used in *Schultz v. Chicago & N. W. R. Co.* (1887) 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321.

⁴ *McKee v. Chicago, R. I. & P. R. Co.* (1891) 83 Iowa, 616, 13 L. R. A. 817, 50 N. W. 209, "It is a master's duty to guard a servant against probable, but not against all possible, dangers." *Lawless v. Laclede Gaslight Co.* (1898) 72 Mo. App. 679; *Drew v. Gaylord Coal Co.* (1886; Pa.) 3 Cent. Rep. 389.

⁵ In the following cases recovery was denied: *McNally v. Savannah, F. & W. R. Co.* (1890) 86 Ga. 262, 12 S. E. 351

(servant of a railway company struck in the eye by a flake of iron knocked from a swage worked on by other servants and shown to have been in average condition); *Garnett v. Phoenix Brick Co.* (1899) 98 Fed. 192 (servant injured by a fall received in consequence of the breaking of a wrench with which he was screwing on nuts); *Moore v. Great Northern R. Co.* (1897) 67 Minn. 394, 69 N. W. 1103 (brakeman was injured while coupling cars, owing to the fact that a cloud of smoke of unusual density had settled on the track after the passage of a train); *Wabash, St. L. & P. R. Co. v. Locke* (1887) 112 Ind. 404, 14 N. E. 391 (telegraph wire struck the head of an unusually tall brakeman standing on the top of a freight car which was somewhat above the ordinary height, and the blow broke the insulator of the telegraph pole, causing the wire to fall and coil about the body of the decedent, who stood, in the line of duty, on a flat car on a side track, dragging him from the car, and causing instant death); *Schultz v. Chicago & N. W. R. Co.* (1887) 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321 (injury received by a track walker, who, while standing beside the track to allow a train to pass, was struck by a piece of coal which fell from the tender); *Lawless v. Laclede Gaslight Co.* (1898) 72 Mo. App. 679 (master not bound to anticipate that a brick receptacle, which he directs his servant to penetrate for the passage of gas pipes, contains water, and that the water is poisonous and likely to find its way into the servant's shoes and injure him);

course, not open to dispute that the unlikelihood that may be predicted of a catastrophe which results from an "act of God" is sufficiently pronounced to warrant a peremptory conclusion that a servant who has been injured by it cannot be permitted to claim any indemnity.⁶ And it is also settled by the authorities that there are other events, the result of the operation of physical laws, which, though they may not be acts of God in the technical sense, happen so infrequently that it is proper to hold, as a matter of law, that a person may, without incurring the imputation of negligence, conduct his affairs on the assumption that they will not happen at all.⁷

Knox v. New York, L. E. & W. R. Co. (1893) 60 Hun 93, 23 N. Y. Supp. 198 (brakeman struck by a bolster on a passing car, which was designed to allow timbers longer than the cars room for ply while rounding curves, and which was properly devised and inspected, but suddenly worked out and struck the caboose where the brakeman was). In a case where a brakeman fell into a cattle guard while coupling cars at a place where it was not usual for trains to stop, the court said: "That a railroad company should anticipate that a train may, for some necessary purpose, be stopped at a place other than the usual stopping places, is possibly true; but at what place cannot be anticipated, and therefore they, in the exercise of ordinary diligence, are not required, as we have said, to plank every bridge or cattle guard and have the whole track so guarded as to prevent accidents to employees." *Knox v. Chicago, R. I. & P. R. Co.* (1884) 65 Iowa, 224, 226, 51 Am. Rep. 5, 21 N. W. 577. A railway company is not bound to anticipate that the breaking of a glass tube and valve stem of an automatic lubricator will occur at a time when the combined heat of the day and of the boiler will render oiling by hand dangerous. *Stockwell v. Chicago & N. W. R. Co.* (1898) 106 Iowa, 63, 75 N. W. 665. A laborer who, while moving along beside a construction car on a track, trying to stop it with a crowbar, is injured by the bar striking a post 4 feet high and 2 feet from the rail, cannot hold the employer liable for damages, on the theory that the erection of the post on the preceding day for the purpose of a temporary cattle gap, without notifying him thereof, was negligence. *Robinson Lumber Co. v. Gage* (1900; Miss.) 27 So. 998. A packing company is not liable to its em-

ployee for injury to his eye, caused by bacteria in dust from an iron railing from which, in ignorance of the danger, he was removing an accumulation of dried blood, where the dust from the railing settled over the clothing, faces, and hands of about fifteen other persons, but did not injure them, and it is not shown that it was ever before known to produce injury. *Hosell v. Swift* (1899) 74 Mo. App. 39. The court here cited the following statement of the general principle applicable to such cases: "That which never happened before, and which, in its character, is such as not to naturally occur to prudent men to guard against its happening at all, cannot, even in the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing its possible happening, and guarding against that remote contingency." *Hubbell v. Farmers* (1887) 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858. See also note 6, *infra*. Some of the cases illustrating this point of view ought, apparently, to be referred, rather to the conception discussed in subtitle A, *supra*, than to that of extreme improbability.

⁶*Coulton v. Oregon Short Line & P. R. Co.* (1893) 23 Or. 499, 32 Pac. 397 (railroad company not liable for personal injuries caused by the falling of a bridge, owing to an unusual freshet produced by an unprecedented storm); *Galveston, H. & S. A. R. Co. v. Daniels* (1892) 1 Tex. Civ. App. 695, 20 S. W. 955 (similar facts).

⁷See *Bluth v. Birmingham Waterworks Co.* (1856) 11 Exch. 781, 25 L. J. Exch. N. S. 212, 2 Jur. N. S. 333 (unusually severe frost burst water pipes), and the comments thereon in *Smith v. London & S. W. R. Co.* (1870) L. R. 6 C. P. 14, 23 L. T. N. S. 678, 19 Week. Rep. 230, 40 L. J. C. P. N. S. 21.

But there is considerable difficulty in admitting that the occurrences in the cases cited in note 5, *supra*, fall under this category, or that the unusual nature of the accident or the attendant circumstances was anything more than a factor to be considered by the jury in relation to the master's exercise of due care.⁸

146. No similar accident previously produced by same conditions.—In one group of cases the master's nonliability is referred to the consideration that no similar accident had ever before resulted from conditions resembling those complained of.¹ Compare § 136, *ante*.

⁸ In *McKee v. Chicago, R. I. & P. R. Co.* (1891) 83 Iowa, 610, 13 L. R. A. 817, 50 N. W. 209, where a brakeman who, while hanging down from a ladder of a car to examine a brake, struck against a cattle-guard fence was held to have no cause of action, Beck, J., dissented in a well-reasoned opinion which brings out so clearly the impropriety of treating the decision of such cases as being within the province of a court that it is worth while to summarize it briefly. He argued that it was an unjust discrimination to excuse the defendant because the accident was so improbable that the company could not be regarded as negligent in maintaining the fence so near the track, and to hold the plaintiff negligent because he did not know the danger. He also thought that it could not be said, as a matter of law, that such an occurrence as a brake beam getting out of order and trailing along the track was such an unusual occurrence that it could not have been anticipated, and if such occurrence was one incident to the operation of the road, the company was bound so to construct its track, cars, and cattle guards, that trainmen might, with safety, make investigations in the only way in which that could be done, *viz.*, by looking underneath the car from the position which would naturally be taken for that purpose. The view of the majority, that the flying of stones from under a car did not indicate any unusual danger, and that, as it was the duty of the brakeman to report to the conductor if he noticed that anything was amiss with the train, his conduct showed that he did not anticipate any danger, was also combated. The trailing of timbers under the car was thought to be a highly dangerous occurrence, and the brakeman, if he had reason to suspect that this was the cause of the flying of the stones, was

performing his duty in promptly ascertaining what had happened.

¹ *Wood v. Heiges* (1896) 83 Md. 257, 34 Atl. 872 (failure of a foundryman to place a guard around the place where castings were broken by the dropping of a heavy weight upon them, to arrest flying pieces of iron, does not authorize a finding of negligence on his part rendering him liable for injuries to a servant struck by a flying piece of iron while 25 or 30 feet away, where, ordinarily, the pieces of iron did not fly more than 10 feet, and had never been known to fly so far before); *Master v. Chicago, M. & St. P. R. Co.* (1884) 61 Wis. 325, 50 Am. Rep. 141, 21 N. W. 223 (railroad company not liable to an employee for an injury sustained by the throwing of a mail bag from a train by a postal agent at a place where it had never been thrown off before, the train not being propelled, at the time, at an unusual rate of speed). The question being whether the plaintiff's foot was caught by a splinter on the inside of a railroad track or rail, and as to whether the defendant is chargeable with negligence therefor, danger from such cause not being self-evident, it is competent for the defendant to show by experienced witnesses that such accidents have heretofore been unknown. *Dough v. St. Paul, M. & M. R. Co.* (1889) 42 Minn. 79, 43 N. W. 787 (syllabus by court). In *Seaman v. Kahn* (1899) 40 App. Div. 62, 57 N. Y. Supp. 554, the injury was caused by an explosion due to the convexity of a metal die, so slight as to be discoverable only by the application of a straight edge, and the master was held not to be liable, on the ground that there was no previous instance of an explosion being produced by that degree of convexity, although it was known to him that explosions were likely to occur in such machines when convex dies were used.

146a. Unexpectedly severe strain put upon appliances.— In another group recovery has been denied on the ground that the unusual event which caused the injury put a severer strain upon the instrumentality in question than that which was fairly within the contemplation of the master when he put it into use.¹ These cases really amount to the assertion, in a different form, of the doctrine that the master's duty is fulfilled if his instrumentalities are reasonably safe for the specific purposes which they were designed to subserve. See § 26, *ante*.

147. Unexpected position of the servant at the time of the accident.— In a third group the rationale of the inability to maintain the action was that the local relations of the injured person with respect to the appliance in question at the time of the accident were such as for some reason the master was not bound to anticipate.¹ These cases, it will

In a case where a brakeman was killed by a pusher engine parting from its tender by running into another engine, an instruction that the company might be found negligent in not having engine and tender attached by a safety chain was held erroneous for the reason that there was no evidence that an engine and tender had ever separated for the lack of safety chains, and that the evidence did not show that this was so likely to occur as to authorize the jury to find that their omission was actionable negligence. *Morse v. New York C. & H. R. R. Co.* (1886) 39 Hun. 414.

¹ In constructing a scaffold a master is not bound to anticipate the unusual strain to which it will be subjected when a gutter which an employee is wrenching off comes away with unexpected ease. *McLean v. Cole* (1899) 175 Mass. 5, 55 N. E. 458. In *Kern v. De Castro & D. Sugar Ref. Co.* (1890) 125 N. Y. 50, 25 N. E. 1071, a freight elevator became tightly wedged in the shaft, and the engineer, in trying to move it, put such a strain on the cables that one of them, and also the wheel on which it worked, was broken. A fragment of the wheel, in falling, rebounded from the side of the well and struck plaintiff. Held, that no action lay. In *Beasley v. Linchan Transfer Co.* (1899) 148 Mo. 413, 50 S. W. 87, a heavily loaded car broke loose from a train, and, running down an incline, at the foot of which was moored a transfer boat, rushed against her boilers and caused them to explode. The jury was held to have been erroneously charged that if the proper position of the track

on the boat was in a straight line with that on the incline, and it was not in that position, and that was the cause of the accident, the defendant was liable. The extent of the defendant's duty, it was laid down, was to have the boat in such a position that it could safely receive cars going at their ordinary speed. In *Preston v. Chicago & W. M. R. Co.* (1893) 98 Mich. 128, 57 N. W. 31, it was held that no negligence could be inferred from the fact that an engine tank was not fastened firmly enough to remain in its place when a collision occurred.

¹ *Jorgenson v. Johnson Chair Co.* (1896) 67 Ill. App. 80 (not negligence to leave the opening into an elevator shaft unguarded at night, where the master has no knowledge that anyone will go into the room opening into such shaft); *Eckles v. Chicago Ship Building Co.* (1896) 63 Ill. App. 436 (recovery denied, there being no evidence that a master could have reasonably anticipated that an employee might be injured by an open gearing 6 ft. 4 in. above the floor). The failure of an employer to repair a steam gauge attached to a boiler after notice that it was defective will not render him liable for injuries from the escape of steam from the safety valve, to an employee who went upon the boiler to ascertain where alterations could be made, believing such gauge to indicate the steam pressure, where he could not have anticipated that employees would go upon the boiler when it was under steam. *McCallum v. McCallum* (1894) 58 Minn. 288, 59 N. W. 1019.

be observed, merge into those in which contributory negligence is ascribed to a servant who puts himself unnecessarily in a dangerous position. See chapter XIX., *post*.

147a. Servant's attention diverted by fellow servant.—In one case the servant failed to recover for the reason that the particular movement to which the accident was due was caused by the fact that a sudden shout, proceeding from another employee, diverted his attention at a critical moment from the special dangers of the position in which he happened to be.¹ Such a case, it may be remarked, may also be regarded as an application of a comprehensive principle of which the defense of common employment is one particular exemplification, *viz.*, that a master is not liable for an injury which proximately results from the act of a co-servant of the injured person, whether that act was or was not negligent or otherwise tortious. In fact, the court relied, both on the theory of the master's excusable nonanticipation of the event which led to the catastrophe, and on the theory that that event broke the chain of causation.

D. WHOSE KNOWLEDGE OF ABNORMAL CONDITIONS IS IMPUTED TO THE MASTER.

148. Introductory.—All the courts proceed upon the theory that the master is chargeable or is not chargeable with the knowledge of an employee that the instrumentality in question was unsuitable for use, according as that employee was or was not one who fell within the category designated by the term "vice principal," or "*alter ego*." It is apparent, therefore, that the factors which, in any given case, determine whether the knowledge, actual or constructive, of a delinquent employee shall or shall not be imputed to the master are, for practical purposes, the same as those which determine whether the employee was or was not a representative of the master in the sense explained in the subsequent chapters which deal with the exceptions to the doctrine of common employment (XXVIII. to XXXI.). The extended discussion of the latter question in those chapters may, however, be appropriately anticipated at this point to an extent sufficient to elucidate the subject with which we are now more immediately concerned.

Where the servant with whose knowledge it is sought to charge the master is not one of those whose knowledge is, as a matter of law, im-

¹ *Cheney v. Middlesex Co.* (1894) 161 Mass. 296, 37 N. E. 175 (servant turned quickly around on hearing the outcry, chimes between which he was passing).

puted to the master, liability can be brought home to the master only by showing that the danger was actually reported.¹ *A fortiori*, where no relation whatever exists between the person notified and the injured person's employer, there is no principle upon which the latter can be charged with notice.²

It is, of course, immaterial that the individual servant who acquired the knowledge was no longer in the master's employment when the injury in suit occurred. The master's liability, so far as it depends upon his imputed knowledge, is complete, in law, as soon as the actual knowledge of the servant would have reached him if such servant had used due diligence in transmitting the information which he had obtained.³ Still less should a verdict for the defendant be directed where there is evidence which goes to show that the dangerous condition from which plaintiff's injuries resulted had been discovered by a former foreman of the defendant corporation, and actually communicated by him to its officers.⁴

As to the effect of the doctrine of imputed knowledge upon the question of the admissibility of declarations of agents as evidence, see chapter XLIII., *post*.

149. Knowledge of a mere coservant not imputed to the master.—

The knowledge of an employee who was a mere coservant of the injured person is not chargeable to the master.¹ In other words, the

¹ *Kidwell v. Houston & G. N. R. Co.* 114, 20 So. 284 (employee had left the service); *Baird v. New York C. & H. R. R. Co.* (1901) 64 App. Div. 14, 71 N. Y. Supp. 734 (employee was dead).

² *Linton Coal & Min. Co. v. Persons* (1894) 11 Ind. App. 264, 39 N. E. 214.

³ Liability has been denied where the employee who knew of a defect in a scaffold was the foreman supervising the work (*Gallagher v. Piper* [1864] 16 C. B. N. S. 669, 33 L. J. C. P. N. S. 329, 10 Jur. N. S. 879, 10 L. T. N. S. 718, 12 Week. Rep. 988); where the chief engineer of a steamboat knew of defects in the machinery (*Searle v. Lindsay* [1861] 11 C. B. N. S. 429, 31 L. J. C. P. N. S. 106, 8 Jur. N. S. 746, 5 L. T. N. S. 427, 10 Week. Rep. 891); where a carpenter in a railway shop knew that the timber used in the manufacture of the handle of a hand car was defective (*Indiana, I. & T. R. Co. v. Snyder* [1893; Ind.] 32 N. E. 1129); where a section foreman knew of the defective condition of appliances under his control (*Barringer v. Delaware & H. Canal Co.* [1879] 19 Hun, 216; *Kinney v. Corbin* [1890] 132 Pa. 341, 19 Atl.

Thus, an employer is not liable for an accident to a servant, caused by an insufficient fastening of a ladder, of which he had no other notice than that the architect, who was not his agent, discovered its dangerous condition ten minutes before. *Quinn v. Fish* (1893) 6 Misc. 106, 26 N. Y. Supp. 10.

⁴ *Bland v. Shreveport Belt R. Co.* (1896) 48 La. Ann. 1057, 36 L. R. A.

master will not be regarded as negligent in not knowing of a defect which is not known to any officer or agent for whose negligence the master would be responsible.² There is, accordingly, a misdirection wherever the jury is given to understand that notice received by any of the servants was sufficient to affect the master with liability,³ or where a right to recover is predicated upon the knowledge of a servant who was not chargeable with the performance of the duties which supervened as a result of the acquisition of that knowledge.⁴

150. Knowledge of vice principal imputed to master.— The rule which charges a master with the knowledge of any servant who is a vice principal is merely a special application of the general doctrine that notice to an agent of a corporation or individual, relating to a matter of which he has the management and control, is notice to his employer.¹ The practical consideration upon which the rule is based

141); where the only person who was aware of the temporary physical unfitness of a conductor was a subordinate employee, whose duty it was to call the conductors in a certain order, when trains were ready, and, if one could not go, to call the next (*Michigan C. R. Co. v. Dolan* [1875] 32 Mich. 510). Where there is no evidence that a brake was out of order when at the last car-inspecting station, or at any previous time, and the testimony merely goes to prove that another employee not an inspector, nor in any way responsible for the condition of the car, testified that he had noticed the defect three or four hours before the accident, no negligence on the part of the company is shown. *Chicago & E. I. R. Co. v. Hagar* (1882) 11 Ill. App. 498. Notice of a defect in a railway track, given to an official of the company who is not in charge of that part of the track, is not notice to the company. *Union P. R. Co. v. Springsteen* (1889) 41 Kan. 724, 21 Pac. 802. A master builder is not chargeable with knowledge which was imparted only to a foreman superintending a branch of the work quite distinct from that on which the injured servant was engaged. *Richardson v. Cooper* (1878) 88 Ill. 270. "Notice to a person as agent will not bind anyone as principal, unless such person really be agent of the one sought to be bound; and the agency of such person must be proved by evidence directed to that point, and cannot be proved by the mere fact of giving the notice." *McGowan v. St. Louis & I. M. R. Co.* (1876) 61

Mo. 528 (railway company held not to be chargeable with knowledge of conductor that a rope used in connection with a work train was defective, there being no evidence to show that it was his duty to see that it was safe).

² *Smoot v. Mobile & M. R. Co.* (1880) 67 Ala. 13.

³ *Brown v. Hershey Land & Lumber Co.* (1895) 65 Mo. App. 162; *St. Louis S. W. R. Co. v. Threat* (1896) 12 Tex. Civ. App. 375, 34 S. W. 152. In *Stout City & P. R. Co. v. Finlayson* (1884) 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860, the following instruction was sustained: "Even if the agents of the defendant who had charge of the engines on defendant's road, and the duty of their repair, did not positively know that the engine was unsafe, yet, if it was in fact unsafe, and they had received such reports in regard to it as ought to have put them on their guard, and to have led, by the use of proper diligence, to knowledge of the facts, the defendant must be held to the same liability as if its agents had actual knowledge." The objection made to the instruction was that "it held the defendant liable, regardless of who of its agents had knowledge of the defects of the engine, or to whom reports of such defects were made." But the court said that the proposition could not be maintained, as the instructions as a whole, and the entire case, made it perfectly plain what agents were referred to.

⁴ *Corey v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 635.

⁵ *Pittsburgh, Ft. W. & C. R. Co. v.*

has been thus tersely stated in a leading English case: "If a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others the less will he be liable."²

By referring to chapters xxviii.—xxxI., *post*, it will be seen that the cases involving the question whether an employee was a vice principal are divisible, broadly speaking, into two main classes. In one of these the representative character of the employee is regarded as being determinable by the rank which he holds in his master's service. In the other, his rank is treated as immaterial, and the master is held liable or not, according as he was or was not deputed to perform one of those strictly personal duties of the master which are variously denominated absolute, non-delegable, nonassignable, or nontransferable.

Ruby (1871) 38 Ind. 294, 10 Am. Rep. 111; *Ohio & M. R. Co. v. Collard* (1881) 73 Ind. 261, 38 Am. Rep. 134; *Crown Coal Co. v. Hiles* (1892) 43 Ill. App. 310.

²*Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, per Byles, J. In *Baltimore & O. R. Co. v. McKenzie* (1885) 81 Va. 71, the court refused to adopt the theory contended for by the railroad company, that it was not bound by the knowledge which employees charged with the duty of keeping its tracks in good order possessed as to its defective condition, saying: "To hold otherwise would be to hold that a corporation, whose lines—as we know from the record in the present case—extend into several states of the Union, and over which numerous employees are daily carried, is, so far as the guarding of its track is concerned, virtually without a representative at all. It would be to declare that to be law which is consistent neither with reason nor sound policy, and the evil consequences of which it is easy to imagine. But, if this be not the correct view, and if, in the present case, the company is not affected by notice to Flynn and Foster, how, it may be asked, could notice affect it? Would notice to an executive officer suffice? And if so, to whom? We are at a loss to answer. On the other hand, let it once be settled that the humblest watchman who walks the track is, within the scope of his employment, the representative of the company, that he has eyes to see, ears to hear, and lips to communicate to his superiors the knowledge

he acquires as to the condition of the track, or of impending danger, and the law upon this important subject will be placed upon such a footing as that none can misapprehend, and all reasonable men must approve it. That such is the law is clear, we think, not only upon reason, but from the authorities already referred to; from which it will appear that, in cases like the present, the proper inquiry is not what is the rank of the servant, but, does he represent the company? And if he does, then the result is the same, no matter whether his rank be high or low,—whether he be the president of the company, or the conductor of a train, a section master, or a common watchman." In *Saugamon Coal Min. Co. v. Wiggerhaus* (1887) 122 Ill. 279, 13 N. E. 648, one of the instructions informed the jury that if they believed from the evidence that an agent of the defendant whose duty it was to adjust said door or cause the same to be adjusted was notified that the door across the gangway was difficult and hard to open, then such notice was notice to defendant, etc. The defendant contended that notice to a co-servant of plaintiff is not notice to the common employer, but the court said: "We do not think it important to discuss the doctrine indicated by the objection urged. It is, we think, sufficient to say that, when a duty is imposed upon and intrusted to an agent by a corporation, notice to such agent of matters falling within his line of duty is notice to the corporation. The instruction, we think, stated the rule correctly."

a. Superintendents and managers.—Adverting, in the first place, to the former of the categories of vice principals just mentioned, it will be sufficient for present purposes to state that, so far as the American courts are concerned, there is complete unanimity upon the point that the master is chargeable with any knowledge possessed by a general or departmental manager or superintendent with respect to the abnormal condition of any part of the plant.³

How far the same doctrine can be said to prevail in England since the decision in *Wilson v. Merry*,⁴ is open to some doubt. See chapter xxix., *post*.

b. Superior servants of lower grade than superintendents.—There are also decisions in which the knowledge of employees of a lower grade than superintendents has been held imputable to the master. These embody the so-called "superior servant doctrine" (explained in chapter xxviii., *post*), and, so far as they rest upon that doctrine, would not be regarded as good law except in the comparatively small

³ *Corcoran v. Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369; *Cone v. Delaware, L. & W. R. Co.* (1880) 81 N. Y. 206, 37 Am. Rep. 491 (1878) Affirming 15 Hun. 172; *Schultz v. Rohe* (1893) 53 N. Y. S. R. 576, 24 N. Y. Supp. 118; *Upton v. Bartlett* (1891) 37 N. Y. S. R. 193, 13 N. Y. Supp. 451; *Patterson v. Pittsburg & C. R. Co.* (1875) 76 Pa. 389, 18 Am. Rep. 412; *Huntingdon & B. T. Mountain R. & Coal Co. v. Decker* (1876) 82 Pa. 119 (1877) 84 Pa. 419; *Pantzar v. Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 368, 2 N. E. 24; *Frazier v. Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467; *Caldwell v. Brown* (1866) 53 Pa. 453; *Quincy Coal Co. v. Hood* (1875) 77 Ill. 68; *Texas Mexican R. Co. v. Whitmore* (1883) 58 Tex. 276; *Deere v. Mercier Iron Min. Co.* (1895) 128 Mo. 423, 31 S. W. 110, Affirming (1893) 54 Mo. App. 476; *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216; *Bowers v. Union P. R. Co.* (1885) 4 Utah, 215, 7 Pac. 251; *Wilson v. Williamantic Linen Co.* (1883) 50 Conn. 433, 47 Am. Rep. 653; *Kroeg v. Atlanta & W. P. R. Co.* (1886) 77 Ga. 202; *Goggin v. D. M. Osborne & Co.* (1896) 115 Cal. 437, 47 Pac. 248; *Delaney v. Hilton* (1883) 18 Jones & S. 341; *Higgins v. Williams* (1896) 114 Cal. 176, 45 Pac. 1041; *Swift v. Foster* (1896) 163 Ill. 50, 44 N. E. 837; *Ashley Wire Co. v. Mercier* (1895) 61 Ill. App. 485; *Louisville, N. A. & C. R. Co. v. Graham* (1890) 124 Ind. 89, 24 N. E. 668; *Fr. Wayne v. Christie* (1900) 156 Ind. 172, 59 N. E. 385; *Campbell & Z. Co. v. Roediger* (1894) 78 Md. 601, 28 Md. 901; *Nash v. Nashua Iron & Steel Co.* (1882) 62 N. H. 406; *Missouri P. R. Co. v. Peregon* (1887) 36 Kan. 424, 14 Pac. 7; *Missouri P. R. Co. v. Patton* (1894; Tex. Civ. App.) 25 S. W. 339 (1894; Tex.) 26 S. W. 978; *Hanlon v. California Bridge & Constr. Co.* (1899) 127 Cal. 232, 47 L. R. A. 597, 59 Pac. 577; *Connor v. Saunders* (1894) 9 Tex. Civ. App. 56, 29 S. W. 1140. The knowledge of one who customarily superintends a mill in the absence of a superior officer is assimilated to that of a regular superintendent. *Chapman v. Southern P. Co.* (1895) 12 Utah, 30, 41 Pac. 551. For the purposes of the rule here under discussion, a captain of a ship is, by some courts, treated as being of the same grade as a manager of a business on land. *The A. Heaton* (1890) 43 Fed. 592; *The Norwegian v. Jensen* (1869) 52 Ill. 375 (defective rigging). A complaint which alleges that a plaintiff was injured by the negligence of the defendant's superintendent, in furnishing for the plaintiff's use a newly invented blasting powder, "without first informing himself whether it could be safely used," is not demurrable on the theory that it does not show that the injury was caused by the negligence of the defendant. *Spelman v. Fisher Iron Co.* (1870) 56 Barb. 151. ⁴ (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30.

number of jurisdictions which have adopted it. But, as will be seen from the memoranda indicating the character of the conditions of which the servants in question had knowledge, it is clear that, upon the facts, all these cases might be sustained as applications of the second of the two tests of vice principalship above noted.⁵

⁵A roadmaster. *Thompson v. Chicago, M. & St. P. R. Co.* (1883) 5 McCrary, 542, 18 Fed. 239 (dangerous bank). A mate of a ship. *The Carolina* (1886) 30 Fed. 199 (defective rope); *The Ethelred* (1899) 96 Fed. 446 (defective rope); *The Phœnix* (1888) 34 Fed. 769 (defective hoisting apparatus). A division superintendent and a division engineer. *Illinois C. R. Co. v. Welch* (1869) 52 Ill. 183, 4 Am. Rep. 593 (warning dangerously near track). A foreman in charge of the underground work of a mine. *Consolidated Coal Co. v. Wombacher* (1890) 134 Ill. 57, 24 N. E. 627, affirming (1889) 31 Ill. App. 288 (defective condition of roof). A foreman in charge of workmen. *Union Bridge Co. v. Trebban* (1900) 92 Ill. App. 259 (defective machinery). Foreman of switch crews, under whose supervision trains are made up. *Reed v. Burlington, C. R. & N. W. Co.* (1887) 72 Iowa, 166, 33 N. W. 451 (defective cars). An assistant roadmaster and assistant foreman in control of a trackman. *Atchison, T. & S. F. R. Co. v. Vapole* (1895) 55 Kan. 401, 40 Pac. 669 (defective hand car). An employee in full control of the work of building a culvert. *Kansas P. R. Co. v. Little* (1877) 19 Kan. 267. A foreman who is in charge of the works, and who hires the employees; precise function and rank not stated. *Atchison, T. & S. F. R. Co. v. Midgett* (1895) 1 Kan. App. 138, 40 Pac. 995 (defective machinery). A roadmaster. *McDermott v. Hannibal & St. J. R. Co.* (1881) 73 Mo. 516, 39 Am. Rep. 526 (1885) 87 Mo. 285 (incompetent servant). A foreman of a gang of laborers. *Sullivan v. Hannibal & St. J. R. Co.* (1891) 107 Mo. 60, 17 S. W. 748 (defective scaffold). A section foreman. *Clowers v. Wabash, St. L. & P. R. Co.* (1886) 21 Mo. App. 213 (defective lever of hand car). An overseer of the yards of a stock company. *Union Stock Yards Co. v. Larson* (1893) 38 Neb. 492, 56 N. W. 1079 (defective draw-bridges). A conductor. *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312 (train not suffi-

ciently manned). A railway engineer; precise functions not stated. *Nashville & C. R. Co. v. Elliott* (1860) 1 Coldw. 611, 78 Am. Dec. 506 (defective bridge). A conductor. *Louisville & N. R. Co. v. Kenley* (1893) 92 Tenn. 207, 21 S. W. 326 (defective foot rest on car). In *Chicago & N. W. R. Co. v. Jackson* (1870) 55 Ill. 492, 8 Am. Rep. 661, it was held that, as employees having charge of the inspection and repair of railway cars are superior in authority to a brakeman, he cannot be prejudiced by their negligence, and notice to them of a defect is notice to the company. In *Chicago & E. I. R. Co. v. Rung* (1882) 104 Ill. 641, it was held that a jury might properly find a railroad company liable for an injury caused by a defect in an engine which had been frequently reported by the engineer to his immediate superior, the court taking the ground that, upon the principle that everyone is presumed to do his duty, it was reasonable to assume that through the foreman the company obtained the requisite notice, whether he had immediate charge of the machinery or not. In Texas, an employee with power to hire and discharge hands, and to exercise the control over them by which that power is customarily accompanied, is deemed a vice principal not merely for the purpose of receiving notice of the incompetency of his own subordinates, with a view to the protection of other employees (see next note), but also for the purpose of ascertaining the condition and quality of the appliances with which they are required to work, and guarding those subordinates themselves against injury therefrom. *Texas Mexican R. Co. v. Whitmore* (1883) 58 Tex. 276; *Connor v. Saunders* (1894) 9 Tex. Civ. App. 56, 29 S. W. 1140; *International & G. N. R. Co. v. Smith* (1895; Tex. Civ. App.) 30 S. W. 501.

A railroad company is chargeable with knowledge that its employees habitually violated a promulgated rule, when such fact is known to the division superintendent. *Galveston, H. & S. A. R. Co. v. Stinkard* (1897) 17 Tex. Civ.

c. Servants furnishing or maintaining inorganic instrumentalities.—The cases cited in the subjoined note proceed upon the doctrine that the master is affected with the knowledge of any employee who is intrusted with the discharge of any duty incident to the furnishing or maintenance of suitable instrumentalities of the inorganic class.² The facts involved will be more fully stated in chapter xxxi., *post*.

App. 585, 44 S. W. 35. A complaint as to the incompetency and inexperience of a coservant, made to an employee having direction of the work of the complainant and certain other switchmen, but having no authority to employ and discharge any employee, will not affect the company with notice, so as to render it liable for personal injuries sustained by the complainant because of such inexperience and incompetency. *Galveston, H. & S. A. R. Co. v. Eckels* (1894) 7 Tex. Civ. App. 429, 26 S. W. 1117.

² *Northern P. R. Co. v. Herbert* (1885) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Texas & P. R. Co. v. Thompson* (1895) 17 C. C. A. 524, 30 U. S. App. 549, 70 Fed. 944; *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216; *Elledge v. National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720, Rehearing denied in 34 Pac. 852; *Wilson v. Willimantic Linen Co.* (1883) 50 Conn. 433, 47 Am. Rep. 653; *Toledo, W. & W. R. Co. v. Fredericks* (1874) 71 Ill. 294; *Hess v. Rosenthal* (1896) 160 Ill. 621, 43 N. E. 743; *Chicago & N. W. R. Co. v. Jackson* (1870) 55 Ill. 492, 8 Am. Rep. 661; *Chicago & I. R. Co. v. Scanlan* (1897) 170 Ill. 106, 48 N. E. 826; *Goldie v. Werner* (1894) 151 Ill. 551, 38 N. E. 95; *Falkenau v. Abrahamson* (1896) 66 Ill. App. 352; *Consolidated Coal Co. v. Scheiber* (1896) 65 Ill. App. 304; *Indiana, I. & I. R. Co. v. Snyder* (1895) 140 Ind. 647, 39 N. E. 912; *Ohio & M. R. Co. v. Stein* (1894) 140 Ind. 61, 39 N. E. 246; *Terre Haute & I. R. Co. v. Fowler* (1900) 154 Ind. 682, 48 L. R. A. 531, 56 N. E. 228; *Locke v. Sioux City & P. R. Co.* (1877) 46 Iowa, 109; *McGhee v. Bell* (1897) 38 S. W. 792 (reversed on rehearing in 19 Ky. L. Rep. 267, 39 S. W. 823, but merely on the ground that the evidence showed that the servant was fully aware of the danger, and voluntarily used the appliance at his own risk); *Mattise v. Consumers' Ice Mfg. Co.* (1894) 46 La. Ann. 1535, 16 So. 400; *Cowan v. Umbagog Pulp Co.* (1897) 91 Me. 26, 39 Atl. 340; *Anderson v. Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585; *Ashman v. Flint & P. M. R. Co.* (1892) 90 Mich. 567, 51 N. W. 645; *Lytle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571; *Burnside v. Novelty Mfg. Co.* (1899) 121 Mich. 115, 79 N. W. 1108; *Dutzi v. Giesel* (1886) 23 Mo. App. 676; *Brothers v. Cartter* (1873) 52 Mo. 372, 14 Am. Rep. 424; *Lewis v. St. Louis & I. M. R. Co.* (1875) 50 Mo. 495, 21 Am. Rep. 385; *Hollenbeck v. Missouri P. R. Co.* (1897) 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 36 Am. Rep. 454; *Willman v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 530, 28 Pa. 625; *Corey v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 635; *Van Stenburgh v. Thornton* (1895) 58 N. J. L. 160, 33 Atl. 380; *Cerrillos Coal R. Co. v. Deserant* (1897) 9 N. M. 49, 49 Pac. 807; *Kain v. Smith* (1882) 89 N. Y. 375; *Rima v. Rossie Iron Works* (1890) 120 N. Y. 433, 24 N. E. 940; *Glaze v. Belmore, L. & W. R. Co.* (1878) 14 Hun 446; *Larkin v. Washington Mills Co.* (1899) 45 App. Div. 6, 61 N. Y. Supp. 93; *Missouri P. R. Co. v. Sasse* (1893) Tex. Civ. App. 22 S. W. 187; *Cunningham v. Union P. R. Co.* (1885) 4 Utah, 206, 7 Pac. 795; *Davis v. Central Vermont R. Co.* (1892) 55 Vt. 84, 45 Am. Rep. 590; *Baltimore & O. R. Co. v. McKenzie* (1885) 81 Va. 71, *Skidmore v. West Virginia & P. R. Co.* (1895) 41 W. Va. 293, 23 S. E. 713; *Riley v. West Virginia C. & P. R. Co.* (1885) 27 W. Va. 145; *Schultz v. Chicago, M. & St. P. R. Co.* (1879) 48 Wis. 375, 4 S. W. 399; *Besser v. Chicago & N. W. R. Co.* (1878) 45 Wis. 477. In *Brabbs v. Chicago & N. W. R. Co.* (1875) 54 Wis. 289, an action against a railroad company for injuries sustained by a brakeman while coupling cars, owing to a defect in the engine, the following instruction was held correct: "If the company had any individual in their service whose duty was made by the company itself to be in charge of the repairs of engines, to

d. Servants having power to hire and discharge other servants.—It is agreed by all the American courts that, where an employee is invested with the power to appoint and remove, promote and degrade, other servants, any knowledge, actual or constructive, which he may possess as to their incompetency is imputed to the master.⁷ This principle has lately been declared to be applicable also to the case of an officer entitled to suspend a servant of the company temporarily.⁸ On

whom engineers were to report when engines became out of repair, and whose duty it was made by the company to act on such reports,—to see that the engines were put in repair.—I must instruct you that, if such notice was given to any person thus acting in behalf of the defendant in this case, such notice is good notice to the company." In *Johnson v. Missouri P. R. Co.* (1888) 96 Mo. 340, 9 S. W. 790, it was insisted that the trial judge erred in overruling defendant's objection to the reception of the evidence of two blacksmiths, Smith and Hardy, which tended to show that the hammer which caused the injury had not been repaired with reasonable skill. But the court said: "The petition alleges that the hammer in question had been repaired at defendant's own shops, and it was owing to the imperfect and brittle condition and flaws in the hammer negligently furnished him that plaintiff was injured. Under these averments the evidence was admissible, and also as bearing upon the question of defendant's knowledge as to the defective condition of the hammer, the repair of it having been made or done by defendant's agent in its repair shops, thus making the knowledge of the agent the knowledge of its principal; and in this respect this case is distinguished from the case of *Guttridge v. Missouri P. R. Co.* (1887) 94 Mo. 468, 7 S. W. 476." It has been held that an injured servant cannot recover, where, so far as the evidence goes, the employee through whom it is sought to impute notice to the master might have been merely a workman sent to repair one particular defect. *Illinois C. R. Co. v. Bardsdor* (1901) 94 Ill. App. 206. But there does not seem to be any reason why the absolute quality of the master's obligations should not be conceived to attach to such a piece of work.

⁷ *Illinois C. R. Co. v. Jewell* (1867) 16 Ill. 99, 92 Am. Dec. 240; *Baird v. New York C. & H. R. R. Co.* (1901) 64

App. Div. 14, 71 N. Y. Supp. 734; *Hubbard v. Harrison* (1871) 38 Ind. 323; *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1871) 38 Ind. 294, 322, 10 Am. Rep. 111; *Francis v. Kansas City, St. J. & C. B. R. Co.* (1895) 127 Mo. 658, 28 S. W. 842, 30 S. W. 129; *Lanning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417; *Baile v. New York & H. R. Co.* (1874) 50 N. Y. 356, 17 Am. Rep. 325; *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579; *Gilman v. Eastern R. Co.* (1866) 13 Allen, 433, 90 Am. Dec. 210; *Marcell v. Hannibal & St. J. R. Co.* (1884) 85 Mo. 95; *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285; *Texas Mexican R. Co. v. Whitmore* (1883) 58 Tex. 270; *Missouri P. R. Co. v. King* (1893) 2 Tex. Civ. App. 122, 20 S. W. 1014, 23 S. W. 917; *Corr v. Ohio River R. Co.* (1893) 38 W. Va. 456, 18 S. E. 596; *Cherokee & P. Coal & Min. Co. v. Dickson* (1900) 10 Kan. App. 391, 61 Pac. 450.

⁸ *Baltimore & O. R. Co. v. Henthorne* (1896) 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634. The court said, on the contention that knowledge must have been brought home to the division superintendent or to the superintendent of motive power, whose office was several hundred miles distant: "It would be exceedingly difficult to bring home in any way the knowledge of an engineer's incompetency to these two officers, under the circumstances. For the safety of the road, the company was obliged to intrust to many other agents than those mentioned the power to suspend incompetent servants, in order that the company's property, and the persons whose lives were in its custody, should not be exposed to extraordinary dangers. Clearly, the men whose duty to the company it was to exercise this power were those through whom the company sought its knowledge of the manner in which its servants were discharging their duties. They were agents for the very purpose of discovering habitual negligence, and of prevent-

the other hand, a master is, in most states, not chargeable with the knowledge of an employee who has no power to dismiss the incompetent employee.⁹ But the rule is otherwise in at least one of the states in which the "superior servant doctrine" is applied.¹⁰

c. *Servants whose duty is restricted to reporting defects.*—The fact that the employee with whose knowledge it is attempted to charge the master was not under any duty to report the delinquencies of an incompetent employee was adverted to as one of the elements which tended to show, in a case already cited, that he was not a vice principal.¹¹ But whether the mere possession of that power will constitute him an agent of the master, so far as to render the latter chargeable with his knowledge, seems to have never been directly determined. In view of the functions of such an employee, it seems difficult to contend that he is not a vice principal.¹²

ing danger from its presence, when discovered, by immediate suspension. We entirely concur with the court below in holding that an officer entitled to suspend a servant of the company temporarily is an officer who has authority to receive notice for the company of the incompetency of the person to be suspended. If, as was testified to, Fitzgerald, the yard master, had power to suspend the engineer from a further discharge of his duties when he found that he was intoxicated, if the master mechanic had the power to suspend an engineer pending inquiry for any dereliction of duty, if the train master had the same power,—then all these officers were persons whose knowledge of the incompetency of employees under their supervision was the knowledge of the company, and the failure on their part to use due diligence in observing the competency and sobriety of those whom it was their duty to suspend for incompetency or inebriety was the negligence of the company. This obligation of a railway company to use due diligence in the selection and retention of its employees is one which, in view of the assumption of risk by the employees of any casual negligence of their fellow servants, it is most important to maintain, and it should not be frittered away by limiting those whose knowledge shall be the knowledge of the company to one or two officers so far removed from possible knowledge as to make it a hopeless task to bring the incompetency of subordinate servants to their notice."

⁹ *Smith v. St. Louis & S. F. R. Co.* (1899) 151 Mo. 391, 48 L. R. A. 368, 52 S. W. 378 (head hostler of railway roundhouse); *Baltimore Elevator Co. v. Neal* (1886) 65 Md. 438, 5 Atl. 338 (captain of tugboat belonging to an elevator company); *Reiser v. Pennsylvania Co.* (1892) 152 Pa. 39, 25 Atl. 175 (train despatcher).

¹⁰ In Tennessee it has been held that as a conductor is the immediate superior of the engineer, his knowledge of such engineer's incapacity is imputed to the company, although he has no authority to discharge him. *East Tennessee, V. & G. R. Co. v. Wright* (1897) 100 Tenn. 56, 42 S. W. 1065.

¹¹ *Smith v. St. Louis & S. F. R. Co.* (1899) 151 Mo. 391, 48 L. R. A. 368, 52 S. W. 378.

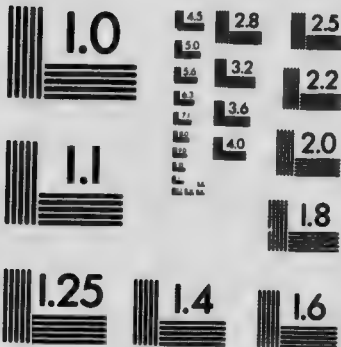
¹² Under the "consociation" theory (see chapter XXVII., *post*), a night-watcher employed by a railroad company to note and report upon the conduct of the foreman of a night engine, whose duty it is to make up trains is a fellow servant with the foreman. *Chicago & E. I. R. Co. v. Geary* (1884) 119 Ill. 383. But the doctrine of non-delegable duties was not referred to. The decision, in *Hord v. Mississippi C. R. Co.* (1874) 50 Miss. 178, that a conductor is a fellow servant of a section foreman, whose duty it was to report defects in the track, necessarily implies that the court considered that notice to the latter was not notice to the company. But here again the theory of non-delegable duties was not considered by the court.

As to the circumstances under which the knowledge of certain employees that a rule is habitually violated will be held to justify the inference that the rule is virtually abrogated, see chapter xv., *post*.



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CHAPTER XI.

DUTY OF INSPECTION.

151. Introductory.

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152. Rule where the employer is himself the manufacturer of the instrumentality.

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As to the liability for negligent inspection, so far as it depends upon the quality of the duty, as being delegable or non-delegable, see chapters xxxi. C, xxxii. D, *post*.

As to the duty of inspection under statutes, see chapter xviii. *post*.

151. Introductory.— The rule stated under its positive and negative

forms in §§ 125, 126, *ante*,—*viz.*, that a master is or is not chargeable with the consequences of knowledge, according as he or his agents could or could not have obtained it by the exercise of ordinary care,—casts upon him, in some instances, a duty of a much more stringent and onerous character than that of taking notice of those abnormally dangerous conditions which, in this branch of the law of negligence, are designated by some such term as obvious, palpable, apparent, and the like. The standard of ordinary care is frequently not deemed to be satisfied unless he also obtains knowledge of any abnormal conditions which are discoverable by a formal inspection, made for the express purpose of ascertaining whether they exist, and as minute and searching as a reasonably cautious man, mindful of the safety of his servants, may be supposed to deem proper under the circumstances.

The extent and character of the master's duty to inspect his plant depend upon somewhat different considerations, according as it is predicated of the time when that plant is first brought into use, or of some subsequent time. It will, therefore, be necessary to segregate the two classes of cases thus indicated.

A. DUTY AT THE TIME WHEN THE INSTRUMENTALITIES ARE FIRST BROUGHT INTO USE.

152. Rule where the employer is himself the manufacturer of the instrumentality.—It is well settled that a master who, himself, manufactures and supplies an instrumentality is chargeable with such knowledge of its defects as ordinary care during such manufacture would have disclosed.¹ Manifestly, the responsibility which is thus

¹ *Standard Oil Co. v. Bowker* (1895) 141 Ind. 12, 40 N. E. 128 (ladder); *Tennessee Coal, I. & R. Co. v. Carrier*, (1901) 47 C. C. A. 161, 108 Fed. 19 (tear in a mine); *Atchison, T. & S. F. R. Co. v. Carey* (1897) 58 Kan. 815, 49 Pac. 662 (machinery); *Feltham v. England* (1865) 4 Fost. & F. 460, per Cockburn, Ch. J. (structure); *Foley v. Webster* (1892) 2 B. C. 138. Affirmed in 21 Can. S. C. 580 (defective railway and chock blocks in a sawmill. The case is for the jury where a mine owner, in constructing a gangway into his mine, did not examine the roof for loose and fractured pieces of coal, so that they might be removed. *Vanessa v. Catsburg Coal Co.* (1893) 159 Pa. 403, 28 Atl. 200. A railroad company, it has been said, is properly held liable where a brakeman was killed owing to the fracture of a brake rod, in which the evidence shows there was a crack or flaw at the point where it passed through the clasp which is attached to the top of the car, and that the defect existed when the rod was originally placed in the car. *Hickman v. Missouri P. R. Co.* (1886) 22 Mo. App. 344. The report does not state whether the company was the manufacturer of its own cars or not, and it is therefore doubtful whether this case belongs to this category or the following. In *Daly v. Lee* (1899) 39 App. Div. 188, 57 N. Y. Supp. 293, a distinction was noted between cases where a master has furnished tools of apparently good quality, manufactured by others, and cases where the tools are furnished by a master who has knowledge of the defective quality of the material used.

assumed to come into existence continues as long as the defects remain unremedied, irrespective of whether the instrumentality was or was not properly inspected after being put into use.² This is apparently all that is meant by the language used in several Illinois cases to the effect that, where negligence in the original construction of an instrumentality is established, it is not necessary to show that the master had notice of its dangerous condition.³ That there was negligence in the construction implies, *ex hypothesi*, that there were abnormally dangerous conditions which were or ought to have been discovered. But, if this be the actual position of the court, the phraseology used

² *McGar v. National & P. Worsted Mills* (1901) 22 R. I. 347, 47 Atl. 1092; *Stock v. Le Boutillier* (1897) 19 Misc. 112, 43 N. Y. Supp. 248, Affirming (1896) 18 Misc. 349, 41 N. Y. Supp. 649. This distinction is also referred to in *Greenleaf v. Illinois C. R. Co.* (1870) 29 Iowa, 14, 4 Am. Rep. 181, where the court said: "If this car was wanting in the appliances referred to by plaintiff, at the time of its construction, and so continued when put and used upon the road, it would not be necessary to show further notice or knowledge thereof on defendant's part, or that of its agents, in order, thus far, to fix liability." See also the extract from the opinion in *Vosburgh v. Lake Shore & M. S. R. Co.* (1884) 94 N. Y. 374, 46 Am. Rep. 148, in note 9 of the following section.

³ *Crown Coal Co. v. Hiles* (1892) 43 Ill. App. 310, citing *Alexander v. Mt. Sterling* (1874) 71 Ill. 369, where the court said: "For the proper construction of this sidewalk, it is not denied the town authorities were responsible. They should see to it that such structures are properly made, and reasonably safe; and they must be kept so. They, being the projectors of them and the builders of them, are, in law, held to a knowledge of their original condition. It would be absurd to say they must have notice of the original defect, when they themselves are the authors of the defect. Why notice to a party of original defects in a work he is bound to make safe and reasonably free from defects? The town being in fault at the outset, no notice was necessary." In *Chicago & A. R. Co. v. Maroney* (1897) 170 Ill. 529, 48 N. E. 953, Affirming (1896) 67 Ill. App. 618, the court said: "If the scaffold had been

properly constructed, and had become unsafe by reason of a defect subsequently arising, the doctrine that the liability of the appellant company depended upon notice of such subsequent defect might have had application; but not so when the defect occurs by reason of the failure of the appellant company to discharge the duty cast upon it by law, of providing a safe place for the appellee to work. If it omitted its duty in this regard, no rule of law required it should be notified of its own failure before it should be deemed answerable for injuries resulting from such failure." In *McBeath v. Rawle* (1900) 93 Ill. App. 212, an instruction to the effect that, where a scaffold, properly constructed, has become unsafe by reason of defects subsequently arising, the liability of the master depends on notice of such subsequent defect, was held to be rightly refused as misleading, where the defect existed at the time when the scaffold was first erected. *Illinois C. R. Co. v. Harris* (1894) 53 Ill. App. 592, held that the rule that, if a car has become defective by use in the service of a company, notice of the defect is necessary to affect the company with liability, while, if a defectively constructed car is used, notice is not necessary, was applicable to foreign, as well as to domestic, cars; criticising instructions which made the defendant's liability depend on his knowledge, actual or imputed, of the fact that two foreign cars were so constructed that the buffers did not prevent the drawbars from coming together. But this decision can scarcely be correct, as it runs counter to the fundamental principle that knowledge, actual or imputed, is one of the essential elements of negligence. See preceding chapter.

is not very apt for the purpose of conveying the real conception on which the decisions are based.

In cases where the evidence tends to show that the dangerous conditions supervened subsequently to the time when the instrumentality was put into use, it is error to give an instruction which fails to make it clear to the jury that notice of those conditions cannot arise out of anything connected with the original construction. In this state of the evidence, such an instruction, as the court pointed out in the case cited, runs counter to the general principle that a master is only liable where actual or constructive notice of the defect is brought home to him⁴.

153. Rule where the employer is a purchaser of the instrumentality.—(See also § 163, *post*.)—Negligence is sometimes inferable from the fact that the purchase of the instrumentality was carried out in a careless manner.¹ But, in the absence of some special feature of this sort, the extent of the master's responsibility in cases of this type is necessarily determined with reference to the principle that he may rely in some degree upon the assumption that the parties who supplied an instrumentality exercised ordinary diligence in seeing that it was fit for use. All the authorities are agreed that the fact of the appliance being of an approved pattern (see chapter VI., *ante*), and having been bought from a reputable maker, is at least *prima facie* evidence that the defendant was not negligent in requiring his servant to use it.² But most of the cases go much further than this, holding that such facts are conclusive in the master's favor in the absence of some circumstance which would put a prudent man upon inquiry at the time of the purchase or afterwards.³ *A fortiori* is the defendant re-

⁴ *Baldwin v. St. Louis, K. & N. R. Co.* (1885) 68 Iowa, 37, 25 N. W. 918, holding that there was a misdirection where the jury were told that if certain timbers were piled by the employees of the defendant, under its direction, that would be notice, of itself sufficient to bind the defendant for negligence.

¹ A jury is therefore justified in finding the defendant liable where it appears that his representative, in ordering an appliance, omitted to inform the manufacturers for what use it was intended, or that care in making it and testing its strength might be insured, and defects it, if any, might be thus detected.

Consolidated Ice Mach. Co. v. Kiefer (1888) 26 Ill. App. 466.

² *Schroeder v. Michigan Car Co.* (1885) 56 Mich. 132, 22 N. W. 220.

³ *Kaye v. Rob Roy Hosiery Co.* (1889) 51 Hun, 519, 4 N. Y. Supp. 571. This aspect of an employer's liability was carefully considered in *Shea v. Wellington* (1895) 163 Mass. 364, 40 N. E. 173, where it was held that the owner of a quarry owes no duty to its employees to inspect exploders given to the quarrymen for use, where the manufacturers of them make repeated inspections in the process of construction, the exploders are as good as any made, no one but an expert could make a competent inspection, and no defect in any has been discovered after use for several years. Plaintiff put reliance on the fact that on the day of the accident he saw one with a seam in it, or one which exposed the mercury; but there was no evidence that an exploder of this kind with a seam in it, or with any other defect of construction, had ever before been dis-

garded as free from culpability where there is specific testimony going to show that the appliance had been thoroughly tested by the maker before he sold it.⁴

If, in a case where the master is entitled to put an article into use without inspecting it, his managing agent undertakes to make an inspection, that inspection will not affect the master's liability for an injury to an employee, caused by a defect not discovered, unless he knows and consents to the agent's performing the work as a part of that which he is employed to do. In the absence of such consent, the inspection is regarded as supererogatory and outside of the scope of his employment.⁵

This right of the employer to rely upon the quality of articles so purchased involves the corollary that he is not under any obligation to subject the articles to tests as minute as can and ought to be applied by a manufacturer.⁶

covered by anybody. The principle of *Grand Rapids & I. R. Co. v. Huntley* (1878) 38 Mich. 537, 31 Am. Rep. 321, 586, 14 N. E. 574, and the other rulings which dealt with the master's duty to supervise the instrumentalities of his business, with a view to discovering whether it was necessary to replace or repair them, were held inapplicable. The court said these exploders "were not a part of the machinery or tools of the defendant. They were articles to be used in his business, which were instantly consumed in use. It was his duty, so far as he could do it by reasonable effort, to see that none but safe and proper articles were furnished to his servants for such a use, but he was only called upon to do what was reasonable under the circumstances." In *Reynolds v. Merchants' Woolen Co.* (1897), 168 Mass. 501, 47 N. E. 406, the bursting of the cylinder of a dusting machine, a few weeks after its purchase from a reputable maker, was in question. It was held that if "a machine is bought of a reputable maker,—in other words, if reasonable care is used in selecting the maker, and then reasonable care is used, upon the delivery of a machine, in inspecting it, in setting it up, in putting it in operation,—it cannot be said that the defendant, or an employer, would be liable in such a case, although it might clearly appear, later on, that the maker of that machine was careless, and put in improper materials, or did imperfect and improper work." See also the cases cited in the following notes. That similar principles are controlling where a passenger is suing a railway company for damages, see

⁴ As in *Fuller v. New York, N. H. & H. R. Co.* (1900) 175 Mass. 424, 56 N. E. 574; *Shea v. Wellington* (1895) 163 Mass. 364, 40 N. E. 173.

⁵ *Shea v. Wellington* (1895) 163 Mass. 364, 40 N. E. 173.

⁶ In a leading New York case it was held that an employer is not liable for injuries caused by a latent defect in a bar of iron purchased from a reputable house, and used in making a hook, when he orders the best quality, and the defect could not have been discovered without resorting to extraordinary tests. *Carlson v. Phœnix Bridge Co.* (1890) 55 Hun. 485, 8 N. Y. Supp. 634. The court said: "The case shows that such iron is tested in its manufacture to make it homogeneous, and that such is known to be the practice at all well-established mills. A minute examination and test would have detected the latent defect in the iron in this case, yet the institution of such an examination would evidence extraordinary vigilance and caution, and that is never exacted from a master in respect to the provision of implements for his servant. There is no conceivable defect which may not be discovered by some possible test. The law is designed for application to the ordinary affairs of business and everyday life. All men are not scientists, and all are justified in acting upon certain assumptions and appearances. We do not test a harness or a wagon which we order from a reputable dealer before we use the same, and there were no circum-

Nor do the courts, in determining whether an employer should have ascertained the existence of a defect, hold him responsible for the lack of technical knowledge which is ordinarily possessed only by per-

stances surrounding the manufacture of the hook in question which would induce a prudent man to depart from the usual course of procedure, and adopt special and extraordinary precautions." This judgment was affirmed by the court of appeals (1892; 132 N. Y. 273, 30 N. E. 750), which said: "When articles are manufactured by a process approved by use and experience, and apparently properly finished and stamped, it is not usual for them to be tested again in quality, and such examinations are not generally required by law. All the best iron and steel is made in a few large establishments. The evidence shows that all practicable tests are used during the process of manufacture, and the completed product represents the best articles that can be produced. It passes into the hands of dealers, and so reaches the consumer. If the best refined iron is required, the purchaser may assume that the tests necessary to produce that article have been properly made and the work properly done. He must see that the work that he undertakes to do is properly performed, but if the tool breaks from an internal defect in the material, not apparent from an external examination of the iron, or in the process of making the tool, the master is no more responsible than he would be if he had purchased it ready made in the market, or if it had broken from an external, apparent defect produced by use, of which he was not chargeable with knowledge." To the same effect, see *Powers v. New York C. & H. R. R. Co.* (1891) 60 Hun. 19, 14 N. Y. Supp. 408, Affirmed in 128 N. Y. 659, 29 N. E. 148; *Doyle v. White* (1896) 9 App. Div. 521, 41 N. Y. Supp. 628; *Stourbridge v. Brooklyn City R. Co.* (1896) 9 App. Div. 129, 41 N. Y. Supp. 128. An employer who procures a steam boiler from a reputable manufacturer cannot be held liable for an explosion on the ground that the iron of which it was constructed was of inferior quality, where that fact could have been discovered only by breaking or cutting the plates. Nor is he liable if the explosion was caused by defects in the riveting, which could not have been discovered without taking the boiler apart and removing the rivets. *Bullard v. Hitchcock Mfg. Co.* (1889) 51 Hun. 188, 1 N. Y. Supp. 949. Ordinary care does not require a railroad company to take out the dome cap and throttle valve of a locomotive purchased from reputable manufacturers. It would be an unreasonable rule to require such a company to keep on hand mechanical contrivances and employ experts capable of making the highest tests, like those which the manufacturers are in a position to make. *Clyde v. Richmond & D. R. Co.* (1894) 65 Fed. 482. There the special master, whose report was approved *in toto* by Newman, D. J., considered that the rule laid down by the Supreme Court of the United States in *Richmond & D. R. Co. v. Elliott* (1893) 149 U. S. 266, 37 L. ed. 728, 13 Sup. Ct. Rep. 837, meant that the employer was not bound to do more than test an engine to see that it was in good running order, where it had been purchased from a manufacturer of good standing. Compare *Indianapolis, B. & W. R. Co. v. Toy* (1879) 91 Ill. 474, 33 Am. Rep. 57 (no liability where defect in locomotive could only have been discovered by cutting through its walls). *Nashville & C. R. Co. v. Elliott* (1860) 1 Coldw. 611, 78 Am. Dec. 506, which is to the opposite effect, has been overruled in *Nashville & D. R. Co. v. Jones* (1871) 9 Heisk. 27. In *Roughan v. Boston & L. Block Co.* (1894) 161 Mass. 24, 36 N. E. 461, a block having a hidden flaw broke a month or two after it was put in use, in doing the work for which it was designed, thereby injuring an employee. The employer sued the manufacturer for breach of warranty. The court said: "The plaintiff was not under an absolute obligation to his servant that the block should not break. The block was one of that class of implements which the employer is expected to buy; and the care he is bound to use in providing it is in making the selection, and includes such inspection as will detect defects which can be found by a careful inspection. But this does not require him to find a possible hidden flaw the presence of which there is no reason to apprehend, and which is so concealed in the construction of the machine that it cannot be discovered by inspection; nor does it

sons in certain lines of business, and which it would therefore be unjust to expect other persons to possess.⁷

Similar principles are applied in favor of a person who engages the services of an independent contractor to erect a structure, the rule being that one who, having no knowledge of scaffold building, employs a builder whom he knows to be skilful and experienced to erect a scaffold for the use of his employees, does not owe them a duty of inspection, the proper performance of which would have disclosed the defect.⁸ But a case in which a structure is purchased from another person, who has been using it in the business in which the defendant succeeded him, stands upon a somewhat different footing, as will be seen from the ruling cited in the subjoined note.⁹

make him responsible for such a flaw in the block which he has purchased with due care."

An instruction requiring an employer to show that he had applied "all known tests" to determine the safety of a boiler is erroneous where there is no evidence introduced to indicate what known tests might have been applied by him, and which were omitted, the jury being thus left to determine of their own volition what tests ought, in their judgment, to have been applied. *Ballard v. Hitchcock Mfg. Co.* (1889) 51 Hun, 188, 4 N. Y. Supp. 940. On the second appeal of this case (1893; 71 Hun, 582, 24 N. Y. Supp. 1101. Affirmed (1895) 145 N. Y. 619, 40 N. E. 163) this point was not discussed.

⁷*Deane v. Roaring Fork Electric Light & P. Co.* (1895) 5 Colo. App. 521, 39 Pac. 346 (machinery); *Prentice v. Wellsville* (1893) 50 N. Y. S. R. 557, 21 N. Y. Supp. 820 (blasting compound). In *Allison Mfg. Co. v. McCormick* (1888) 118 Pa. 519, 12 Atl. 273, where an explosion of paint used in painting the interior of a water tank was involved, the court held that the master may provide materials such as are ordinarily used in the same business, but is not required to secure the best known materials, or to subject such as he does provide to a chemical analysis in order to settle by experiment what remote and possible hazard may be incurred by their use.

⁸*Devlin v. Smith* (1882) 89 N. Y. 470, 42 Am. Rep. 311, as explained in *Vosburgh v. Lake Shore & M. S. R. Co.* (1884) 94 N. Y. 374, 46 Am. Rep. 148. *Devlin v. Smith* was followed in *Butler v. Townsend* (1891) 126 N. Y. 105, 26 N. E. 1017, and the effect of the two

cases has quite recently been stated to be that, where an appliance (as a boat) has been constructed by a skilful and experienced builder, the master is liable to his servant for injury resulting in its construction, and is at liberty to accept the same without inspection. *Wittenberg v. Friederich* (1896) 8 App. Div. 433, 40 N. Y. Supp. 895.

⁹In *Vosburgh v. Lake Shore & M. S. R. Co.* (1884) 94 N. Y. 374, 46 Am. Rep. 148, the court rejected the contention that a railroad company acquiring by purchase an additional line already built and in operation, of which an existing bridge forms a part, owes no obligation to its employees running trains over such bridge, except to keep it in as good condition as when it was bought, and has a right, without negligence, to assume the sufficiency of its original plan and construction; and denied the application of the doctrine of *Devlin v. Smith* (1882) 89 N. Y. 470, 42 Am. Rep. 311, for two reasons: (1) Because the defendant here bought the bridge of another railroad company, and without any selection or choice of the builder, such as was made in the scaffold case; and (2) because the bridge, unlike the scaffold, was not a temporary but a permanent structure, intended for continuous use through the years. The court said: "Assuming, as we must, what the jury could have found from the evidence,—that the bridge when purchased was unsafe and dangerous by reason of defects in its original plan and construction, and which defects were obvious to the eye of a skilled inspector, and easily and surely ascertainable by a structural analysis determining its factor of safety,—it was negligence on the part of the defendant to continue

A doctrine less favorable to the master than that applied in the cases thus far cited has been applied in some jurisdictions.¹⁰

There are at least two very weighty reasons why the theory that a

its use in the face of such obvious defects without ascertaining their effect upon its strength and capacity. The defects pointed out by the evidence were almost all obvious to the eye of a competent examiner. The learned counsel for the appellant insists that the defendant did employ suitable and competent persons to inspect the bridge, who did make the usual and customary examinations, and that there is no dispute about that in the evidence. But it is plain that the inspection described in the proofs as customary is that made by a company which has built its own bridges. In such case it already knows the plan and mode of construction, and is already responsible for the lack of reasonable care in either the design or its execution. The subsequent inspection is directed only to its perfect repair, and to indications of weakness. But, where the company does not know either the safety of the plan or the prudence of the construction, because it has purchased it completed, and in use, and knows nothing of the skill or want of skill of the builder, an inspection which takes no heed of that inquiry when defects are obvious, and lack of safety is indicated and may be easily ascertained, is not sufficient. Of course, the test of actual, previous use goes for something. It might justify a continuance of that use until a competent inspection could reasonably be made, but would not justify a neglect when it was made to observe and remedy obvious defects and elements of danger, because in the original plan, and an effort to learn, by a well-understood process, whether, in view of its apparatus, it had the ordinary surplus strength."

In *Morton v. Detroit, B. C. & A. R. Co.* (1890) 81 Mich. 423, 46 N. W. 111, the extent of the defendant's duty to test the strength of a chain was discussed. The court first laid down the general rule that railroad companies "cannot be held responsible for hidden defects in tools or appliances, if they have used reasonable care in procuring them; but they are not absolved from the duty of testing or inspection because they have bought in the open market of reputable dealers, or employed competent workmen to construct them. If

any defect exists which a careful test or inspection would have discovered, the master must be held to have knowledge of such defect, and to be responsible for it." The court then proceeded thus: "It is urged that the railroad company has done all it can do when it buys of reputable dealers material and machinery for use by its employees; that it cannot, when buying, inspect personally every link of a chain to see whether it is properly welded. But it can do this personally, as well as it can personally do any act involved in the operation of its road. It not only can, but its duty requires that it shall, before it is placed on a car, cause every link of every chain used by its employees in places or under circumstances involving danger in case the chain should break, to be carefully tested and inspected by someone competent to judge of its fitness for the utmost strain that is likely to come upon it. If this duty had been performed in this case, the cold weld in the chain would very likely have been discovered, and the chain condemned as unfit for its intended use." See also *Sim v. Dominion Fish Co.* (1901) 2 Ont. L. Rep. 69, where the court discussed the defendant's liability, on the assumption that it was for the jury to say whether the handles of a box designed to sustain a heavy weight should have been inspected by a competent person before it was put into use. In the following passage the Supreme Court of the United States also recognizes the obligation of making at least some kind of examination, where it was laid down that, if a railroad company, after purchasing an engine from a manufacturer of recognized standing, made such reasonable examination as was possible without tearing the machinery to pieces, and subjected it fully to all the ordinary tests which are applied for determining the efficiency and strength of completed engines, and such examination and tests disclosed no defect, it could not, in an action by an employee of another company, be adjudged guilty of negligence because there was a latent defect which subsequently caused the destruction of the engine, and injury to him. *Richmond & D. R. Co. v. Elliott* (1893) 149 U. S. 266, 37 L. ed. 728, 13 Sup. Ct. Rep. 837.

master is entitled, as a matter of law, to rely on the quality of appliances obtained from a reputable manufacturer should be rejected. One of these is that such a theory is essentially inconsistent with the doctrine of non-delegable duties. See chapter xxxi., *post*. As between master and servant, this doctrine should, it is submitted, always be regarded as controlling whenever it comes into conflict with that which declares that the employer of an independent contractor is not liable for his negligence. See chapter xxxi. A, *post*. The situation is materially different from that presented where a stranger is the injured person, inasmuch as the former of these doctrines has no application to such cases, except where statutory duties are violated. The other reason is that, according to the rule adopted by most of the authorities, the servant has ordinarily no right of action against the manufacturer, and, if he cannot recover from his master, he cannot recover at all.¹¹ Assuming the defect which caused the injury to have been discoverable by the exercise of proper care, someone ought, in fairness, to be held responsible for its existence, and it is a mere mockery of justice to absolve the master simply on the ground that he was justified in trusting to the skill and diligence of a person who, if that skill and diligence were, as a matter of fact, not exercised, is not liable to the servant because there is no privity of contract between them.

The question as to what extent the employer had a right to rely upon the skill of a manufacturer is, of course, immaterial, where he was put upon inquiry as to the condition of the appliance which caused the injury.¹²

B. DUTY OF INSPECTION WHILE THE INSTRUMENTALITIES ARE IN USE.

154. Generally.—After an instrumentality has been put into use, the presumption that proper skill and care were exercised in manufacture begins to lose its evidential importance with greater or less rapidity, according to circumstances (see § 158, *post*), and, as a matter of fact, that presumption is usually a negligible quantity. It

¹¹ See a note contributed by the author to *Cleveland, C. C. & St. L. R. Co. v. Berry* (Ind.) 46 L. R. A. 38, *et seq.*, and an article published by him in the *Law Quarterly Review* of April, 1900, and in the *Canada Law Journal* for the same month.

¹² As, by the report of an employee. *Delaney v. Hilton* (1883) 18 Jones & S. 341. There it was held that the servant could maintain an action for in-

juries caused by the breaking of a chain of an elevator bought from first-class machinists, where the engineer had previously stated to the employer's manager that the chain was not strong enough. (*Sedgwick, Ch. J.*, dissented, on the ground that the engineer's statement was merely the expression of an opinion, and that the employer was entitled to rely on the judgment of the machinists.)

follows, therefore, that, whether the instrumentality in question was obtained from another party, or was manufactured or constructed by the master himself, the servant's right of action will almost always be determined simply and solely by the principle that he was bound to subject that instrumentality to a systematic examination at such regular intervals as its nature and quality indicated to be proper, and at such other times as were suggested by specific circumstances calculated to put a prudent man on inquiry as to its condition.

This duty is sometimes spoken of as if it were one peculiarly and specially incident to the duty of keeping the instrumentalities in good condition.¹ See chapter ix., *ante*. But this phraseology, wherever it occurs, is doubtless suggested by the evidence which happened to be under review. The cases cited in subtitle A show that the duty of inspection may, under some circumstances, be predicated with reference also to the time when the instrumentalities are first put into use, and, in some of the general statements relative to the existence of the duty, this logical connection is more or less distinctly recognized.² Any other theory, it is manifest, would be inconsistent with the fundamental principle which underlies all the cases, *viz.*, that, except in so far as his obligations may be modified by the doctrine of common employment, the master's responsibility for the safe condition of his instrumentalities attaches at the first moment when they are put into use, and continues as long as they remain in use. Such being the character of the master's responsibility, the existence of the duty of in-

¹ The master's duty to the servant requires of the former reasonable care and skill in furnishing safe machinery and appliances, and in keeping such machinery and appliances in safe condition, including the duty of making inspection and tests at proper intervals. *Comben v. Belleville Stone Co.* (1896) 59 N. J. L. 224, 36 Atl. 473. "There is a duty of the employer arising out of the liability of machinery or appliances to get out of order at a time to time, or to become unfit for use from wear or from age and decay, and this is the duty of inspection, as meant by the law." *Armour v. Brazosa* (1901) 191 Ill. 117, 66 N. E. 904. "Negligence on the part of the corporation [employer] may consist of acts of omission or commission, and it necessarily follows that the continuing duty of supervision and inspection rests on the corporation. For it will not do to say that having furnished suitable and proper machinery and appliances, the corporation can

thereafter remain passive. The duty of inspection is affirmative, and must be continuously fulfilled, and positively performed." *Brann v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5. For other examples of similar language, see *Richmond & D. R. Co. v. Burnett* (1892) 88 Va. 538, 14 S. E. 372; *Munch v. Great Northern R. Co.* (1898) 75 Minn. 61, 77 N. W. 541; *Cameron v. Great Northern R. Co.* (1898) 8 N. D. 124, 77 N. W. 1016; *Chesson v. John L. Roper Lumber Co.* (1896) 118 N. C. 59, 23 S. E. 925; *Oberfelder v. Doran* (1889) 26 Neb. 118, 41 N. W. 1094; *Ocean S. S. Co. v. Matthews* (1890) 86 Ga. 418, 12 S. E. 632.

² See *Tierney v. Minneapolis & St. L. R. Co.* (1885) 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229; *Vard Deutscher Lloyd S. S. Co. v. Inghegast* (1894) 57 N. J. L. 400, 31 Atl. 619; *Chicago & E. I. R. Co. v. Kucirim* (1894) 152 Ill. 458, 39 N. E. 324.

inspection is a necessary consequence of the fact that the master's obligations cannot be adequately discharged unless, during the entire period of which that responsibility is predicated, he takes notice of whatever a reasonably prudent person would have ascertained under the particular circumstances which happen to be involved.

It has been held that an omission to inspect cannot be the foundation of a charge of negligence where the abnormally dangerous conditions resulted from the tortious and unauthorized acts of servants who were not vice principals.³ But this rule is to be taken subject to the limitations indicated in § 129, *ante*. The principles laid down in that section also involve the corollary, recognized in one case, that a master is not invariably entitled to conduct his business on the assumption that there will be no unlawful interference by trespassers with his plant.⁴

The duty of inspection is imposed merely as a means towards an end. Hence, if knowledge of a defect, such as the inspection was designed to reveal, has reached the master or his representative through some other channel, the mere fact that inspection has been duly provided for will not absolve the master.⁵ So, also, if the agent employed to inspect and repair an instrumentality fails to perform the work properly, and defects still remain which would have been discovered by a proper inspection, the employer is liable for any injury which may afterwards be caused by those defects.⁶ And it would also seem that there are good grounds for saying that the satisfactory character of the test applied for the purpose of determining whether an appliance was in good condition must be an inadequate reason for inferring the nonliability of the master in any case where the appliance was of a kind not suitable to be used at all.⁷ On the other hand, evidence that a sufficient force of inspectors was not employed, and that

³ *Schwandt v. William Wright Co.* (1901) 126 Mich. 609, 85 N. W. 1107 (plank laid on roof to stop pulley weights, if they should fall, was moved).

⁴ *International & G. N. R. Co. v. Johnson* (1900) 23 Tex. Civ. App. 100, 55 S. W. 772.

⁵ *Indiana, I. & I. R. Co. v. Snyder* (1894) 140 Ind. 647, 29 N. E. 912; *Hart v. Naumburg* (1888) 50 Hun. 392, 3 N. Y. Supp. 227, 1888 (1890) 123 N. Y. 641, 25 N. E. 300, but merely on the ground that the master was ignorant of the defects.

⁶ *Hoes v. Ocean S. S. Co.* (1900) 50 App. Div. 259, 67 N. Y. Supp. 782 (verdict sustained, which was based on evi-

dence showing that certain machinery had not been tested after it was repaired). The duty of inspection being non-delegable, the employer cannot escape liability merely on the ground that he had good reason to suppose that the agent who made the repairs was competent. *Connors v. Barite Mfg. Co.* (1892) 156 Mass. 163, 30 N. E. 101.

⁷ This principle was relied on in Judge Barrett's dissenting opinion in *Bobbinscomb v. Cameron* (1898) 35 App. Div. 561, 55 N. Y. Supp. 127, and appears to be a sound one, whether it was applicable to the facts or not. In the majority opinion there is nothing inconsistent with it, considered as an abstract proposition.

one of the inspectors sometimes got drunk when on duty, is not sufficient to authorize a recovery, where it is shown that the defective instrumentality was, as a matter of fact, properly inspected.⁸

The duty of inspection is not predicable of circumstances in which the essential situation presented is that the servant is engaged in completing or repairing some instrumentality,⁹ or in restoring the place of work to its normal condition.¹⁰ The duty of inspection does not extend to the small and common tools in everyday use, of the fitness for use of which the employees using them may reasonably be supposed to be competent judges.¹¹ In such cases the employer may

⁸ *St. Louis, I. M. & S. R. Co. v. Guiney* (1890) 13 S. W. 740.

⁹ *Allen v. Galveston, H. & S. A. R. Co.* (1896) 14 Tex. Civ. App. 344, 37 S. W. 171. In *Stoughton v. Brooklyn City R. Co.* (1896) 9 App. Div. 129, 41 N. Y. Supp. 128, the court took the ground that the only duty of an employer, in regard to a cross beam furnished merely as a part of the structure in which the servant is engaged in erecting, and not for the purpose of providing him with a place of work, is to apprise him of the existence of any latent defects of which he has knowledge. See, further, as to this class of cases, chapter XXXII., *post*.

¹⁰ A servant is not entitled to rely on his employer's having examined the place where he is put to work, where he is sent into a room, on the day of the explosion of a fly wheel, to clear away the ruins. *Kang v. Page* (1897) 168 Mass. 217, 46 N. E. 620. The court said: "There are many momentary dangers which, though hidden, it is impracticable to guard against by inspection, and for which, on this ground, the employer is held not liable." *Whittaker v. Bent* (1897) 167 Mass. 588, 46 N. E. 121. There are others which, even if permanent conditions of the business, are obvious without warning, and of which the workman must take the risk if he accepts employment there. *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 587, 52 Am. Rep. 733, 2 N. E. 115; *O'Maley v. South Boston Gaslight Co.* (1893) 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119. There are others which are both transitory and obvious, or at least equally easy to be discovered by employer and employed. When a room has been shattered by an explosion, it is plain to everybody that things are not in their normal condition, that the usual support of part by part has been

shaken or interfered with, and that some portion may have been weakened to the point of being ready to fall. If the explosion was of an iron wheel, it is plain that the fragments probably have flown in different directions, and that they may have lodged above or below. When a workman is sent into such a room on the day of the explosion to clear away the ruins, it is manifest that he is taking one of the steps which are necessary to disclose just what has happened. It is not a natural inference on the part of one so sent that the place has been inspected, and it is not a natural interpretation of the offer to take it as implying that the superior knows that it is safe. Such an inference and interpretation are not based on the experience of life; they are mere deductions from the letter of an inaccurately stated rule of duty assumed beforehand to cover the case. Someone must be first in the place of possible danger. The workman sent in to clean it up has no right to assume that he is not the first, nor is the employer bound in formal language to notify him that no one, as yet, has made certain that nothing will give way."

This rule may be regarded as a necessary inference from the principle explained in § 20, *ante*, or, as indicated by the reasoning in the Massachusetts case cited, it may be deduced from the conception that the risk of handling the thing in its defective condition is assumed by the servant as an inseparable and manifest incident of the very work which he undertakes to perform. See chapter XVII., *post*.

¹¹ *Wachsmuth v. Shaw Electric Crane Co.* (1898) 118 Mich. 275, 7 N. W. 497 (sliver flew off from a snap hammet used for driving rivets).

ordinarily rely on the presumption that those using the article will first discover the defect.¹² See chapter iv., *ante*.

One case seems to proceed upon the theory that a master is not bound to examine into the condition of articles which form part of his stock of merchandise, and which are merely handled for the purposes of transportation.¹³ As there is nothing in the facts of that case to indicate that the master knew who was the maker of the injurious agency, or whether he was or was not a reputable manufacturer, this decision goes beyond even those cited in § 153, and the conclusion is apparently independent of the principle there relied upon. It is difficult to see any satisfactory reason why the responsibility for accidents of this type should be thrown upon the servant. The essential import of such evidence is simply that certain conditions existed by which the place of work was rendered unsafe, and it is submitted that a distinction which segregates from the rest one particular class of the material substances which may produce this result is purely arbitrary.

The mere fact that the conditions which caused the injury were due to an act of God will not excuse the master if it appears that no harm would have resulted if a reasonably careful inspection would have disclosed the danger in time to have prevented the catastrophe.¹⁴ Compare § 129, *ante*.

155. Evidential prerequisites to the maintenance of an action based on the failure to inspect.—The first step in the establishment of the plaintiff's case is to show that the master was subject to the duty of inspecting the instrumentality in question. If it was a part of his plant, as is the situation in all the cases considered in this chapter,¹ the only circumstances under which this point can be of any importance are those in which it is open to controversy whether the duty lay upon him or upon the servants who prepared or adjusted the instrumentality. See chapter xxxii., *post*.² If this point is determined in the

¹² *Miller v. Erie R. Co.* (1897) 21 App. bankment weakened by extraordinary rain).
Div. 45, 47 N. Y. Supp. 285 (poles for pushing cars along an adjoining track).

¹³ *Garragan v. Fall River Iron Works Co.* (1893) 158 Mass. 596, 33 N. E. 652 (purchaser of cotton is not liable for an injury to his servant from the giving way of the bagging upon a bale while he was moving it with a hook, in the absence of evidence of a custom or agreement on the master's part to inspect it and ascertain its strength).

¹⁴ *Central R. Co. v. Grady* (1901) 113 Ga. 1045, 39 S. E. 441 (railway em-

¹ Cases not answering this description are considered in the following chapter.

² In *Lafayette Bridge Co. v. Olcott* (1901) 54 L. R. A. 33, 47 C. C. A. 367, 108 Fed. 335, the defendant company was held liable for the reason that it had made no arrangements for inspecting the timber from which the workmen in a bridge gang were to select the necessary pieces for constructing a false work. Compare § 164, *post*.

servant's favor, the master's liability depends upon the answer to the following questions:

(1) Whether the conditions which caused the injury were discoverable by an examination of a reasonably careful character.

(2) Whether any examination of the instrumentality had ever been made.

(3) Whether the examinations which were actually made were made as frequently as was proper.

(4) Whether there were any circumstances which would have suggested to a prudent man the advisability of making a special examination during the interval between two of the regular examinations.

(5) Whether the regular or special examinations which were actually made were as thorough as the circumstances demanded.

These questions will be considered in the following sections.

156. No negligence imputable where a defect is not discoverable by a reasonably careful inspection.— (See also § 163, *post*.)—The general principle explained in § 126, *ante*, involves the corollary that an employer cannot be held negligent for failing to discover a defect which an examination, made with that degree of care which is obligatory under the circumstances, would not disclose. The phraseology used in stating this principle is often of a sufficiently general character to indicate that its applicability is independent of the question whether, as a matter of fact, such an examination had or had not been made.¹ Indeed, it is clear that the failure to examine an instrumentality cannot be regarded as an efficient cause of an accident, where *ex hypothesi*, the conditions which rendered it possible would not have come to the master's knowledge even if the examination had been made.²

¹ A master is declared not to be liable for "hidden defects, which could not have been discovered by the most careful inspection" (*Ladd v. New Bedford R. Co.* [1876] 119 Mass. 412, 20 Am. Rep. 331); or which "the usual and well-recognized tests of science and art fail to detect" (*Toledo, P. & W. R. Co. v. Conroy* [1873] 68 Ill. 561); or "for latent defects which could not have been discovered by the use of ordinary diligence" (*Quintana v. Consolidated Kansas City Smelting & Ref. Co.* [1896] 14 Tex. Civ. App. 347, 37 S. W. 369); or for "latent defects" simply (*Missouri P. R. Co. v. Crenshaw* [1888] 71 Tex. 341, 9 S. W. 262).

² See *Louisville & N. R. Co. v. Campbell* (1893) 97 Ala. 147, 12 So. 574; *Atchison, T. & S. P. R. Co. v. Ledbetter* (1885) 34 Kan. 326, 8 Pac. 411; *Boess*

v. Clausen & P. Brewing Co. (1896) 12 App. Div. 366, 42 N. Y. Supp. 848; *Berlin v. Wabash, St. L. & P. R. Co.* (1885) 87 Mo. 545 (rail without any visible defect broke by reason of cold weather); *Racine v. New York C. & H. R. R. Co.* (1893) 70 Hun. 453, 24 N. Y. Supp. 388 (nonsuit proper, where the evidence was that, after a supposed burning of the crown plate of a boiler, it was subjected to the test of 145 pounds pressure, its maximum capacity, and resisted that pressure; that it was then put in service by the defendant, in hauling freight and passenger trains, under a pressure of from 140 to 145 pounds of steam, and continued in such service for about one week after such supposed burning of the plate and up to the time of the accident without any evidence of weakness, and that it finally

But in the great majority of the cases in which this principle appears as a controlling factor the actual situation presented by the evidence is that an inspection, upon the sufficiency of which the master was entitled to rely, had been duly made before the accident, and that the

exploded while carrying only 110 pounds of steam, and while running at only a moderate rate of speed and without a train); *Atz v. Newark Lime & Cement Mfg. Co.* (1896) 59 N. J. L. 41, 34 Atl. 980 (bolt broke from internal flaw not visible on the surface). This is, perhaps, the actual ground on which, in *Watts v. Hart* (1893) 7 Wash. 178, 34 Pac. 423, 771, the defendant was absolved from liability, where the only visible defect in a piece of timber used for "staking" cars was a small knot. But the precise position of the court on this aspect of the case is not very clear. In *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, a bridge fell after about nine and a half years' use. The evidence showed that bridges of similar construction and materials upon the defendant's road had stood over ten years, and were considered, and to all appearances were, sound and safe; some had stood over fourteen years, and one over seventeen years, in the same condition. Although some of the witnesses for the plaintiff testified that they would not consider such a bridge as safe beyond the period of seven or eight years, yet the court said that if, upon adequate and repeated inspection, and the application of appropriate tests, no defect was exhibited, a mere opinion as to the length of time such a bridge might be expected to stand would have no appreciable weight in the scale of evidence. It was held that there was no conflict of evidence as to the care and skill used in the inspection, as well as the construction and maintenance, of this bridge, and that there was an absolute want of any actual notice of any defect, real or suspected, therein, and that it was the duty of the court to take the case from the jury, and hold that, on the established facts, the plaintiff could not recover, but that, at all events, the defendant was entitled to the instruction the counsel asked, to wit, that, in order to charge the defendant, it was necessary for the plaintiff to show that the decay in the bridge, if it fell from decay, was known, by some notice or otherwise, to the president and directors of the road. In *Painton v. Northern C. R. Co.* (1880) 83 N. Y. 7,

it was held that an action could not be maintained by a brakeman injured by the breaking of a defectively welded eyebolt connecting the chain with the rod of a brake, as there was no evidence that defendant or any of its agents had notice of the defect, or that it could have been discovered by inspection, except that the maker could have discovered it by bending the bolt while hot, and in other ways; but it did not appear whether the eyebolt was made by the company or purchased; and no want of care, the exercise of which would have discovered the defect, was shown. In *Carlson v. Phoenix Bridge Co.* (1892) 132 N. Y. 273, 30 N. E. 759, several hooks were made by a blacksmith from pieces of iron about 18 inches long, cut from a bar purchased by the defendant's superintendent. They were used in lifting the heavy girders which formed a part of the structure for the railway, and only one was shown to have broken, or to have been weak or defective. The piece of the bar not used was shown to have been of the best quality, and to possess an elasticity and strength far beyond that required in lifting the girder in question. The hook that broke did so from a weakness in the iron at the particular point of fracture. The court said: "The evidence does not show from what part of the bar the piece of iron from which the hook was manufactured was taken, and, if the cutting test had been applied to either end or the middle of the bar, the jury could not have found that it would have disclosed the defect complained of. A conclusion that the defect would have been discovered would have had no other basis than speculation or conjecture, and evidence of that character would be insufficient to sustain a judgment." In *Bannon v. Sanden* (1896) 68 Ill. App. 164, it was contended that a proper examination was not made of the timber that broke in a scaffold, but the court was of the opinion that, from the facts that it had been used four or five times without breaking, and that an examination would not have disclosed any knot in the timber, an examination would have been useless. In *Kranz v. White*

period which had elapsed between the inspection and the accident was so short that he might reasonably act upon the presumption that the condition of the instrumentality had undergone no change for the worse.³

The practical effect of this principle is considerably limited by the operation of another, equally well settled, viz., that the master's non-liability cannot be affirmed, as a matter of law, merely because the abnormal conditions which created the risk from which the servant suffered injury were not apparent to a person making a superficial examination of the instrumentality in question. In other words, it is laid down that no defect can be considered latent which is discoverable by the exercise of due care.⁴ The predication of a specific duty of active

(1881) 8 Ill. App. 583, where, for anything that appeared to the contrary, the defect which caused the explosion of a gas generator might have been of such a nature as to elude the most careful examination of the most skilful experts, an instruction was held erroneous which told the jury that the mere absence of examination by prudent men was conclusive of the defendant's liability.

³ See the cases cited in the following sections, and also the following cases in which the fact of the previous inspection was adverted to: *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 504, 45 N. E. 108 (defective car); *O'Connor v. Illinois C. R. Co.* (1891) 83 Iowa, 105, 48 N. W. 1002 (defective car); *Powers v. New York C. & H. R. R. Co.* (1891) 60 Hun, 19, 14 N. Y. Supp. 408 (king bolt had a defect underneath the surface); *Indiana, I. & I. R. Co. v. Snyder* (1893; Ind.) 32 N. E. 1129 (defective hand car); *Sullivan v. Poor* (1900) 32 Misc. 575, 66 N. Y. Supp. 409 (elevator pronounced safe by competent experts at the time it came under defendant's control, and inspected carefully from time to time); *Smith v. New York C. & H. R. R. Co.* (1900) 164 N. Y. 491, 58 N. E. 655 (ring in chain broke owing to concealed defect, due to the presence of dirt or sulphur; no external indications of flaw). Evidence that there was, in a platform over which workmen were wheeling barrows, a depression, "so small that it escaped the attention of the numerous other persons who used the platform, some of whom specially examined it," is insufficient to support an allegation of negligence against the employer.—especially where it is improbable that the imperfection played any part in the accident

occasioning the injury complained of. *Kaare v. Troy Steel & I. Co.* (1893) 139 N. Y. 369, 34 N. E. 901. A verdict for the plaintiff cannot be sustained where a coupling pin broke owing to a hidden flaw which could not have been discovered before the break, except by an exceedingly critical examination. *Weston & A. R. Co. v. Beason* (1901) 112 Ga. 553, 37 S. E. 863. A railroad company is not liable for an injury to an employee caused by the breaking of a brake rod, due to an imperfect welding, where the flaw was not discoverable by the usual methods of inspection, owing to the accumulation of rust over the welding. *Read v. New York, N. H. & H. R. Co.* (1897) 20 R. I. 209, 37 Atl. 947. In *Skidmore v. West Virginia & P. R. Co.* (1895) 41 W. Va. 293, 23 S. E. 713, the bottom of a wrecked tender fell out and injured one of the wrecking crew. The comments of the court upon the occurrence were as follows: "As to the character of the danger which the plaintiff encountered in performing this work, it was no more apparent to the skilled and experienced supervisor and section boss than it was to the plaintiff, or to the humblest and most uninformed section hand engaged about the work. If the bolts that held the bottom on were severed, as they must have been, between the tap and the nut, no eyes could penetrate the iron and the wood that surrounded the bolt, and it could not be expected or required that the section boss should chip into the bolt or cut through the iron and destroy the tender to ascertain whether the bolts were sound or broken before going to work to remove the tender from its proximity to the main track."

⁴ *Sack v. Dolese* (1890) 35 Ill. App.

inspection obviously entails the adoption of the latter of these principles. But it will be seen, by comparing the cases cited in the subjoined note with those cited in notes 2 and 3, *supra*, that there is considerable difficulty in reconciling, with reference to the actual facts involved, some of the decisions in the two groups.⁵

636. Affirmed (1891) 137 Ill. 129, 27 N. E. 62. "A defendant cannot avoid its liability by shutting its eyes to its obligation to maintain a reasonably safe place." *Barnes v. Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 41, 31 S. W. 347. It has been held that proof that the appliance which caused the plaintiff's injury was defective will justify the implication that the defendant was negligent only when the defect was patent and obvious ("open to visual observation"), and the failure to discover it was the result of carelessness. *Erskine v. Chino Valley Beet-Sugar Co.* (1895) 71 Fed. 270, where a rope broke, in which there was no discoloration, nor anything whatever in its appearance to suggest a suspicion of its unsoundness. This decision, however, seems to be too strongly in the master's favor, unless it was made in view of the conceded fact that the rope had been carefully inspected at reasonable intervals. The same may be said of the ruling that an employer is not liable for an accident occurring because of a defect in appliances furnished to his servants, if they were apparently reasonably safe and adequate. *Watts v. Hart* (1893) 7 Wash. 178, 34 Pac. 423, 771. See, however, as to this case, note 2, *supra*.

⁵ The servant was allowed to recover in the following cases: *Northern P. R. Co. v. Teeter* (1894) 11 C. C. A. 332, 27 U. S. App. 316, 63 Fed. 527 (hole in track concealed by slush); *True v. Lehigh Valley R. Co.* (1897) 22 App. Div. 588, 48 N. Y. Supp. 86 (inspection of bank from which slides may be expected not sufficient, where it has been only such as could be made by observation in passing along the track); *Union P. R. Co. v. Daniels* (1894) 152 U. S. 684, *sub nom. Union P. R. Co. v. Sayler*, 38 L. ed. 597, 14 Sup. Ct. Rep. 756, Affirming (1890) 6 Utah, 357, 23 Pac. 762 (evidence tended to show that a car had a crack about 12 inches long in one of its wheels, and that the crack, although it was old and filled with greasy dirt and rust, could have been detected without difficulty if the wheel had been properly examined at the last inspecting station); *Munch v. Great Northern*

R. Co. (1898) 75 Minn. 61, 77 N. W. 541 (old break in wheel of railway car); *Myers v. Erie R. Co.* (1899) 44 App. Div. 11, 60 N. Y. Supp. 422 (crack on brake staff concealed by rust); *La Fayette Bridge Co. v. Olsen* (1901) 54 L. R. A. 33, 47 C. C. A. 367, 108 Fed. 335 (curl in the grain of the timber used for a false work); *Toledo, P. & W. R. Co. v. Conroy* (1873) 68 Ill. 561 (bridge timbers externally sound, but rotten within); *Benzing v. Steinman & Sons* (1886) 101 N. Y. 547, 5 N. E. 448 (evidence was that a casual inspection of the lower side of a plank in a scaffold would have disclosed a knot); *McDonald v. Postal Teleg. Co.* (1900) 22 R. I. 131, 46 Atl. 407 (knot in cross arm of telegraph pole); *Kearney Electric Co. v. Laughlin* (1895) 45 Neb. 390, 63 N. W. 941 (laborer injured by the caving of an imperfectly propped tunnel, the supports of which the superintendent had examined a short time previous); *Chase v. Ristine* (1899) 30 C. C. A. 450, 94 Fed. 745 (large rock imbedded in the slope of a railway cutting was loosened by the action of frost and water, and fell); *Mayer v. Lichman* (1897) 16 App. Div. 54, 44 N. Y. Supp. 1067 (rivet holes in the rods and brackets of the run used for lowering barrels into a cellar had become enlarged by use and rust); *Davis v. Nuttall-Lane Coal & Coke Co.* (1890) 34 W. Va. 700, 12 S. E. 539 (rock fell from roof of mine); *McMillan Marble Co. v. Bluff* (1890) 89 Tenn. 118, 14 S. W. 479 (projecting rock in a quarry fell); *Flanagan v. Guggenheim Smelting Co.* (1899) 63 N. J. L. 647, 44 Atl. 762 (knot in side piece of ladder in close proximity to nail driven into cross piece); *Whelan & S. Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242 (boards covering terra cotta coping on a building under erection were left loose, and one of them fell). See also, to same effect, *Richlin v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374, 14 N. E. 407; *Messersmith v. P. R. Co. v. Dwyer* (1886) 36 Ky. 58, 12 Pac. 352; *Kaplan v. New York & N. J. R. Co.* (1896) 5 App. Div. 60, 28 N. Y. Supp. 1649. Testimony that a look after it gave way, looked as if there had

157. Culpability usually inferable where the master has made no inspection of an instrumentality.—That a master cannot, in the majority of instances, be pronounced free from negligence, as a matter of law, where the instrumentality which caused the injury had never been inspected at all before the accident, or not at the time when it should have been (see next section), is obviously a necessary consequence of assuming that inspection is one of the duties which he owes to his servants. Usually, therefore, the case is for the jury wherever the evidence tends to show such omission to inspect.¹ Setting aside the

been a break previous to the main break; that "if a man made a careful examination of the hook, after making it he might possibly, or if a man familiar with hooks examined it he might perhaps, have discovered the flaw which caused the accident; but these flaws would not be visible on an ordinary inspection;" that there was actually a visible crack or flaw in the hook above the flaw at the place of rupture; and that, as testified to, iron will usually break in the weakest spot.—tends to show that a careful inspection would have revealed the weakness of the hook. *Spicer v. South Boston Iron Co.* (1885) 138 Mass. 426. Where several witnesses have testified that the materials furnished for a scaffold were rotten, it is error to take from the jury the question whether the condition of those materials ought to have been known to the master. *Roberts v. Smith* (1857) 2 Hurlst. & N. 213, 26 L. J. Exch. N. S. 319, 3 Jur. N. S. 469. A finding that an employer was negligent in furnishing an improper or defective jack-screw, by the breaking of which his employee was injured, is justified by proof that the break had begun before the jack-screw was given, that an inspection could have disclosed it, and that the inspection was not made. *Kennedy v. Chicago, M. & St. P. R. Co.* (1894) 57 Minn. 227, 58 N. W. 878. A railway company which, after using a lifting jack purchased by it, containing a latent defect in the weld of the foot attached to the jack, sends it to its shops for other repairs, is liable to a servant injured because of such defective weld, if it could have been discovered by a reasonable examination at the time such repairs were made. *Kansas City & P. R. Co. v. Ryan* (1894) 52 Kan. 637, 35 Pac. 292. The master's negligence is for the jury, where the evidence is that steel cables supporting a derrick were old, and the outer surface had become

worn, and many of the wires were broken; that the cables appeared rusty, as though they had been used, and were flattened in places, and, on account of the wires being broken, could not be handled with bare hands; that after the break the broken ends were rusty and worn, with little strands sticking out, and some wires were longer than others, and the break looked as though the cable had pulled apart; and that when one of the wires breaks and moisture gets in, the rust eats into the wire, and weakens it. *Yarr v. Whitmore* (1899) 46 App. Div. 422, 61 N. Y. Supp. 731. It was error to charge the jury to find that there was no defective machinery, on the testimony of a conductor that he went along the side of the train, and looked under the cars, and saw no defects. *Wright v. Southern R. Co.* (1900) 127 N. C. 225, 37 S. E. 221.

¹ *Weiden v. Brush Electric Light Co.* (1889) 73 Mich. 268, 41 N. W. 269; *Byrne v. Eastmans Co.* (1900) 163 N. Y. 461, 57 N. E. 738. Reversing (1898) 27 App. Div. 270, 50 N. Y. Supp. 457, 52 N. Y. Supp. 1139 (no uniform inspection of an iron wheel supporting a heavy weight, though the evidence showed that it was liable to be broken by hard usage at any moment; merely oiled when work was slack); *Whitelaw v. Moffat* (1849) 12 Sc. Sess. Cas. 2d series, 434; *International & G. N. R. Co. v. Elkins* (1899) Tex. Civ. App. 54 S. W. 931. An employee of a railroad company may recover for injuries resulting from an accident occasioned by a defect in a brake rod, which an investigation, pursuant to a rule of the company, would have revealed in time to prevent the accident. *Bailey v. Rome, W. & O. R. Co.* (1893) 139 N. Y. 302, 34 N. E. 918. All the cases cited in the following sections may also be regarded as virtual recognitions of the doctrine in the text.

cases commented upon in § 164, *post*, which are not relevant in the present connection, the single exception to this rule would seem to be the case of an instrumentality which had been purchased under circumstances which absolved the employer from the duty of examining it when it passed into his possession (see § 153, *ante*), and the injury was received so soon afterwards that it would be unreasonable to hold that a new obligation to examine it came into existence while it was in use. But this particular situation does not seem to have been the subject of any express decision.

It has been held that the rule that the performance of a duty may sometimes be presumed is not available in the master's favor, where the question is whether an instrumentality has been duly inspected.²

158. With what frequency inspections should be made.—How often an inspection should be made depends entirely upon the character of the instrumentality and the length of time during which it may reasonably be presumed that it will remain in that normal condition in which it must, for the purposes of the inquiry, be supposed to have been found at the time when it was put into use, or at the last preceding examination. It is therefore inevitable that the general expressions used to describe the extent of the master's obligations from this point of view should be somewhat vague.¹ In view of the numer-

¹ *McCauley v. Southern R. Co.* (1897) 10 App. D. C. 560, where the contention of the defendant was that the due inspection of an engine might be presumed from the fact that it had been in the roundhouse, and might have been inspected on the day that the accident occurred.

² It has been said that the master must examine his instrumentalities after they have been in service as long as they can, with safety, be used without examination and overhauling (*Sioux City & P. R. Co. v. Finlayson* [1884] 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860); or from time to time (*Chesson v. John L. Roper Lumber Co.* [1896] 118 N. C. 59, 23 S. E. 925); or from time to time, as occasion may require (*Murphy v. Phillips* [1876] 24 Week. Rep. 647, 35 L. T. N. S. 477); or from time to time as may be necessary to enable him to see that they are in a reasonably safe condition (*Egan v. Dry Dock, E. B. & B. R. Co.* [1896] 12 App. Div. 536, 42 N. Y. Supp. 188); or frequently (*Richmond & D. R. Co. v. Burnett* [1892] 88 Va. 538, 14 S. E. 372; *Knapp v. Sioux City & P. R. Co.* [1887] 71 Iowa, 41, 32 N. W. 18); or

as frequently as is reasonable under all the circumstances (*Krampe v. St. Louis Brewing Assn.* [1894] 59 Mo. App. 277); or as frequently as custom and experience require (*Wabash & W. R. Co. v. Morgan* [1892] 132 Ind. 430, 31 N. E. 601); or at reasonably frequent intervals (*Manson v. Eddy* [1893] 3 Tex. Civ. App. 148, 22 S. W. 66; *Chicago G. W. R. Co. v. Healy* [1898] 30 C. C. A. 11, 57 U. S. App. 513, 86 Fed. 245); or at proper intervals (*Nord Deutscher Lloyd S. S. Co. v. Langbecken* [1894] 57 N. J. L. J. 400, 31 Atl. 619; *Comben v. Belleville Stone Co.* [1896] 59 N. J. L. 226, 36 Atl. 473; *Daniels v. Union P. R. Co.* [1890] 6 Utah, 357, 23 Pac. 762; *Erskine v. Chino Valley Beet-Sugar Co.* [1895] 71 Fed. 270); or at reasonable intervals (*Williams v. St. Louis & S. F. R. Co.* [1893] 119 Mo. 316, 24 S. W. 782 [railway company cannot be held liable for an injury to a brakeman who is tripped up by a small coil-spring, left on a side track by a car repairer and almost covered by grass, where the employee working on the track had never seen it, and there is no evidence to show how long it had been lying between the

ous and diversified elements involved in the consideration of the sufficient performance of the master's duty, it is evident that, in the great majority of instances, his liability must be treated as a question of fact for the jury. The subjoined note, in which the decisions are classified under headings which indicate the subject-matter, shows under what circumstances the courts have deemed it justifiable to exercise their power of controlling or setting aside verdicts.²

rails)). A master is said not to be chargeable with negligence by reason of a defect which suddenly appears in a tool or instrumentality furnished an employee, unless he has been remiss in testing the same. *Atchison, T. & S. F. R. Co. v. Napole* (1895) 55 Kan. 401, 40 Pac. 669. The degree of vigilance which a railway company is required to exercise to guard against injuries to employees, resulting from the interference of trespassers with the track and switches, is determined by the possibility or probability of such interference, and the harm likely to result therefrom. *International & G. N. R. Co. v. Johnson* (1900) 23 Tex. Civ. App. 160, 55 S. W. 772.

1. *Railway tracks*.—Where loose rocks are left in such a position above railway tracks that they may be displaced by the action of the elements and precipitated upon the tracks, the failure to patrol the track at night is culpable negligence. *Clune v. Ristine* (1899) 36 C. C. A. 450, 94 Fed. 745. Negligence may be inferred where a switch rail has been in a battered condition for a month. *Chicago, L. & E. R. Co. v. Hartmann* (1897) 71 Ill. App. 427. The court cannot say, as matter of law, that the interval of six and a half or four and a half hours between the time of the breaking of a drawbar on a car and the accident, caused by a piece of the broken drawbar remaining on the track, was not sufficient to charge the company with knowledge of the presence of such obstacle, and with the responsibility for the danger thus created. *Chicago & N. W. R. Co. v. Delaney* (1897) 169 Ill. 581, 48 N. E. 476. Affirming (1896) 68 Ill. App. 307. Where it is shown that a track inspector and his gang carefully examined and repaired a curve about two weeks before an accident, an employee of the railroad company working upon an engine cannot recover for injuries alleged to be due to a defect in the rails at that place. *Burrell v. Goren* (1890) 134 Pa. 527, 19 Atl. 678. A railway company is not

liable for the death of an engineer by the derailment of his engine, caused by a sudden fall of rain saturating the already moist earth so that the cross ties sunk on one side under the weight of the engine and turned it over, where the place had been twice inspected that morning and appeared to be safe, and two heavy freight trains and a fast express train had passed over it in safety. *Binnis v. Richmond & D. R. Co.* (1892) 88 Va. 891, 14 S. E. 701.

2. *Railway bridges*.—"Of whatever material bridges are built, they should be subjected periodically, every year, to the closest examination." *Toledo, P. & W. R. Co. v. Conroy* (1873) 68 Ill. 561. Whether a wooden bridge ought to be inspected during the night as well as the day, to obviate the risk of accidents from fire, is a question for the jury. *Maydole v. Deurer & R. G. R. Co.* (1900) 15 Colo. App. 449, 62 Pac. 964. The fact that a bridge had been properly inspected and tested the day before the accident is conclusive evidence of the company's exercise of due care. *Faulkner v. Erie R. Co.* (1867) 49 Barb. 324. See also *Warner v. Erie R. Co.* (1868) 39 N. Y. 468.

3. *Switches*.—A switch on a grade and curve, and near a large city where there are lawless characters who may interfere with it, ought to be inspected at least once every six hours. *International & G. N. R. Co. v. Johnson* (1900) 23 Tex. Civ. App. 160, 55 S. W. 772.

4. *Locomotives*.—In *Pierson v. New York, N. H. & H. R. Co.* (1900) 53 App. Div. 363, 65 N. Y. Supp. 1039, a verdict for the plaintiff was upheld where he was injured by the failure of the air brakes to work because of a leak in the steam pipe in the smoke box, the evidence being that the engine had not been inspected for several days before the accident. In *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 140, the plaintiff was allowed to recover where an engine had been unsafe and dangerous for "some considerable time." A

It has been laid down that the master's freedom from culpability cannot be affirmed, as a matter of law, where the evidence is that a defect is one produced by gradual wear. The reasonable inference that

railroad company which every month subjects the stay bolts in a boiler to the best test known is not liable for the death of an engineer from an explosion of the boiler due to broken stay bolts, eight days after such inspection. *Chicago & A. R. Co. v. Du Bois* (1894) 56 Ill. App. 181.

5. *Railway cars.*—It has been laid down that a "railway company must have its inspectors not only at its termini, where a general overhauling of property is had, but at convenient stations along its line, to detect such injuries as may have been received *en route*." *St. Louis, I. M. & S. R. Co. v. Rice* (1888) 51 Ark. 487, 4 L. R. A. 173, 11 S. W. 699. But in *Brann v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5, the court, while holding that the evidence warranted the conclusion that the "hand hold" of a car had got out of repair at some time on a trip to and from a certain city, which lasted several days, declined to say, as a matter of law, whether the car should have been inspected during the trip. In a case where there were three points for the inspection of certain coal cars within 20 miles, besides other alleged inspections at the coal chutes by an employee who had these cars in his special charge, the court said: "The inspections at these points were not minute or critical; they were limited to a hurried examination of the most exposed and important points; the cars were subjected to a thorough examination only when turned into the shop for repairs. Whether this provision of the company, in view of the heavy grades along the road and the number of cars to be inspected, was a reasonably adequate one, would, if the question were material, be for the determination of the jury." *Philadelphia & R. R. Co. v. Hughes* (1888) 119 Pa. 301, 13 Atl. 286. Evidence that the employer had formerly had two inspectors at the place of the injury, but had none at the time of the accident, is competent as tending to prove the want of ordinary care. *Missouri, K. & T. R. Co. v. Miller* (1901; Tex. Civ. App.) 61 S. W. 978. The case is for the jury where the injury was caused by a defect in the door of a box

car which had been at an inspecting station for two days (*Closson v. O. & N. R. Co.* [1897] 69 Minn. 67, 71 N. W. 915) and where a nut which held the wheel on the brakestaff had been absent for several weeks (*Chicago & E. I. R. Co. v. Kneirum* [1894] 152 Ill. 458, 39 N. E. 321); and where, during the night of a certain day, the ladder gave way on a car which had not been inspected since the previous day (*Missouri, K. & T. R. Co. v. Miller* [1901; Tex. Civ. App.] 61 S. W. 978). In one case it was laid down that a car should be inspected immediately on its arrival at an inspecting point, and the servant was allowed to recover for an injury received two or three hours after its arrival. *Missouri, K. & T. R. Co. v. Murphy* (1898) 59 Kan. 774, 52 Pac. 863. A railway company is, as matter of law, not responsible to a fireman who, in proceeding to clean his engine at the end of a trip, was injured by a defect in the side of the locomotive, the evidence being that it was in good condition at the beginning of the trip, and that he did not wait for the regular inspection at the arrival of the train. *Patton v. Texas & P. R. Co.* (1901) 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275. Affirmed (1899) 37 C. C. A. 56, 95 Fed. 244. Negligence in regard to inspection cannot be predicated where a drawbar had been properly inspected a few hours before the accident. *Johnson v. Chesapeake & O. R. Co.* [1892] 36 W. Va. 73, 14 S. E. 432; nor where a brake wheel which had been inspected on the previous day came off. *Uhearn v. Central R. Co.* [1900; N. J. L.] 45 Atl. 1902; nor where the king bolt of a coupling apparatus had been tested eight days before it gave way. *Powers v. N. York C. & H. R. R. Co.* [1891] 60 Hun 19, 14 N. Y. Supp. 408. Affirmed in 128 N. Y. 659, 29 N. E. 148).

6. *Elevators.*—It has been held that an employer cannot be held liable where the safety device of an elevator was properly tested two weeks before the accident. *Biddiscomb v. Cameron* [1898] 35 App. Div. 561, 55 N. Y. Supp. 126. Affirmed in [1900] 161 N. Y. 637, 57 N. E. 1104; nor where the hook which supported the wire cable by which a freight elevator was started and stopped had

is that it has existed for a considerable time, and might, therefore, have been discovered if the appliance had been inspected with rea-

been examined one week before it straightened and let the cable fall (*Bacher v. Pygihil* [1897] 19 App. Div. 126, 45 N. Y. Supp. 972); nor where the whole appliance (here one used for freight) had been inspected four months prior to an accident caused by its eccentric motion, which produced a jerk, an incline in its floor which caused the servant's foot to slip, and an opening under the gate, which allowed her foot to come in contact with the easing of the elevator (*Montgomery v. Bloomington* [1898] 34 App. Div. 375, 54 N. Y. Supp. 329).

7. *Other vehicles*.—Negligence is inferable where a truck has not been inspected for two years. *Boyce v. Schroeder* (1898) 21 Ind. App. 28, 51 N. E. 376. As regards an employee whom his master is driving in a buggy to his place of work, negligence cannot be predicated of the omission of the latter to examine the bolts and fastenings before starting, where it is also shown that the vehicle was examined every three months by a blacksmith. *Moffatt v. Bateman* (1869) L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore P. C. C. N. S. 369.

8. *Roofs of tunnels*.—Evidence that the roof of a mine had been carefully inspected on the day on which the accident occurred conclusively proves the exercise of due care. *Southwest Virginia Improv. Co. v. Andrew* (1889) 86 Va. 270, 9 S. E. 1015.

9. *Derricks*.—Verdicts for the plaintiff have been sustained where the clamp to which a derrick guy rope was fastened was only inspected once a week (*Welsh v. Cornish* [1900] 49 App. Div. 203, 63 N. Y. Supp. 44 [court suggested that there should have been a daily inspection]); where a derrick gave way owing to the working out of a pin which was, almost every day, subjected to the strain of lifting heavy loads, and had not been inspected for about thirty days before the accident (*Houston v. Brush* [1894] 66 Vt. 331, 29 Atl. 380); where the attachments which held the boom in its place had not been examined for over two years (*Scandell v. Columbia Constr. Co.* [1900] 50 App. Div. 512, 64 N. Y. Supp. 232); or, as another case has it, for several years (*Dyer v. Pittsburg Bridge Co.* [1901] 198 Ia. 182, 47 Atl. 979).

10. *Steps*.—A master is not negligent

in acting on the assumption that steps leading to a platform, which were safe at the close of one working day, will be secure at the beginning of the next working day. *Kranke v. St. Louis Brewing Assn.* (1894) 59 Mo. App. 277.

11. *Poles*.—A jury may properly find that two years is too long a period to leave a telegraph pole without inspection. *Essex County Electric Co. v. Kelly* (1897) 60 N. J. L. 306, 37 Atl. 619. Affirmed in 61 N. J. L. 289, 41 Atl. 1115. In *Webb v. Rennie* (1865) 4 Fost. & F. 614, the question left to the jury was whether the defendant had been negligent in not examining the poles of a scaffolding, and Cockburn, Ch. J., charged as follows: "It appeared that a pole had been two years in the earth, and that during that time it had not been examined, and at the end of that time it was unsound. . . . If the jury were satisfied that, according to the general practice of ship builders, poles were allowed to remain two, three, or four years in the ground without being examined, and that the usual mode of raising them was adopted in this case, and that all this had gone on in shipbuilding yards for years without any accident, then it would be for the jury to say whether, looking to the experience of the past (which, of course, though not conclusive, was always material as an element of judgment), there was any negligence on the part of the defendants; or whether, by leaving the poles so long in the ground without examination, there was, in this respect, a want of due and ordinary care on the part of the defendants. But it was not because, in a single instance, it had turned out that a pole could not be safely left in the ground for two years, and that the accident might have been prevented by a timely examination,—it did not necessarily follow from this that therefore there was a want of due and reasonable care on the part of the employer, who had acted in accordance with all his past experience. Such a matter must always be dealt with by juries in a reasonable way, and with reference to reasonable care. No man could be safe against the occurrence of accidents from causes quite casual, fortuitous, and unforeseen. A man might have 1,000 poles used on his premises with safety, and then by some chance

reasonable frequency.³ But this rule is doubtless to be taken as being subject to the qualification indicated by an Irish decision, that neither a court nor a jury should undertake to declare how often an appliance should be examined, where no expert evidence is proffered to show what is usual or requisite as to inspections in the business in question, nor how long such an appliance would, in the ordinary course, remain in repair, and adequate to its work. In the absence of such testimony any opinion formed would be purely speculative.⁴

A master who chooses to adopt inferior appliances and methods in

one might turn out to be unsound and cause an accident for which the master was not necessarily liable. . . . If any instances had been proved of poles having previously broken by reason of their having been left so long in the ground, it would have been strong to show negligence; but there was no such evidence. On the other hand, evidence that poles had been left in the ground much longer without any accident occurring went strongly to a contrary conclusion."

13. *Iron rods*.—The fact that there had been no inspection for two years of an iron rod which had been subjected to twice the strain it had been originally designed to bear, and used for a purpose which tended to crystallize it, warrants the inference of negligence. *Mounihan v. Hills Co.* (1888) 140 Mass. 580, 16 N. E. 574.

14. *Chains*.—There is sufficient evidence to go to the jury where a chain supporting a weight of over 250 pounds had been mended by joining two of its links with five strands of fine wire, and suffered to remain in that condition without inspection for eight years. *Tanquey v. J. B. Wilson & Co.* (1891) 87 Mich. 453, 49 N. E. 606.

15. *Ropes*.—A master is not, as matter of law, free from negligence, where for six months he had not inspected a rope supporting a heavy weight and subject to constant friction. *McGuigan v. Beatty* (1898) 186 Pa. 329, 40 Atl. 490.

16. *Eyebolts, keys, etc.*—A master is not negligent in failing to take out an eyebolt, after about a year and a half of use, for the purpose of examining its condition at places not visible. *Killman v. Robert Palmer & Son Shipbuilding & M. R. Co.* (1900) 42 C. C. A. 281, 102 Fed. 224. The case should be taken

from the jury where the plaintiff is the only witness in his own behalf, and merely testifies that he noticed nothing out of the way in the appliance (in key of the coupling which held the two saws together), and that the key had not been taken out and examined since it had been put into the coupling, about six months before the accident. *Brown v. Hershey Lumber & Lumber Co.* (1896) 65 Mo. App. 162.

17. *Miscellaneous*.—Negligence may be inferred where a servant engaged in depositing hot slag on a piece of wet ground, where the action of the tide was constantly opening cracks in the slag and so exposing the water underneath, is injured by an explosion resulting from a portion of a load of slag dropping into a crack of that kind which had opened about three days before. *Kiras v. Nichols Chemical Co.* (1901) 59 App. Div. 79, 69 N. Y. Supp. 41. The master's liability for an injury to a servant, due to the fact that the elbow of an exhaust steam pipe in a privy vault had become turned so as to point directly upward, is for the jury upon evidence that, although the elbow pointed downward when first put in position, it had not been inspected for more than four years. *Russell v. Pacific Can. Co.* (1897) 116 Cal. 527, 48 Pac. 616.

³ *Paine v. Eastern R. Co.* (1895) 91 Wis. 340, 64 N. W. 1005.

⁴ *Haurahan v. Ardnamult S. S. Co.* (1887) Ir. L. R. 2; C. L. 55 (death resulted from the fall of a derrick on an iron ship in consequence of the breaking of a bolt, which, at the time, was defective to the extent of two thirds of its thickness, but the defect was not visible unless the bolt was drawn out of its socket. Held, that a verdict for the defendant was rightly directed).

his business must use proportionately greater care to see that the servant is not injured, and must make more frequent examinations.⁵

Where a part of an instrumentality had been temporarily displaced by a workman for the purpose of oiling or cleaning it, the master's failure to discover, immediately after the work was finished, that the part had not been restored to its position is not imputable as negligence.⁶

159. Specific circumstances putting an employer upon inquiry as to the condition of instrumentalities.— In §§ 129-147a, *ante*, the evidential significance of various circumstances, as justifying or negating the inference that the master ought to have known of existing dangerous conditions, or anticipated the probability of their supervening at some future time, was considered at length. It is clear that, if the logical standpoint is slightly changed, such testimony may always be viewed as an element bearing upon the question whether the employer should have taken any active steps for the purpose of ascertaining whether some particular instrumentality had become defective. This aspect of the circumstances adverted to, as well as of some others which were not dealt with in the sections referred to from the standpoint there exemplified, it is proposed to discuss in the present section.

a. External appearance of instrumentality.—If any conditions visible upon a superficial examination indicate that there may be defects, only discoverable by a closer inspection, it is the duty of the employer to make such an inspection.¹ This rule is sometimes appli-

⁵ *Eddy v. Aurora Iron Min. Co.* (1890) 81 Mich. 548, 46 N. W. 17, where it was held that a mine owner who employs a method of bracing and support for timbers and staging which renders the piece more subject to be displaced by blasts than other methods in use must adopt such frequent inspection as is necessary to prevent accident from the collapse of the roof.

⁶ *Woshigian v. Washburn & M. Mfg. Co.* (1896) 167 Mass. 20, 44 N. E. 1058.

¹ Where a grindstone before hanging presented a shelly appearance, and such appearance indicated a possible lack of cohesion throughout its structure, even if, when the shelly place was turned off, it then appeared sound and its use seemed to be justified, still, if the original apparent defect was such as to suggest a doubt as to its interior cohesive quality to a man of ordinary prudence, it was the duty of the defendant to re-

solve the doubt by subsequent examination. *Hall v. Emerson-Stevens Mfg. Co.* (1900) 94 Me. 445, 47 Atl. 924. Evidence that a grab-iron on a railway car was out of place, and that such defect could be easily detected by an inspector, is sufficient to sustain a finding of negligence in failing to discover the unsafe condition of the grab-iron by a reasonably careful inspection of the car. *Thompson v. Great Northern R. Co.* (1900) 79 Minn. 291, 82 N. W. 637. Where the ladder of a car shows signs of being defective when looked at from the outside, the inspection should have been extended to the inside, if the actual conditions could have been ascertained only in this manner. *Missouri, K. & T. R. Co. v. Chambers* (1897) 17 Tex. Civ. App. 487, 43 S. W. 1090. A car ladder should be inspected when one of the rings is bent. *Jones v. New York C. & H. R. R. Co.* (1882) 28 Hun, 364.

cable so as to charge him with negligence in failing to examine some particular part of an instrumentality, although the visible indications of danger were confined to other parts.²

b. Unsatisfactory operation of instrumentalities prior to the accident.—That negligence may be inferred on the ground of a breach of the specific duty to inspect some particular instrumentality has been laid down in cases where it had not been working properly before the accident.³

c. Length of time an instrumentality has been in use.—In view of the natural tendency of an inorganic instrumentality to become less and less safe the longer it is used,⁴ a court will not set aside a verdict for the servant which is based upon the theory that the failure to inspect it was culpable, where the evidence shows that it had been a part of the master's plant for such a period that, taking into account the nature of the materials of which it was composed, the functions it was performing, and the various influences to which it was exposed by climatic changes or physical forces, it is not an unreasonable inference that a prudent man would have examined it for the purpose of ascertaining what its actual condition was.⁵

² Whether or not a railroad company exercised reasonable care in putting into its train a car with a brake in which there was a defect, not apparent upon an ordinary train inspection, is for the jury, upon evidence that the car was the oldest in defendant's service, that the paint was very much faded, timbers and flooring cracked, worn in and shivered from use, and sides badly worn. *Campbell v. Louisville & N. R. Co.* (1895) 109 Ala. 520, 19 So. 975. (for first appeal, see [1893] 97 Ala. 147, where, however, this point was not presented by the evidence).

³ *Re California Nav. & Improv. Co.* (1901) 110 Fed. 670 (drum of donkey engine had been leaking); *Mooney v. Connecticut River Lumber Co.* (1891) 154 Mass. 407, 28 N. E. 352 (machine had run away); *Chicago & A. R. Co. v. Shannon* (1867) 43 Ill. 338 (engine reported unsafe); *Purell Mill & Elevator Co. v. Kirkland* (1898) 2 Ind. Terr. 169, 47 S. W. 311 (employer told that a galvanized iron rope had rusted); *Hoffman v. Dickinson* (1888) 31 W. Va. 142, 6 S. E. 53 (machinery had emitted an unusual sound which startled an employee, and machine was stopped in the master's presence); *Union Show Case Co. v. Blindauer* (1898) 75 Ill. App. 358 (elevator known to be obviously de-

fective, though not apparently dangerous).

⁴ This tendency is ordinarily not a material factor where the instrumentality is a living creature. See chapters XIII., XIV., *post*.

⁵ In *Toledo, P. & W. R. Co. v. Conroy* (1873) 68 Ill. 361, the court refused to set aside a verdict for a plaintiff who had been injured by the fall of a wooden trestle on a railway, remarking that an ordinary wooden bridge of this kind, uncovered and unpainted and exposed to climatic influences for fifteen years, might be expected to be in a state of decay, demanding the utmost vigilance of the company. On the previous appeal of this case (1871; 61 Ill. 162) the court said that it could not be assumed, as a matter of law, that the decay of the timbers of a bridge, being necessarily gradual, could always be ascertained by the use of due diligence; that this question is entirely one of fact which cannot be withdrawn from the jury. In *Lehigh Valley Coal Co. v. Kissel* (1897) 25 C. C. A. 566, 51 U. S. App. 265, 80 Fed. 470, the defendant called witnesses to testify in regard to the usual duration of the life of a boiler. One said: "I have known some of them [the Hazelton boilers] to last eighteen or twenty years." Another said that

they lasted from twenty to twenty two years. Another said: "I have known them to last twenty years." The exploded boiler was eighteen years old. Experts thought the crack and the resulting explosion were due to the unequal expansion of the bottom and the top of the boiler, caused by too sudden and hot a fire when the boiler was cold and the masonry was still damp, and there was not enough water in the boiler. The court said: "Upon this state of the evidence, especially in regard to the time when a boiler must be expected to wear out, the question of an unsoundness which ought to have been ascertained by the defendant's agents or representatives could not be taken from the jury." In *Brown v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5, the court said: "It may be assumed that a car when first placed upon the track is in proper condition, and in every respect suitable for its intended use. But it is a well-known fact that in time it will become out of repair, and unfit for use. It is not the duty of the employee, who is required to simply use said car when it composes a part of a train, to ascertain and know, at his peril, when such time occurs. Such, however, is the duty of the corporation, and ordinary care must be used to ascertain whether the car is fit to be used; and what is such care must be measured by the character of the business, and the risks attending its prosecution. . . . For it will not do to say that, having furnished suitable and proper machinery and appliances, the corporation can thereafter remain passive. The duty of inspection is affirmative, and must be continuously fulfilled, and positively performed. In ascertaining whether this has been done or not, the character of the business should be considered." *Warden v. Old Colony R. Co.* (1884) 137 Mass. 204, holds that a railroad company is bound to make due provision for examining a "telltale" near low overhead bridge. The failure to test a rope on a steamer is negligence, where it has been in use for a number of voyages, and has been in a position where it was exposed to injury from heat and smoke. *The Ethelred* (1899) 96 Fed. 446. In *Baker v. Allegheny Valley R. Co.* (1880) 95 Pa. 211, 40 Am. Rep. 634, the court said: "No doubt, a perfectly new rope, and one to all appearances sound, may break, and the master would not be responsible for the consequence, having

furnished a rope of the proper size for the purpose, to all appearance sound. But there was evidence in this case, sufficient, certainly, to make a question for the jury, that such a rope, after having been used for a year or more, and exposed during that time as the one in question seems to have been, was no longer a safe rope, even though it did not outwardly exhibit any signs of decay. The master is bound to know that a rope, under such circumstances, will only last a limited time. It will not do for him to furnish a sound rope and then fold his arms until, by actually breaking, it is demonstrated to be insecure. It will not do to say that the servant is bound to know this as well as his master, and to warn him that after such a time he ought to procure a new rope. Is the servant bound to notify the master of that which he knows or ought to know himself without such information? He knows how long the rope has been in use. The servant may not know. In this case the deceased did not know." *Murphy v. Phillips* (1876) 24 Week. Rep. 647, 35 L. T. N. S. 477, says that a master is liable for an injury caused by the breaking of a chain, partly from wear and partly from bad welding, where he has not had it examined or tested, although there are well known methods for doing so. In *Morgan v. Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574, the question whether the defendant had been negligent was held to be for the jury, where it was proved that a rod which broke was designed to carry one iron ball weighing about 113 pounds, and that under the defendant's direction the machine had been reconstructed, and the rod made to carry two such balls; that it had been subjected to a use which caused the iron in the rod to vibrate while under strain, which tended to crystallize it and make it brittle; that there had been no inspection of it to ascertain its condition for nearly two years before the accident; that the rod was slightly discolored at the place of the fracture, as if the break was not fresh, and that it appeared as if the iron had not freshly parted. *Hackett v. Middlesex Mfg. Co.* (1869) 101 Mass. 101, holds the negligence of the employer a question for the jury, where it is in evidence, on the one hand, that the iron of a chain supporting an elevator was worn down in the link which broke to one third of its original thickness, and at another place had been worn even

There is a specially strong obligation incumbent upon an employer to examine carefully any apparatus which has not been used for a considerable period.⁶

In one Massachusetts case it was laid down that, where an appliance has been in use a long time, but shows no special signs of wear at the point of strain, it is not permissible for a jury to find that the master should have known it to be defective because of its age alone.⁷ But this doctrine is inconsistent with several of the decisions of other courts which are cited in note 5, *supra*, and seems to be an unwarrantable limitation of the functions of a jury.

d. Operation of physical laws.—The principle that the master is bound to foresee the ordinary results of the action of physical laws upon the materials of which his instrumentalities are composed, or the materials which those instrumentalities are designed to deal with (see § 141, *ante*), entails the consequence that he is bound to examine the instrumentalities when there is any reason for apprehending that they may have become abnormally dangerous from this cause.⁸

thinner; and, on the other hand, that the chain was new when it was put up, and that, after it broke, a slight flaw was found at the place of fracture, which could not have been discovered at the time its use began. *Houston v. Brush* (1894) 66 Vt. 331, 29 Atl. 380, holds that there is no error in refusing a request to charge that, when an appliance or machinery not obviously dangerous has been in daily use for a long time, and has uniformly proved safe and efficient, its use may be continued without the imputation of imprudence or carelessness. The court said: "It is a well known fact that in time it (a derrick) will become out of repair and unfit for use. It is not the duty of the servant who is required to use it, to know, at his peril, when such time occurs. Such, however, is the duty of the master, and ordinary care must be used to ascertain whether it is fit to be used; and what is such care must be measured by the character of the business, and the risks attending its prosecution. Negligence on the part of the master may consist of acts of omission or commission, and it necessarily follows that the continuing duty of inspection and supervision rests on the master. It will not do to say that, having furnished suitable and proper machinery and appliances, the master can thereafter remain passive so long as they work well and seem safe. The

duty of inspection is affirmative, and must be continuously fulfilled and positively performed. Anything short of this would not be ordinary care." For other cases in which a duty of inspection is predicated on the ground that ordinary care requires that the master shall take notice of the liability of his plant to decay from age or wear out by use, see *Indiana Car Co. v. Parker* (1885) 100 Ind. 181; *Chicago & E. R. Co. v. Brangan* (1894) 10 Ind. App. 570, 37 N. E. 190; *Louisville, E. & St. L. Consol. R. Co. v. Utz* (1892) 133 Ind. 265, 32 N. E. 881; *Wabash & W. R. Co. v. Morgan* (1892) 132 Ind. 430, 31 N. E. 601; *Bartley v. Troilicht* (1892) 49 Mo. App. 214; *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149, 152.

⁶ *Crowell v. Thomas* (1897) 18 App. Div. 520, 46 N. Y. Supp. 137 (barrel exploded owing to insertion of a plug in a steam escape pipe since the time the barrel had been used, several weeks before).

⁷ *Allen v. G. W. & F. Smith Iron Co.* (1894) 160 Mass. 557, 36 N. E. 581 (wooden lever used to raise the iron door of a furnace).

⁸ In *Pantzar v. Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 368, 2 N. E. 21, where the plaintiff was injured by the fall of a cliff, the defendant sought to avoid liability on the ground that the evidence showed that it is the nature of gneiss rock to disintegrate and fall

e. Accidents subjecting instrumentalities to extraordinary strains.

—The obligation to overhaul an instrumentality which has been subjected to a shock of an uncommonly severe character is sufficiently clear.⁹ The obligation to make a thorough examination for concealed defects is especially strong where an appliance has been injured in the parts open to view, and there is a strong probability that the same accident may have weakened it in other places.¹⁰

f. Inexperience of employees who erected an appliance.—An employer is negligent if he fails to examine an appliance which has been erected by inexperienced men.¹¹

from time to time at unexpected intervals, through the action of the elements operating upon it. The court said: "It does not follow from this fact that the master is excused from using proper precautions to protect his workmen from danger known to the master, arising from such a cause. The very fact that the material was likely to fall upon and injure the defendant's servants at unexpected times imposed upon defendant the duty of inspection, and frequent and careful examinations, and, upon the discovery of any indications of danger, to adopt all suitable precautions to protect its servants from injury." *Motion v. Central Vermont R. Co.* (1890) 123 N. Y. 280, 25 N. E. 373, held it error to nonsuit a plaintiff whose intestate was killed through the fall of a quantity of wheat from the sides of an elevator bin, where the liability of the wheat to accumulate, and the consequent peril to those working in the bin, were well known to the defendant's vice principal. It is for the jury to say whether there was a proper inspection before the intestate was sent inside the bin. *Malone v. Hathaway* (1875) 6 Thomp. & C. 1, 3 Hun, 553, holds that the fact that the timbers supporting a washtub, being constantly in a damp condition, will be apt to grow rotten, is sufficient notice to an employer of the necessity for watchfulness and for frequent inspections, with a view to ascertaining whether those timbers are capable of sustaining the strain to which they are subjected. This case was reversed in (1876) 64 N. Y. 5, 21 Am. Rep. 573, but merely on the ground that the carpenter charged with the duty of looking after the structure was a fellow servant of the plaintiff. *Ryan v. Fowler* (1862) 24 N. Y. 410, 82 Am. Dec. 315, holds that a master who erects

a privy for the use of his operatives in such a dangerous place as in a wheel house, directly over the water wheel, is under a specially imperative obligation to see that the foundations of the structure are made and kept sound and safe beyond contingency. It is his duty to know that the privy is safe, and that the servants for whose use it is designed may resort to it without personal risk or peril to life or limb. The track and every exposed place on a line of railway ought to be examined after every storm, before a train is allowed to proceed. *Hardy v. North Carolina C. R. Co.* (1876) 74 N. C. 734. The certainty that a large rock left in the slope of a railway cutting will become loosened by the action of frost and water imposes an obligation to subject the track underneath it to frequent examination. *Clune v. Ristine* (1899) 36 C. C. A. 450, 94 Fed. 745. Evidence showing that the rust and damp in the holes of defective castings caused an explosion when molten metal was poured therein justifies a finding that the master was negligent in not having examined the holes beforehand. *Dyer v. Brown* (1901) 64 App. Div. 89, 71 N. Y. Supp. 623.

⁹ Negligence may be inferred from the failure to suitably inspect the coupling of an engine after it has been subjected by a collision to a strain which is likely to injure. *Norfolk & W. R. Co. v. Nunnally* (1892) 88 Va. 546, 14 S. E. 367.

¹⁰ As, where the lever of a hand car breaks, and it proves to have been cracked underneath one of its rings by the shock of a severe collision which it had undergone the day before. *Solomon R. Co. v. Jones* (1883) 30 Kan. 601, 2 Pac. 657.

¹¹ *Westbrook v. Crowds* (1900; Tex. Civ. App.) 58 S. W. 195.

160. Sufficiency of the inspection; generally.— Negligence is inferable where the inspectors employed are not reasonably competent for the duty to be performed by them¹ (see chapter XIII., *post*), or where they are not sufficient in number,² or where they are not stationed at places where their services are especially required,³ or where they are not allowed sufficient time for the discharge of their functions⁴ (see chapter XV.), or have not been supplied with suitable appliances for the purpose of making the inspection which is appropriate under the circumstances,⁵ or where the arrangements of the employer are in any other way inadequate to secure a proper inspection.⁶

The effect of a statute requiring steam boilers to be tested in a certain manner every year is merely to provide an additional safeguard, and, since the duty of an employer to use care in inspecting the appliances used by the servants does not arise out of statute, but is imposed by the common law, the fact that such a statute has been complied with by such employer does not necessarily establish that his duty has been performed.⁷

¹ *Beardsley v. Minneapolis Street R. Co.* (1893) 54 Minn. 504, 56 N. W. 176; *Chicago & A. R. Co. v. Du Bois* (1895) 65 Ill. App. 142 (where, however, it was held that a railroad company is not liable for the death of an engineer by the explosion of a boiler because it employs, to test the boiler for broken stay bolts, an inspector who is partly deaf in one ear, but whose hearing is good enough to determine whether a bolt struck with a hammer is sound or broken).

² *Toledo, P. & W. R. Co. v. Conroy* (1873) 68 Ill. 561.

³ Evidence that the defendant railway company had no car inspector at a town containing about 8,000 people, where there is a busy junction, is not irrelevant, as it tends to show that the defendant did not exercise proper care as regards the examination of its cars. *Missouri, K. & T. R. Co. v. Crowder* (1899; Tex. Civ. App.) 55 S. W. 380 (writ of error denied by Supreme Court).

⁴ Where the evidence tends to show that, considering the number of cars to be examined, there were not enough inspectors to make a proper inspection of the cars passing through a certain junction; that the thoroughness of the work depended upon the amount of time they had at their disposal and the labor to be done; that better inspection was needed at such a station than at way stations,—it is a fair inference that the

inspectors did not have sufficient time at their disposal to discover the defects in cars and machinery examined by them. *Missouri P. R. Co. v. Dwyer* (1886) 36 Kan. 58, 12 Pac. 352.

⁵ *Beardsley v. Minneapolis Street R. Co.* (1893) 54 Minn. 504, 56 N. W. 176 ("bucking" of street car, caused by the worn-out condition of the electrical fields).

⁶ In *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128, the court remarked that proof of negligence on the part of the inspectors on a single occasion would properly have been excluded on the ground stated in *Mackin v. Boston & A. R. Co.* (1883) 135 Mass. 201, 46 Am. Rep. 456, that the inspectors were fellow servants with the plaintiff; but that evidence of the custom to make no inspection of such cars would have a tendency to show the rules, instructions, and superintendence under which the inspectors were acting, and would be proper for the consideration of the jury, as foundation for the argument that such rules, etc., were insufficient to provide proper inspection. *Dunn v. Connell* (1897) 21 Misc. 205, 47 N. Y. Supp. 185, holds that the question whether the employer, a saloon keeper, knew or ought to have known of the presence of a solution of potash in the waste pipe of a toilet room, is for the jury.

⁷ *Egan v. Dry Dock, E. B. & B. R. Co.*

161. Nature of the inspection required.— The character of the inspection which the master is bound to make is described by various epithets and phrases, all of which, as will be seen from the subjoined note, are essentially the logical equivalent of the proposition that the examination must be such as a person of ordinary prudence would have made under the circumstances.¹ The question whether the examination to which the instrumentality which caused the injury was actually subjected before the accident was such as to satisfy the standard thus indicated is primarily one for the jury.² This principle is

(1896) 12 App. Div. 550, 42 N. Y. Supp. 188.

¹ In some of the cases it is merely said that the inspection or examination must be "proper." *Sack v. Doles* (1891) 137 Ill. 129, 27 N. E. 62; *North-ern P. R. Co. v. Herbert* (1885) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Benzing v. Steinway* (1886) 101 N. Y. 547, 5 N. E. 449; *Louisville & N. R. Co. v. Binion* (1894) 107 Ala. 645, 1 So. 75; *Mayer v. Liehmann* (1897) 10 App. Div. 54, 44 N. Y. Supp. 1067; *Johnson v. Richmond & D. R. Co.* (1879) 81 N. C. 453; *Chesson v. John L. Roper Lumber Co.* (1896) 118 N. C. 59, 23 S. E. 925. In others the descriptive epithet is "reasonable." *Linton Coal & Min. Co. v. Parsons* (1894) 11 Ind. App. 264, 39 N. E. 214; *Parsons v. Missouri P. R. Co.* (1887) 94 Mo. 286, 6 S. W. 464; *Mulligan v. Crimmins* (1894) 75 Hun. 578, 27 N. Y. Supp. 819. In others it is laid down that the employer must make a "proper test" (*Beardsley v. Minneapolis Street R. Co.* [1893] 54 Minn. 504, 56 N. W. 176); or a "reasonably" practical test (*Scherer v. Holly Mfg. Co.* [1895] 86 Hun. 37, 33 N. Y. Supp. 205).

In a second group of phrases the conception that the standard to be attained is the exercise of due care emerges more distinctly than in those just adverted to. "Careful inspection." *Spicer v. South Boston Iron Co.* (1885) 138 Mass. 426; *Richmond & D. R. Co. v. Burnett* (1892) 88 Va. 538, 14 S. E. 372. "Reasonably careful inspection." *Parsons v. Missouri P. R. Co.* (1887) 94 Mo. 286, 6 S. W. 464; *Murphy v. Phillips* (1876) 24 Week. Rep. 647, 35 L. T. N. S. 477. "Careful and prudent examination." *Perry v. Rogers* (1895) 91 Hun. 243, 36 N. Y. Supp. 208. "Reasonable, proper, and careful examination." *Illinois C. R. Co. v. Hilliard* (1896) 18 Ky. L. Rep. 503, 37 S. W.

75; "Such an inspection as ordinary prudence would dictate." *Atz v. Newark Lime & Cement Mfg. Co.* (1896) 59 N. J. L. 41, 34 Atl. 980. "Vigilant and careful inspection." *Paine v. Eastern R. Co.* (1895) 91 Wis. 340, 64 N. W. 1005. "Careful tests." *Morton v. Detroit, B. C. & A. R. Co.* (1890) 81 Mich. 423, 46 N. W. 111. "Reasonable and proper vigilance" is said to be obligatory in *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149. An instruction stating that the master is bound to exercise reasonable care will be pronounced erroneous, simply on the ground that the trial judge refused to give a further instruction that he is bound to give only such inspection as ordinarily careful persons in the same line of business give under like circumstances. *McGarr v. National & Providence Worsted Mills* (1901) 22 R. I. 347, 47 Atl. 1092.

² *Geary v. Kansas City, O. & S. R. Co.* (1896) 138 Mo. 251, 39 S. W. 774; *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128; *Carruthers v. Chicago, R. I. & P. R. Co.* (1895) 55 Kan. 600, 40 Pac. 915; *Coontz v. Missouri P. R. Co.* (1894) 121 Mo. 652, 26 S. W. 667; *Missouri, K. & T. R. Co. v. Young* (1896) 4 Kan. App. 219, 45 Pac. 963; *Standard Oil Co. v. Bowker* (1894) 141 Ind. 12, 40 N. E. 128; *Consolidated Ice Mach. Co. v. Kiefer* (1887) 26 Ill. App. 466; *Toy v. United States Cartridge Co.* (1893) 159 Mass. 313, 34 N. E. 461; *Deo, ick v. Missouri P. R. Co.* (1886) 21 Mo. App. 433; *Brann v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5; *Fuchs v. Wm. H. Sweeney Mfg. Co.* (1890) 34 N. Y. S. R. 925, 12 N. Y. Supp. 870; *Crowell v. Thomas* (1897) 18 App. Div. 520, 46 N. Y. Supp. 137; *Tissue v. Baltimore & O. R. Co.* (1886) 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 667; *Everson v. Rollinson* (1887;

not affected by the fact that the preponderance of the testimony, whether measured by the number of the witnesses or the comparative credit which the court may think to be due to each, is in favor of one litigant.³

Pa.) 6 Cent. Rep. 745; *Lake Shore & M. S. R. Co. v. Ryan* (1897) 70 Ill. App. 45; *Missouri, K. & T. R. Co. v. Cox* (1900; Tex. Civ. App.) 55 S. W. 354; and the cases cited *infra*. In an action for an injury caused by a railway coal chute, evidence showing that there was a daily inspection of the chutes, and, on the other hand, that, ten days after the accident, only one chute out of the twelve in the same shed would operate properly, warrants the submission to the jury of the question whether the chute was in good repair, and, if not, whether the defendant knew or should have known of it. *Great Northern R. Co. v. Kasischke* (1900) 43 C. C. A. 626, 104 Fed. 440. The case is for the jury where a bridge fell owing to the vibrations caused by the operation of a pile driver upon it, and one employee testified that he had inspected it three or four times a day, and another that he had inspected it at least twice a day; and it was also in evidence that forces of men were at work on both sides of the river, and at different places on the bridge, and that some of these inspections were made in going from one place to the other to give directions. *Borren v. Chicago, B. & N. W. R. Co.* (1888) 95 Mo. 268, 8 S. W. 236. A court of review is, of course, particularly averse to setting aside a verdict which was based to a large extent upon the conclusions which the jury drew from a view of an accurate model of the appliance which proved defective. *McKnight v. Chicago, M. & St. P. R. Co.* (1890) 44 Minn. 141, 46 N. W. 294. But a charge is erroneous which declares the defendant to be liable if the defects which caused the explosion of a boiler were such as were known or discoverable by examination, or the application of known tests, where there is no evidence offered to show what known tests existed which the defendant could have applied, and the jury were thus left to determine by their own judgment what tests ought to have been applied. *Ballard v. Hitchcock Mfg. Co.* (1839) 51 Hun. 188, 4 N. Y. Supp. 940. The court refused to set aside a judgment for the plaintiff, where he was injured by the giving way of a brake shaft,

where a subsequent examination showed that there was an old fracture in the shaft, and a weld at the place of the fracture and a sliver just above it. It was considered reasonable to infer that upon proper inspection, these appearances would have invited scrutiny, and led to a discovery of the defect. *Texas & P. R. Co. v. O'Fiel* (1890) 78 Tex. 486, 15 S. W. 33. The fact that a stake on a lumber car is "decayed, rotten, and dozy," according to the uncontradicted testimony, shows that there has been no efficient inspection of the loading of the cars. *Ryan v. New York C. & H. R. R. Co.* (1895) 88 Hun. 269, 34 N. Y. Supp. 665. It is negligence to send out a car with a hand-hold so defective that its condition is obvious to one making the most casual inspection. *Settle v. St. Louis & T. F. R. Co.* (1894) 127 Mo. 336, 30 S. W. 125. A loose bolt or screw on one end of a hand-hold on a railroad car is a defect which could have been discovered by an inspection conducted with ordinary care. *Brown v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5. A railroad company is liable for an accident to a brakeman, free from contributory negligence, caused by the absence of a nut from the top of a brake staff, which held the lever fast to it, notwithstanding an imperfect inspection made a short time before the injury. *Hunter v. Platt* (1895) 84 Hun. 487, 32 N. Y. Supp. 1144. See also *McMahon v. McHale* (1899) 174 Mass. 320, 54 N. E. 854 (displacement of key caused fall of derrick); *Hutton v. Hilton Bridge Constr. Co.* (1899) 42 App. Div. 298, 59 N. Y. Supp. 272 (clamps fastening the rods by which a scaffold was supported became loose).

³So held where there was much testimony showing that a car stake was apparently sound, and that there was no defect about it which could be discovered by a reasonably careful inspection, but one witness testifies that the outside of the stake was "spongy and like a cork when it had been shaved off with an ax." *Bushby v. New York, L. E. & W. R. Co.* (1885) 37 Hun. 104. *St. Louis, I. M. & S. R. Co. v. Harper* (1884) 44 Ark. 524, where the witnesses

Whether or not the duty of a master with regard to proper inspection has been performed by the application of any given test is to be determined by considering whether that test will give indications as to the actual condition of the instrumentality in question.⁴ In the application of this principle the courts have usually proceeded upon the theory that a merely visual or ocular inspection of external conditions does not satisfy the full measure of a master's obligations, where the servant's safety depends upon the soundness of the material of which an instrumentality is composed,⁵ or upon the firmness with which the separate parts of an instrumentality are attached to each

who seemed to be entitled to the greatest credit declared that the best tests had been employed.

⁴ *Egan v. Dry Dock, E. B. & B. R. Co.* (1896) 12 App. Div. 556, 42 N. Y. Supp. 188.

⁵ A wooden bridge must be tested by boring or chopping into its timbers for the purpose of detecting any hidden defects. *Toledo, P. & W. R. Co. v. Conway* (1873) 68 Ill. 561; *Chicago G. W. R. Co. v. Healy* (1898) 30 C. C. A. 11, 57 U. S. App. 513, 86 Fed. 245; *Jarris v. Northern New York Marble Co.* (1900) 55 App. Div. 272, 67 N. Y. Supp. 78. It is the duty of a master to test planks which are knotty by subjecting them to a strain of a weight, at least equal, if not superior, to the weight they are designed to bear, before placing them in a scaffold. *Flynn v. Union Bridge Co.* (1890) 42 Mo. App. 529. A rope must be tested by subjecting it to a strain. *The Ethelred* (1899) 96 Fed. 446. Evidence that the fractured surface on a pair of shears used for cutting boiler plate showed indications of a crack of long standing, and that such crack, if it existed, could have been discovered by sounding the casting with hammers, which was never done, and that such shears were liable to break, raises a question for the jury as to whether the employer was negligent in not discovering the crack. *Pucheco v. Judson Mfg. Co.* (1896) 113 Cal. 541, 45 Pac. 833. In an action by a passenger it was shown that a wheel of a passenger car had been examined by the "hammer" test when new, and found

to be apparently sound. After much use, which reduced its thickness considerably, it was returned, but not subjected to the same test. There being evidence to the effect that if the same test had been applied a defective weld would have been discovered, it was held that it was for the jury to say whether the defendant had been guilty of negligence in regard to a passenger who was injured through the breaking of the wheel. *Manser v. Eastern Counties R. Co.* (1861) 3 L. T. N. S. 585. It is not error to submit to the jury the question whether a railroad company had been negligent in its inspection of a boiler fourteen days before it exploded, where the plaintiff's testimony is to the effect that the stay bolts had become broken, to the number of fifty or sixty, and had been broken so long before the explosion that the ends were worn smooth; that either the hydrostatic or the hammer test was, when properly conducted, sufficient to show the presence of broken bolts; and that, by the hammer test, at least 90 per cent of the broken bolts could be discovered. *Woods v. Chicago & G. T. R. Co.* (1896) 108 Mich. 396, 66 N. W. 328.

The "hammer test" being regarded as the best-known method of examining steam boilers, negligence will not be imputed to an employer where that test had been applied to a boiler six days before it exploded, by an inspector reasonably competent to perform the work. *Chicago & A. R. Co. v. DuBois* (1895) 65 Ill. App. 144.

other,⁶ or upon the stability of some heavy substance.⁷ Nor is it regarded as sufficient to examine a piece of machinery while it is stationary, if its actual condition and efficiency can be ascertained only by the practical test of operating it.⁸

But the position has also been taken that, in the case of some instrumentalities, at all events, there is no obligation to apply the test of a strain or other physical force for the purpose of ascertaining their condition, unless a careful inspection by the eye discloses some defect or probable weakness.⁹

⁶The grab-iron of a freight car must be tested by throwing some weight upon it. *Felton v. Bullard* (1899) 37 C. C. A. 1, 94 Fed. 781 (here the accident disclosed the fact that one end of the iron was held in place only by the stub of a screw $\frac{1}{2}$ inch long, imbedded in rotten wood, while the iron itself was about 2 feet in length, so as to make it obvious that any strain thrown upon that end of it would make its weakness apparent). The inspection of a brake staff is not adequate unless it extends to the portion which rests within the socket. *Moon v. Northern P. R. Co.* (1891) 46 Minn. 106, 48 N. W. 679. But see the next two sections.

⁷In *Finlayson v. Utica Min. & Mill. Co.* (1895) 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 519, it was laid down as a rule of law (Caldwell, J., dissenting), that a foreman of a mine, having knowledge of a gouge or threatening mass protruding from the wall of a mine, brought out by a blast, is not required to resort to any other tool or agency than a pick to dislodge such threatening mass, and that, if it cannot be dislodged with a pick, then he is not guilty of negligence in suffering it to remain at a place where the miners are liable to be injured or killed by its fall. It has also been held that negligence cannot be predicated where the evidence is that, after a blast, an employee was sent round to dislodge with a bar all rocks that seemed to be loose. *Bennett v. Tintic Iron Co.* (1893) 9 Utah, 291, 34 Pac. 61. Still less can the master be found liable where not only bars, but a derrick, was used to turn or pull over the rock which ultimately fell. *Cajasso v. Woolfolk* (1900) 163 N. Y. 472, 57 N. E. 760. Reversing (1898) 25 App. Div. 234, 49 N. Y. Supp. 409.

⁸*Baltimore Boot & Shoe Mfg. Co. v. Jamar* (1901) 93 Md. 404, 49 Atl. 847

(safety clutch of elevator). Compare *Biddiscomb v. Cameron* (1898) 35 App. Div. 561, 55 N. Y. Supp. 127, where the master was absolved because the proper test had been applied. Where an inspection of a locomotive lever, which causes injury by jumping out of the notch in which it is placed, when reversed, is made merely by an examination of the part, and not by a practical test with the engine in motion, the fact that no defect is thus disclosed is not conclusive, and it is properly left to the jury to say whether the lever became detached by reason of the carelessness of the engineer or of some defect. *Burlington & M. R. Co. v. Wallace* (1881) 28 Neb. 179, 44 N. W. 223. An allegation that the plaintiff was injured by reason of a defective brake staff, and that it might have been discovered by proper inspection at the inspecting station, was held to have been sufficiently proved where the inspector himself testified that he did not go on top of the cars to do the inspecting and was not acquainted with stuck brakes put up and let off by hand, and an expert testified that there was nothing to indicate, when a brake was applied, that it was stuck, but that fact became apparent only when the brakeman attempted to let it off. *Louisville & N. R. Co. v. Binion* (1894) 107 Ala. 645, 18 So. 75.

⁹*Thompson v. Great Northern R. Co.* (1900) 79 Minn. 291, 82 N. W. 667 (grab-iron on railway car; contrast similar case in preceding note). In *Flood v. Western U. Teleg. Co.* (1892) 131 N. Y. 603, 30 N. E. 196, the defendant was held not to be liable for injuries caused by the breaking of an arm on one of its telegraph poles, where there was a system of inspection for the arms when purchased, and it does not appear that there was anything in the external appearance of the defective arm when it was new which indicated

For other cases as to adequate modes of testing appliances, see the next two sections.

162. Limits of the master's duty in regard to inspection.—(See also next section, and compare § 174, *post.*)—A master is not required to exercise that exhaustive care in the examination of machinery which is incompatible with the proper furtherance of business.¹ This principle seems to be the main factor in the determination of the extent and character of a railway company's duty in respect to the examination of rolling stock, while it is in use.² The courts decline to

any weakness, or that there was any defect therein discernible by any ordinary inspection. The court said: "This arm had been in use for about six years, and during all that time had perfectly answered its purpose. There was no proof showing how long such an arm ought to last, or be used. The defendant had a system of inspection which appears to have been all that was practicable. Its inspectors went along the line of telegraph poles and wires, and carefully looked at them and tried the poles to see if they were still strong and adequate. . . . They were not expected to climb up every pole and examine the arms thereon. Such an inspection would be manifestly impracticable and unnecessary." In one case the court set aside a verdict based on the theory that a contractor owes masons employed by him the duty of testing the strength of every timber in a scaffold used by the masons, where an external examination shows no defect. *Bannon v. Sanden* (1896) 68 Ill. App. 164. Inspectors of cars are not required to apply tests of physical force to the steps of a ladder upon a freight car, in order to absolve the company from liability for defects therein, unless some indication of weakness or defect is perceived upon a careful inspection by the eye. *Allen v. Union P. R. Co.* (1891) 7 Utah, 239, 26 Pac. 297.

¹ *Philadelphia & R. R. Co. v. Hughes* (1888) 119 Pa. 301, 13 Atl. 286, citing Wharton, Neg. § 213. The limits of the employer's duty to provide for the safety of the workmen are "set by what is practicable in a commercial sense, and by what is naturally to be expected under the circumstances." *Kanz v. Page* (1897) 168 Mass. 217, 46 N. E. 620.

² A railroad company in discharging its duty towards its employees to inspect cars "is not required to resort to

tests that are impracticable, or unreasonable and oppressive, or which would be incompatible with the proper furtherance of business, and which are only required to insure absolute safety." *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564, 45 N. E. 108. It "is not bound to pursue a system of inspection of its cars and locomotives which would embarrass the operation of the road," but simply to exercise ordinary care. *Smoot v. Mobile & M. R. Co.* (1880) 67 Ala. 13 (court refused to say that there should have been an inspection of cars at every station). It is not required that the tests made by car inspectors should be as thorough and exhaustive as the tests made at the general construction or repair shops. *Atchison, T. & S. F. R. Co. v. Ledbetter* (1885) 34 Kan. 326, 8 Pac. 411. In *Tierney v. Minneapolis & St. L. R. Co.* (1885) 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229, the court said: "It is difficult to lay down a general rule which will be applicable in practice, and define accurately the limits of the master's liability in this class of cases. But if the special duty and responsibility belong to the car inspector to examine and determine whether a car is unfit for service, and shall be so marked and sent to the repair track or shop, it is difficult to discover any distinction in kind between his duty and that of the mechanics who make the repairs. It will also be borne in mind that the measure of liability on the part of the company is reasonable care, which must be determined by the circumstances in each case. Experience in the competent and practical management of railroads will naturally determine the nature and frequency of inspections which ordinary care would require should be made between the intervals of the more minute examinations at the general repair shops. But the general examina-

allow a servant to recover on the theory that there is an obligation to remove the bolts, screws, pins, or other machinery of a car *en route*, in order to detect any possible imperfections.³

A master is not chargeable with knowledge of an unsound place in an appliance, which could not have been discovered by any examination short of severing it, and thus destroying it for use.⁴

163. Common usage as a test of the adequacy of an appliance —

tions which experience has shown practicable and necessary to be made of cars at the yards designated for such purpose, without causing undue delay while in the course of transportation, would at least include such patent defects as would be readily discoverable upon inspection by a competent person in the exercise of reasonable care."

³ *Philadelphia & R. R. Co. v. Hughes* (1888) 119 Pa. 301, 13 Atl. 286. In *Detraff v. New York C. & H. R. R. Co.* (1879) 76 N. Y. 125, the court, in commenting on the contention of the plaintiff that the exercise of ordinary care would have discovered the defect in the coupling chain which broke and injured him, and that these chains should be detached at intervals, and their strength tested by hydraulic pressure, or dead weight, or by some other mode which would be effectual for that purpose, said: "Such a requirement is unreasonable and unnecessary, either to insure the safety of the public or employees. . . . As a general rule the degree of vigilance required is measured by the dangers to be apprehended or avoided. It does not appear to be necessary that the full strength of these chains should be kept up. That would involve a test on every trip, and a possible renewal on every trip. Again, on a train of thirty cars, each one having a brake, it would not seem to be indispensable that every brake chain should be perfect, as but a few of that number could or would be used in controlling the train; and again, it does not appear that the breaking of a chain would ordinarily result in such an accident. Such chains frequently break, as the evidence shows, but there is no evidence that an injury ever resulted from such breaking, nor that it would ordinarily do so." In *Louisville & N. R. Co. v. Campbell* (1893) 97 Ala. 147, 12 So. 574, it was held that there was no cause to go to the jury where a brakeman was injured through the giving way of a brake rod in which there was an old

crack, which could have been discovered only by taking it out or cutting it up. The court said: "We have seen that the undisputed evidence shows that ordinary inspections of brakes are never made on well-regulated railroads by taking out or removing the rods; and that it would be impracticable to do so. Indeed, common observation and experience suggest the impracticability of such a system. If one brake should be taken apart and examined, all should, and if all, then every other machine or appliance connected with the train and composed of adjustable parts. To do this would cripple and embarrass the operation of the road beyond any requirement of the law. We are of opinion that such an inspection is an extraordinary duty called into being only by some exigency which would suggest to the mind of a reasonably prudent person a necessity for its performance." The fact that a part of the break had existed long enough for rust to accumulate was too uncertain a predicate to rest a charge of negligence upon. A railroad company is, as matter of law, not liable for injuries caused by the breaking of the lever of a hand car where it gives way owing to a crack in a part of the wood which is concealed by an iron socket, and no one could have discovered the defect by an external inspection. *Louisville & N. R. Co. v. Hinder* (1895) 16 Ky. L. Rep. 841, 30 S. W. 399.

⁴ *Essex County Electric Co. v. Kibler* (1894) 57 N. J. L. 100, 29 Atl. 427. In *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, the court, replying to the objection that the test of boring the timbers was not applied, remarked that this is no more a certain test than the one which had been applied; that it had but rarely been used upon the bridges on the defendant's road, or, so far as the testimony showed, upon any others; that, when carried too far, it became itself a source of weakness.

In chapter v., *ante*, it has been shown that the common usage of employers in the same line of business as the defendant is, by all the courts, recognized as a material factor in the determination of the question whether the master had furnished reasonably safe instrumentalities. The same standard has frequently been applied as a gauge of the master's performance of the duty of inspection.¹

As in cases where the quality of the instrumentalities themselves is in question, it is agreed by all the authorities that a jury may properly infer negligence from the master's failure to conform to usage in regard to the methods of inspection adopted.²

¹In referring to this standard the courts have used the following phrases: "Such tests as are ordinary and usual in the business," *Chicago G. W. R. Co. v. Healy* (1898) 30 C. C. A. 11, 57 U. S. App. 513, 86 Fed. 245. "Such tests as custom and experience have sanctioned and prescribed," *Warner v. Erie R. Co.* (1868) 39 N. Y. 468. Methods of testing "ordinarily in use by prudently conducted roads engaged in like business, and surrounded by like circumstances," *Louisville & N. R. Co. v. Allen* (1885) 78 Ala. 494, repeated in *Richmond & D. R. Co. v. Jones* (1890) 92 Ala. 218, 9 So. 276. "Ordinary and proper tests," *Knoxville Iron Co. v. Holson* (1881) 7 Lea. 367. "Reasonable and usual tests," *Smith v. Chicago M. & St. P. R. Co.* (1877) 42 Wis. 520. "Careful and skilful application of the ordinary and approved tests," *Nashville & D. R. Co. v. Jones* (1871) 9 Heisk. 28. "Usual tests," *South-west Virginia Improv. Co. v. Andrew* (1889) 86 Va. 270, 9 S. E. 1015. "Ordinary inspection," *Cowan v. Chicago, M. & St. P. R. Co.* (1891) 80 Wis. 284, 30 N. W. 180; *McKnight v. Chicago, M. & St. P. R. Co.* (1890) 44 Minn. 141, 46 N. W. 294; *Atchison, T. & S. F. R. Co. v. Penfold* (1896) 57 Kan. 148, 45 Pac. 574; *Flood v. Western U. Teleg. Co.* (1892) 131 N. Y. 603, 30 N. E. 196.

²A verdict holding a railroad company liable for injuries caused by the explosion of an engine, due to defective stay bolts, will not be disturbed where there is testimony to the effect that, if any one out of several recognized tests had been applied within a reasonable time before the explosion, the true condition of the stay bolts would have been discovered. *Texas & P. R. Co. v. Barrett* (1895) 14 C. C. A. 373, 30 U. S. App. 196, 67 Fed. 214. Affirmed in 1897, 166 U. S. 617, 41 L. ed. 1136, 17 Sup.

Ct. Rep. 707. It cannot be contended that a test ought not to be adopted, if it be a useful one and may reasonably be expected to bring about the result, because it is not absolutely fixed. *Channell, B., in Manser v. Eastern Counties L. Co.* (1861) 3 L. T. N. S. 585. The fact that the custom of other roads as to the duty of inspection of air brakes was not followed was held sufficient evidence of negligence in *Pierston v. New York, N. H. & H. R. Co.* (1900) 53 App. Div. 363, 65 N. Y. Supp. 1639. In *Wainmaker v. Rochester* (1892) 44 N. Y. S. R. 45, 17 N. Y. Supp. 321, the defendant municipality was held liable for its failure to comply with the usual custom of inspecting trenches opened by independent contractors for the reception of water mains. In *Jones v. Malvern Lumber Co.* (1893) 58 Ark. 125, 23 S. W. 679, it was shown that the only tests of a boiler's strength applied after it was repaired were made by sounding its rivets and braces with a hammer, and by the pressure of steam raised for that purpose; and testimony was adduced by the plaintiff to prove that the "hammer test" was not effective, and was not the test usually applied. In rebuttal, the defendant introduced a person engaged in the milling business, and asked him what tests the mill men of the vicinity generally applied to the steam boilers used in their business. The question was objected to, but the court permitted the witness to answer and he stated that the "hammer test was the one usually applied, so far as he knew." The court said: "The defendant's duty to its servants did not require it to resort to unusual or impracticable tests; and we think the question was proper, as eliciting evidence tending to show that one of the tests applied by the company's master mechanic was not usually em-

With regard to the evidential significance of conformity to usage, most of the cases apply the principle adopted in the decisions cited in § 41, *ante*, viz., that a jury is not warranted in finding the master to be negligent if such conformity is clearly established.⁵ In

ployed by persons engaged in operating similar machinery."

⁵ *Warner v. Erie R. Co.* (1868) 39 N. Y. 468; *Knorrville Iron Co. v. Dobson* (1881) 7 Lea, 307; *Southwest Virginia Improv. Co. v. Andrew* (1889) 86 Va. 270, 9 S. E. 1015. The master is not required to apply extraordinary tests "not approved, practicable, or customary." *Louisville & N. R. Co. v. Allen* (1885) 78 Ala. 494. A railroad company is not required to adopt extraordinary tests for discovering defects in a locomotive boiler, or any of its machinery, which are not approved, practicable, and customary; but it fulfills its duty in this regard if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances. *Texas & P. R. Co. v. Barrett* (1897) 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707. Negligence as regards inspection cannot be predicated on the ground that a spindle which broke was not removed from the drawbar for the purpose of examining it, where no testimony is adduced to show that it is customary for railway companies, or that it has ever been considered essential by prudent men engaged in the same business, to adopt this method of inspection. *Burns v. New York, P. & B. R. Co.* (1892) 20 R. I. 789, 38 Atl. 826. A verdict for the plaintiff was set aside where the evidence on the part of the defendant tended to show that a flaw in a brake rod was not discoverable, owing to rust on the rod, by the usual methods of inspection, and there was no evidence on the part of the plaintiff to rebut this, his testimony to the effect that the defect would have been discernible by the eye if it had been daylight being held to be merely his inference from the fact that the brake rod was so easily twisted off in his attempt to set the brake. *Read v. New York, N. H. & H. R. Co.* (1897) 20 R. I. 209, 37 Atl. 947. A verdict for a railway servant injured by a defective drawbar will be set aside if no evidence was adduced by him to show that the defect could have been discovered by any of the ordinary tests employed by car inspectors. *Atchison, T.*

& S. F. R. Co. v. Ledbetter (1885) 34 Kan. 326, 8 Pac. 411. An employer is not liable for the death of his engineer from explosion of a boiler, though the repairer, who had stopped a leak at a seam by caulking, did not apply the water test, the evidence being that customarily nothing of the sort was done if caulking proved effective. *Kramer v. Willy* (1901) 109 Wis. 602, 85 N. W. 499. Where a boiler of a locomotive engine bursts, owing to a flaw which is latent, and discoverable only by the steam and hydraulic tests, which are not in ordinary use with railroad corporations, and rarely applied except when boilers are first put in use or when the engines undergo their periodical examination in the workshop, the employer is not liable. *Louisville & N. R. Co. v. Allen* (1885) 78 Ala. 494. In *Smith v. Chicago, M. & St. P. R. Co.* (1877) 42 Wis. 520, the court remarked, with regard to the tests applied to the defendant's brake rods: "The defendant proved by John Baillie, its master car builder, that the iron was purchased of the best makers, and was of the best quality; that samples of each lot were tested in the defendant's shops in the usual and most approved manner; that all materials were inspected, as well as the work done, by first-class inspectors; that he himself examined thoroughly all cars purchased by the company, as to the character of the cars, the material used, and their manufacture; and that no car was allowed to go on the road, in which he could discover any defect which would make it unsafe. It appeared that the system of inspection of cars which were purchased, and the tests applied to the materials of which its cars were manufactured, were the same as those adopted or applied by railroad corporations generally. . . . So far as we are able to judge from the testimony, the defect in the brake rod was a latent one, which would not likely be detected or discovered by the usual examination or inspection of the car. . . . There should be at least some testimony tending to show that the tests applied to determine the sufficiency of the brake rod were inadequate, and not in accordance

one case where this view was adopted it was laid down that, in determining whether an inspection was made with ordinary care, a jury can only find facts showing whether it was made in the usual and ordinary manner,—the one commonly adopted by men of ordinary care and prudence in the same business, under like circumstances.⁴ But the opposite view, that compliance with the practice usual under similar circumstances is merely evidence for the jury to consider in determining the question of due care (see § 50, *ante*), is also embodied in some decisions.⁵

164. Duty of inspection with regard to conditions arising from the progress of the work.—That the master is not under any obligation to examine into the condition of his appliances from time to time, for the purpose of ascertaining whether they expose the servant to those elements of insecurity which arise from the manner in which the details of the work are carried out, is an obvious and necessary infer-

with the most approved methods, to justify the finding of the jury."

⁴*Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564, 45 N. E. 108. There a special verdict was set aside on the ground that it did not state facts sufficient to sustain the judgment. "This court cannot," it was declared, "say, as a matter of law, that the car could not have been inspected properly in less than five minutes, or that it was necessary to use 'tools or other manual tests.' Neither are there any facts found from which we can determine whether the standard of inspection designated as an efficient and proper inspection and examination thereof, and a reasonable and ordinary inspection thereof, is the one required by law."

The finding 'that to have made an efficient and proper inspection and examination thereof would have taken fifteen minutes' is a mere conclusion. The standard thus fixed by the jury may be predicated upon the proposition that such searching and critical inspection must be made as would insure absolute safety to the employees. This, as we have shown, is not required. Facts, not conclusions, must be stated. The special verdict should state such facts as would show whether the inspection made was such as is usually made under like circumstances by inspectors of ordinary care and prudence, and this would include all facts showing whether the inspection was such as the time,

place, means, opportunity, and the requirements and exigencies of the traffic will permit."

⁵In *Missouri P. R. Co. v. Dwyer* (1886) 36 Kan. 58, 12 Pac. 352, with respect to a custom or practice of the inspectors to do nothing more than to make a casual examination of brake staffs which were straight and apparently all right, by which it was not probable a crack or break of the kind stated would be observable, the court said: "Upon the grounds of public policy, a practice or custom which would permit the inspectors to let a car be operated with a defective brake staff, when, by the exercise of reasonable and proper care on their part, the defect could have been discovered and remedied, can hardly be sustained as a valid custom." *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149; *Berg v. Chicago, M. & St. P. R. Co.* (1880) 50 Wis. 419, 7 N. W. 347. If a brake staff is not to be examined for visible defects or cracks until it is bent or broken, inspection would be almost useless; in any event, it would be no protection for the safety of the employees using the brake." In *International & G. N. R. Co. v. Haines* (1899) Tex. Civ. App. 54 S. W. 325, it is held that the fact that a railroad car was inspected by a competent inspector in the ordinary way does not conclusively show that ordinary care was used in making the inspection.

ence from the doctrine developed in chapter xxxii., *post*.¹ But it is by no means easy to define with precision the spheres of operation covered by this doctrine and that which requires the master to maintain the place of work in safe condition. Some cases are cited below which indicate the extent to which the courts have gone in allowing recovery on the ground that the master failed to keep a reasonably careful watch upon the various parts of his plant, to the end that they might not unduly imperil the safety of his servants by any of the temporary conditions which the progress of the work might create in their local relations to each other or to the servants.²

165. Inspection by parties other than the proprietor himself, effect of.—a. Public officials.—On the one hand it has been laid down that the mere fact that an instrumentality—here a freight elevator—is inspected at stated intervals by city officers and the agent of an indemnity company does not, as matter of law, release the master from his duty to make frequent examinations, and apply frequent tests to the elevator, to see that it is in working order and in a safe condition.¹ On the other hand it has been said that an employer who has no knowledge fitting him to inspect a boiler may rely on the certificate of the official boiler inspector of the city where the business is carried on.²

If these cases are to stand together, they are presumably to be dif-

¹ On this ground recovery was denied in *Quigley v. Levering* (1901) 167 N. Y. 58, 54 L. R. A. 62, 60 N. E. 276, Aff. (1900) 50 App. Div. 354, 63 N. Y. Supp. 1059 (trolley ran off traveling bar owing to want of proper cleaning and oiling).

² A master is bound to inspect and see that posts are properly secured before he orders workmen to go upon them for the purpose of placing girders in position. *Herdler v. Buck's Store & Range Co.* (1896) 136 Mo. 3, 37 S. W. 115. It is the duty of an employer, in ordering a laborer to work near or alongside a pile of ore packed into such a mass that the use of explosives is required to loosen it, to observe carefully the condition of the material as to looseness or compactness, and all other features of its structure, so as to be able to determine what shall be done to prevent the fall of the ore upon such employee. *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876. Where a mason is injured by the explosion of a dynamite cartridge left in a stone taken from a quarry at some distance from the work, an instruction is correct

which leaves it to the jury to say in manner in which the operations at the quarry were conducted, and the risk that unexploded cartridges might remain in the stones carted away for building purposes, ought, as an ordinarily prudent man, to have examined the stone from which the servant's injury resulted. *Nerve v. Sears* (1892) 100 Mass. 303, 29 N. E. 472. A servant whose duty it is to empty buggies of molten slag on a dumping ground designated by his superiors does not, in performing that duty, "make the place of work," in such a sense as to absolve the master from the obligation of using proper care to see that the dumping ground itself remains in such a condition that the slag may be safely thrown upon it. *Kiras v. Nichols Coal Co.* (1901) 59 App. Div. 79, 69 N. Y. Supp. 44.

¹ *McGregor v. Reid, M. & Co.* (1899) 178 Ill. 464, 53 N. E. 323, Reversing (1898) 76 Ill. App. 610.

² *Service v. Shoneman* (1900) 196 Pa. 63, 46 Atl. 292.

ferentiated on the basis indicated by the qualifying clause in the second one,— *viz.*, that the want of expert knowledge entitles the master to rely on the adequacy of the official inspection. But it is difficult to admit that the fact of an appliance having been pronounced sound by an official inspector should be deemed to preclude the jury from considering whether his inspection was really an adequate one. Such an inference seems to be unwarrantable without assuming the possession by such inspectors of a much larger measure of skill and diligence than can fairly be credited to any class of employees. Another objection to holding the master not liable, as a matter of law, is that the doctrine of non-delegable duties is virtually ignored.

b. Manufacturer.—It has been held in one case that the proprietor of an elevator and equipments of the most approved kind, which were personally looked after and inspected both by the proprietor and by the regular inspector of the manufacturer who furnished them, is not liable for injuries caused by defects which were not known to him.³ Apparently, no case has been decided in which an inspection by the manufacturer's inspector only had been made. But, provided the inspection made by that inspector is shown to have been as thorough as any that the master himself could have made, there seems to be no reason to doubt that he should be deemed to have exercised due care.

³ *Hart v. Naumburg* (1890) 123 N. Y. 641, 25 N. E. 385, Reversing (1888) 50 Hun, 392, 3 N. Y. Supp. 227.

CHAPTER XII.

EMPLOYER'S LIABILITY CONSIDERED WITH REFERENCE TO THE OWNERSHIP OF THE INSTRUMENTALITY WHICH CAUSED THE INJURY.

166. Instrumentalities both owned and controlled by defendant at the time of the accident.
167. Instrumentalities which belong to a third person and become active for mischief, owing to the negligence of his employees.
168. Instrumentalities not belonging to the employer, and used by his servants without his authority.
169. Instrumentalities neither owned nor controlled by the defendant, but used by his direction; generally.
170. Employer held not to be liable.
171. Employer held to be liable.
172. Instrumentalities not owned by the employer, but controlled by him, and used by him as a part of his plant.
173. Liability of railway companies for the condition of cars received from other roads; generally.
174. Obligation of receiving company to inspect foreign cars.
175. Manner in which foreign cars are constructed; how far a source of liability.
176. Effect of statutory and constitutional provisions requiring railway companies to transport foreign cars.

166. Instrumentalities both owned and controlled by defendant at the time of the accident.— In the absence of any sufficient evidence to show that the instrumentality which caused the injury was not a part of defendant's plant, acquired or constructed by him for the purpose of his business, and controlled by him, as owner, when the injury was received, the doctrine explained in the preceding chapters determines the extent of his responsibility.¹ If the testimony is conflicting, or is susceptible either of the inference that the instrumentality was of this description or that it was not, its true character is a question for the jury to decide.²

¹ Where an electric railway company engages a contractor to ballast the roadbed, allowing the contractor to operate a car thereon, but the company retains the right to direct the management of cars and signals, a motorman

company does not assume the risk of a collision with the contractor's car. *Ortlip v. Philadelphia & W. C. Traction Co.* (1901) 198 Pa. 586, 48 Atl. 497.

² A nonsuit should not be granted in an action against a company to recover

Where the instrumentality belongs to the movable class, the master's liability for its condition does not cease merely because it is transferred temporarily to the premises of another person, and used for the purpose of furthering work which the latter is doing.³

167. Instrumentalities which belong to a third person and become active for mischief, owing to the negligence of his employees.—

An action cannot be maintained for injuries caused by the negligence of the servants of the owner of premises adjoining those of the defendant; at all events, in the absence of evidence showing that the particular event which produced the injury, ought to have been foreseen and provided for by him.¹

for personal injuries sustained by a workman who fell through a rotten plankway, on the ground that the unsound planks were not shown to be the property of the defendant, when there is evidence tending to show that the defendant was operating and conducting the business in which the plankway was provided for the use of its servants in the course of their employment. The plaintiff is not required to prove that the defendant owned the planks of which the plankway was constructed. *Powers v. Standard Oil Co.* (1898) 53 S. C. 358, 31 S. E. 276. Where a laborer unloading a vessel, on arriving in the morning finds that a ladder necessary in the work has been placed in position, and is being used by his fellow workmen under direction of the superintendent of the company which employs him, such circumstances are prima facie evidence that the ladder has been provided by his employer; and it is error to nonsuit him for lack of such proof, in an action for an injury received while using such ladder. *Mills v. Maine Ice Co.* (1889) 51 N. J. L. 342, 17 Atl. 695. In *McGatrick v. Wason* (1855) 4 Ohio St. 566, where the plaintiff was assisting in the shipment of his master's goods on a steamer, the law of the case was thus laid down by the court: "If Wason had no charge of, or control over, the operation of shipping the cars and trucks, but, on the contrary, the duty of shipping them rested solely upon the master of the vessel, and he had the entire control over the operation, and Wason acted merely as his assistant or servant, then the action should have been brought against the owner of the vessel, and not against Wason. But if it was Wason's duty to ship them, or if it was the joint

duty of him and the master, he was (as between him and McGatrick) liable for the injury if it resulted from his neglect, or that of the master, to provide suitable machinery.—the defect in the machinery being unknown to McGatrick. The general rule is, that an employer who provides the machinery, and oversees and controls its operation, must see that it is suitable."

² A railroad company is liable for personal injuries to a fireman in its service ordered to work upon an engine furnished by it to a contractor engaged in constructing an extension of its road, occasioned by defects in the engine attributable to its negligence, although the track of the extension is in possession of the contractor, and the operation and movements of the train are under the latter's exclusive control. *Savannah & W. R. Co. v. Phillips* (1892) 90 Ga. 829, 17 S. E. 82.

³ In a Scotch case it was sought to hold a railway company liable to a servant who, while working at the junction between the line operated by the defendant and a private one leading from a colliery, was injured by a coal car which, owing to its being insufficiently blocked, started down an incline and ran on to the defendant's track. The court decided, without difficulty, that the only party against whom the action lay was the owner of the colliery. *McLaren v. Edinburgh & G. R. Co.* (1861) 23 Sc. Sess. Cas. 2d series, 962. By one of the judges it was suggested, but not decided, the point having been overlooked by counsel, that, under appropriate allegations and evidence, the railway company might be held liable on the ground of its having failed to make suitable regulations in view of such a contingency.

168. Instrumentalities not belonging to the employer, and used by his servants without his authority.— There is clearly no ground upon which an employer can be held liable where the servant was injured while using, for the purposes of his work, some material substance which happened to be in a convenient position, but which was not the property of the employer, and which was not used by his authority.¹

169. Instrumentalities neither owned nor controlled by the defendant, but used by his direction; generally.— The cases dealing with the right of a servant to sue for injuries received from an instrumentality which belonged to and was under the control of a third person at the time of the accident, but which the servant was required to use in the course of his employment, are irreconcilably conflicting, whether they are collated with reference to the fundamental principles relied upon, or with reference to the specific facts involved. This want of harmony seems to be chiefly due to the same cause that produces most of the disagreement in this branch of jurisprudence, *viz.*, the fact that it is often a mere matter of opinion which of two or more doctrines not disputed as abstract propositions should be applied, for the purpose of testing the legal significance of the testimony introduced. In view of this disagreement between the authorities, a commentator can do nothing more than indicate the effect of the decisions in which the master's liability has been denied or affirmed, and state the reasons by which they are supported.

It should be observed that the conflict of opinion disclosed by the cases cited in the next two sections reappears in those decided under the English employers' liability act of 1880, and the American and Colonial statutes modeled upon it. See chapter xxxvii., *post*.

170. Employer held not to be liable.— In numerous cases, presenting a considerable variety of facts, the courts have treated the defendant's want of control over the instrumentality as the controlling factor, and regarded this as a decisive reason for exempting him from responsibility.

In some of these cases the unsuccessful plaintiff was sent to the premises of a third person to perform duties in connection with work which his employer had contracted to do, and the injury was caused by some appliance which he found on those premises.¹ In others,

¹ A telephone company is not liable for an injury to a lineman caused by the breaking of a limb of a tree upon which he was standing for the purpose of removing an obstruction to the stringing of a wire between the poles erected for that purpose, as the tree is not an appliance furnished by the company, or, if so, the lineman assumed the risk incident to its use. *Yearsley v. Sunset Teleph. & Teleg. Co.* (1896) 110 Cal. 236, 42 Pac. 638. ² In *Channon v. Sanford Co.* (1898) 70 Conn. 573, 41 L. R. A. 200, 40 Atl.

an abnormally dangerous situation was permanently created by the position of some substances, relatively to the servant's place of

462. the court denied that the general rule requiring an employer to provide a safe place of work is applicable in a case where a servant is seeking to recover damages from his master, one of the contractors working on a building, for injuries caused by the fall of a scaffold erected by another contractor, saying: "This general rule is not ordinarily applicable to cases where the master neither has nor assumes possession, use, or control, legal or actual, of the premises, or 'place' where the servant may be at work. The general rule is based upon such possession, use, and control by the master of the premises where he puts his servants at work for him; and, speaking generally, his duty to use due care to make and keep such place reasonably safe flows from, and is measured by, such possession, use, and control. Just as the master's liability for the acts of his servants while engaged in his business is based upon his power to control them, so his duty to provide reasonably safe premises is founded essentially upon his occupation, use, and control of such premises. This being the reason of the rule, when the reason does not exist the rule is inapplicable. If an employer sends his servant to a distant place, by rail, to do a piece of work on the premises of B., it would hardly be contended, in the absence of a special agreement to that effect, that the master would be responsible to the servant for the negligence of the transportation company in carrying the servant safely, or for the negligence of B. in failing to keep the premises in a reasonably safe condition. In the case supposed, the servant, both while being carried and while at work on B.'s premises, is at work for his master, and the railroad car and the premises of B. are places where he is directed to and does perform work for his master, and yet the master, as master merely, would be under no duty to use reasonable care to make such places reasonably safe. The law, in such cases, reads no such duty into the contract of hiring. If the master assumes possession and control of the premises of B., with his consent, even temporarily, for the purpose of doing the work there, the result might be different. Such a case might be, under certain circumstances, within the reason of the rule. Ordinarily, however,

we think the law reads such a duty on the part of the master towards the servant into the contract of hiring only with reference to premises used, occupied, or controlled by the master. If this were not so, the duty and liability of the master would be very burdensome. He would be, in effect, frequently made responsible for the negligence of third parties with reference to premises he had never seen, and about the condition of which he knew, and perhaps could know, nothing. The merchant would, in effect, be liable to his clerk for the negligence of the customer with respect to the safety of the premises upon which the clerk goes to deliver his master's goods, and the master plumber or carpenter to his workman for the negligence of the householder upon whose premises he sends the workman, simply to make some slight repairs. In all such cases the servant, if injured, without fault on his part, by the negligent failure of the owner or occupier of the premises to keep them in a reasonably safe condition, has his remedy against such owner or occupier, and, in the absence of some agreement to that effect, has none against the master."

A master who sends his servants to construct an elevator in a building which is in process of construction is not liable for an injury caused by the unsafe condition of a scaffold, in the construction of which he had no part. *Whallon v. Sprague Electric Elevator Co.* (1896) 1 App. Div. 264, 37 N. Y. Supp. 174. The court laid it down that the rule which requires the master to provide the servant a reasonably safe place to do his work only applies where the place is either under the control of the master, or, in the ordinary conduct of the work, should have been under his control, and proceeded as follows: "In a factory, a mill, a shop, or even a mine or excavation occupied or worked by the master, it is his duty to take reasonable care that the place is secure and safe for his servant; and the servant has the right to assume that the master has discharged his duty in that respect. But where the master sends his workmen to work on the premises or property of others, it cannot be said to be his duty to provide a safe place for the servant, for the place is not in any way

work.² In others, the defendant was the licensee of a railway, and using it jointly with the owner for the running of trains.³ In others, the defendant was the owner of premises over which a railway company had constructed a siding, the operation and maintenance of

provided by the master. I cannot find any reported decision in which it has been attempted to enforce liability in such a case. The defendant here had no share in the construction of the building, save to erect the elevators. Its implied license on the premises was confined to such parts as were necessary for it to occupy in the work or in obtaining access thereto, but it had no control over nor was it responsible for the condition of the building. The learned counsel for the respondent concedes that the defendant could not have been held liable for any defect in the permanent structure, but insists that there is a distinction to be made between what is permanent and what is temporary. We believe that this distinction may be well founded, but the necessary result of such a distinction is that what is temporary must be considered as an 'appliance,' and only what is permanent as a 'place.' This seems to be the basis of the decision in *Butler v. Townsend* (1891) 126 N. Y. 105, 26 N. E. 1017, where it was held that a staging on which calkers stood while at work on a vessel was not a 'place' but an 'appliance,' by means of which the work was to be done." (This distinction, however, seems to be wholly immaterial, as the master is just as much under a duty to use care in regard to appliances as in regard to the place of work.) This case was followed by *Wittenberg v. Friederich* (1896) 8 App. Div. 433, 40 N. Y. Supp. 895, a case involving similar facts.

In *Hughes v. Leonard* (1901) 199 Pa. 123, 48 Atl. 862, plaintiff was employed by the defendants, who were contracting wharf and bridge builders, to work on their pile driver in constructing a certain pier. The defendants had purchased the piles from T., who had agreed to bring them to the place in his own vessel, and deliver them over the side. While plaintiff was on T.'s boat, assisting in unloading the piles under direction of defendants' foreman, a short guy rope, part of the tackle of the vessel, broke, allowing the boom to swing around and tighten another rope attached to it, which drew plaintiff into the hold of the vessel, injuring him.

The extremely improbable character of the event which caused the injury, as emphasized by the court, but it is not apparent that the decision is to any extent based upon this circumstance.

A person who contracts to do a portion of the work on a building in course of erection is not bound to have the building in such a condition that employees can wander through it in the darkness, away from the regular passageway, without risk of falling. Nor is it his duty to maintain artificial lights for those who should choose to attempt to go through after nightfall. *Murphy v. Grechen* (1888) 146 Mass. 196, 15 N. E. 654. An auctioneer selling goods on the premises of a stranger is not responsible to his servants for the safety of those premises, nor for the sufficiency of the appliances for bringing forward and removing the goods which are to be sold. *Nelson v. Scott* (1892) 19 Se. Sess. Cas. 4th series, 425 (elevator gave way). To same effect, see also *Hughes v. Mahl*, 146 Mass. 196, 15 N. E. 654. *Anderson v. M. Gaslight Co.* (1897) 168 Mass. 395, 47 N. E. 125 (note 9, *infra*); *Dixon v. Western U. Tel. Co.* (1895) 71 Fed. 143 (note 9, *infra*); *Mounihan v. King's Windsor Cement Dry Mortar Co.* (1897) 168 Mass. 450, 47 N. E. 425 (note 10, *infra*); *Regan v. Donohue* (1893) 159 Mass. 1, 33 N. E. 702 (note 10, *infra*).

² The location of a street railway being fixed by the municipal authorities, the company cannot be charged with negligence in allowing a tree to remain dangerously near the track, unless it had the right to remove the tree. *Hall v. Wakefield & S. Street R. Co.* (1901) 178 Mass. 98, 59 N. E. 668.

³ The nonliability of the licensee company has been held a bar to the action, even where there was a statute making a railroad company liable to be sued as a corporation in any county through which the road runs, for any cause of action to which it might become liable thereafter. *Galloway v. Western & A. R. Co.* (1876) 57 Ga. 512, construing Georgia act of 1870 relative to the defendant company. See also *Dunlap v. Richmond & D. R. Co.* (1888) 81 Ga. 136, 7 S. E. 283 (note 11, *infra*).

which remained entirely under its control.⁴ In others, the defendant is the tenant of a portion of a building.⁵ In others, the distinction relied upon was that the thing which caused the injury was an article to be handled, and not an appliance with which to do work.⁶

In two of the cases already referred to it seems to be considered that the inability of the servant to maintain the action is also deducible through a line of reasoning of which the basis is his comprehension of the situation, and presumable acceptance of the risks to which it exposes him.⁷ And in the case cited below this consideration is

⁴In Scotland it has been held that the fact that a siding which is the property of a railway company passes through the premises of a steel company, and is used for the transit of the cars which convey materials to and from those premises, does not cast upon the steel company a resulting duty towards its employees to supervise and examine the proceedings of the railway company in regard to the maintenance of the siding and the management of the cars thereon. *Smyth v. Caledonian R. Co.* (1897) 24 Sc. Sess. Cas. 4th series, 488 (servant of steel company was injured by a derailment due to a defective switch).

⁵The testimony of an employer in an action by an employee for personal injuries, that the owner of the building furnished the motive power operating the cogwheel by which plaintiff was injured, and that the defendant had nothing to do with the covering of the wheel which is claimed to have been defective, is admissible. *Harlin v. Krulish* (1899) 26 Misc. 381, 56 N. Y. Supp. 275. Reversing on other grounds (1898) 25 Misc. 402, 54 N. Y. Supp. 1093.

⁶In *Rehm v. Pennsylvania R. Co.* (1894) 164 Pa. 91, 30 Atl. 356, the court, in holding that a coal company is not liable for an injury to an employee caused by defective brakes on a railroad car filled with coal and delivered to such company, on the ground of failure to furnish the employee with safe machinery, said: "The cars were the property of the railroad company that delivered the coal. They were not a part of the machinery of the defendants, used in their business. As was said by the learned judge in granting the motion for a nonsuit, they were the things worked upon, not the things worked with. The machinery and appliances of Scott & Co. (plaintiff's employers) were the stationary engines

and cables, and the derrick with its tracks and bins. By means of these the cars received were handled and unloaded. The duty of making them reasonably safe and suitable, and of so maintaining them, was primary and imperative, and one which could not be delegated by an employer except at his peril. This duty, however, did not extend to the thing received and to be handled by means of their machinery and appliances. They did not furnish that; it was not a part of their plant. It was the thing to be operated upon by their employees with the aid of their machinery. It was manifestly negligent to place the car, in its defective condition, on the trestle, but the negligence was that of a fellow servant, for which the employers were not liable." *Anderson v. Oliver* (1890) 138 Pa. 156, 20 Atl. 981, was cited, where it was held that a laborer at a furnace, who while unloading a railroad car in the course of his employment, was injured in consequence of a defective brake thereon, the car being owned by a railroad company and having been delivered by it at the furnace in a defective condition, cannot recover damages for such injury from his employer. In *McMullen v. Carnegie Bros.* (1893) 158 Pa. 518, 23 L. R. A. 448, 27 Atl. 1043, it was held that the rule requiring the inspection of foreign cars (see § 170, *post*) does not apply to companies or persons on whose sidings loaded cars are delivered for the purpose of permitting the owner of the siding to unload the freight. Only a short *per curiam* judgment was filed, and the standpoint of the court is indicated only by the fact that the case was cited as an authority for the one last mentioned. Compare, also, *Hardy v. Shedden Co.* cited note 8, *infra*.

⁷In *Whallon v. Sprague Electric Elevator Co.* (1896) 1 App. Div. 264, 37

virtually the sole rationale of the decision.⁸ But it would seem that there is no logical ground upon which it can be maintained that this conception should be treated as a distinct reason for denying the servant's right to recover. So far as the writer is aware, it has never been even intimated, much less decided, in actions brought against strangers, that the applicability of the fundamental juristic principle, which the existence or absence of the power of control becomes the test of responsibility, depends upon the injured person's knowledge or ignorance of the fact that the defendant had or had not control of the conditions which caused the injury. And there is no apparent reason why a different rule in this respect should prevail in actions against an employer.

The language used in some of the cases seems to be susceptible of being taken literally, of the construction that the effect of the theory exemplified in the rulings so far noticed is entirely to absolve the master

N. Y. Supp. 174, the court said: "The plaintiff knew that the scaffold was not the scaffold of his master or provided by him, but built and in use by persons carrying on a different part of the work. He made inquiries of the workmen whether the scaffold was safe, and was told that it was. He was not guilty of negligence in using it, under the circumstances, but still, in working on this building, which he knew in the main, and with the exception of a small detail, was not constructed by his master, he took the risk of danger from such construction. These were the risks of his employment." In *Dixon v. Western U. Tel. Co.* (1895) 71 Fed. 143, the court emphasized the fact that, as the pole did not belong to the defendant, the plaintiff knew, or ought to have known, that its maintenance in a state of reasonably safe repair was not a duty incumbent on his employer, and that no occasion requiring it to inspect the pole had arisen, or could arise until the moment when a necessity for its casual use should arise. See further, as to this case, note 6, next section.

⁸The owner of a truck hired for use in a procession is not under an implied obligation to his employee, whom he sends to drive it, for defects in a superstructure built upon the truck by the hirer, when the driver knew who built it, and had no reason to believe that his employer had taken any part in its erection or supervision. *Hardy v. Shedden Co.* (1897) 37 L. R. A. 33, 24 C. C. A. 261, 47 U. S. App. 362, 78 Fed. 610.

The court argued thus: "It is well settled that a master is under an implied obligation to the servant to furnish him a reasonably safe place in which to render the services for which he is employed; but this obligation is not absolute, and circumstances may vary it. Where a driver is employed to drive a truck, he has the right to rely on the master taking due care to furnish him a safe truck and a safe seat upon which to ride, provided, in the exercise of reasonable care on his part, he does not discover any defect himself. But where, in the course of the employment, the acts of third persons not employed by the master may increase the danger of the service, and these acts and their character are under the control of the servant, and, to the servant's knowledge, are not under the supervision of the master, we do not think the master is liable if injury results to the servant from the negligence of the third persons. For instance, where a servant is directed to take his truck to a certain point, and from there obtain a load of merchandise to be put on by the servants of the third person, and the merchandise is loaded so carelessly that on the return journey the driver suffers injury from the defective load, it seems clear to us that he cannot hold his master liable therefor. That is the law, because it is reason. Where the servant has greater opportunity than the master to know and observe the probable results from the acts of the third persons, of which the master, to

even from the duty of inspection.⁹ But, apparently, nothing more is meant than that there is no obligation in this regard unless there is something to indicate the existence of some abnormal danger. It would be quite contrary to general principles to predicate an absence of culpability in a case where a master, who had observed circumstances calculated to induce a suspicion that an instrumentality was defective, did not take some steps to ascertain its real condition.¹⁰ *A fortiori* is it impossible for the master to escape liability where he had actual knowledge of a specific defect. Under the general principle discussed in chapter XVI, *post*, the possession of such knowledge raises, at the very least, a specific obligation to communicate it to the servants, so that they may protect themselves.¹¹ And if the circumstances

the knowledge of the servant, has had no opportunity to judge, then it is unreasonable to hold that, with respect to such acts, the master has any obligation to the servant. Of course, there are cases where the circumstances necessarily impose on the master the duty of supervising and inspecting the work of third persons which may subject the servant to risk and danger. Thus, the loading of cars on a railway line is usually inspected by a railway inspector before it is received. But where there is no such inspection, and where, in the nature of things, there cannot be, the servant cannot hold the master for the work of third persons."

⁹In *Hughes v. Malten & M. Gaslight Co.* (1897) 168 Mass. 395, 47 N. E. 125, plaintiff was injured while working in a trench which was neither dug nor controlled by the defendant. The court, in discussing the question as to what the plaintiff had a right to expect when set to work in such a place, said: "He had not a right to expect it to shore the sides of the trench, or to make it safer than it was, because, as was manifest, and as the plaintiff must be taken to have known, the defendant had no control over the trench. He had a right to expect that, if the defendant knew of any danger which the plaintiff did not know, and ought not to be assumed to know, it would inform him. But no such knowledge on the part of the defendant was shown. It does not appear to have known anything except what was visible to the eye, or to have been able or bound to infer from what was visible anything which the plaintiff with his experience was not equally able to infer. What more could it have done? There is no reason to suppose

that inspection would have disclosed anything beyond the visible facts, and therefore it is not necessary to consider whether the duty of inspection existing with regard to cars received from connecting lines to be forwarded on a railroad would be held to exist in such a case as this." In *Dixon v. Western U. Teleg. Co.* (1895) 71 Fed. 143, it was held that when, in the course of the erection of a telegraph pole, an occasion arises for the casual and sporadic use of a telephone pole belonging to another company, to remove an obstructing wire, it is not a breach of the master's duty to direct an employee to climb such telephone pole without a previous inspection of it having been made.

"The fact that there was nothing to show that an inspection was required was emphasized in one decision, in which a warehouseman was held not liable to an employee injured by the fall of a swinging stage, while removing freight from a ship, caused by the breaking of the rope used to support one end of a platform furnished, in accordance with the usual practice, by the captain of the ship (*Momihan v. King's Windsor Cement Dry Mortar Co.* [1897] 168 Mass. 450, 47 N. E. 425); and in another, where recovery was denied for an injury caused by movable steps which workmen were using to descend into a cellar on the premises of a third person (*Regan v. Donoran* [1893] 159 Mass. 1, 33 N. E. 702).

"The master's ignorance was adverted to as one of the essential prerequisites of a successful defense in a case where it was held that a railroad company in sending its locomotive engineer with one of its engines to haul tempo

are such that a warning is not sufficient to enable the servants to secure their own safety, it is clearly the master's duty to remove them altogether from the dangerous environment.¹²

It is, of course, not denied by the courts whose decisions we have been considering, that a master may sometimes so act and speak as to justify the inference that he intended to make himself responsible for the condition of instrumentalities not owned by him. Whether he has assumed that responsibility is a mere question of evidence.¹³

rarily for another company, was not liable to him for the bad condition of the track, nor for want of adaptation of the engine to the track. *Dunlop v. Richmond & D. R. Co.* (1888) 81 Ga. 136, 7 S. E. 283 (demurrer upheld). The court said: "It is not alleged that the employer knew either of the bad condition, or the want of adaptation. For aught that appears, the parties were on equal terms as to their knowledge or information touching both these matters. Had the engineer needed information more than he had, he should have obtained it or declined to go. The question is, whether he had a right to take for granted, as against his employer, that the track of the other company was not defective, but in a fit condition to be used under this particular engine with safety. Did the employer owe to him the diligence of seeing that this was so, before requesting him to go, and accepting his consent to do so? The employer could not, by authority of the contract, order him to go, for the duty of going was not embraced in the contract of employment. Had he objected, and been discharged for it, his wages for the unexpired month would have gone on notwithstanding. We think the case is much like that of a farmer sending his hired man to plow for a neighbor a few days. If the neighbor's field is not safe, has sink holes in it, for instance, or the plow is not adapted to the soil, and from one or both of these causes the hired man is injured, his employer, it seems to us, would not be to blame, and would not be responsible unless he knew the facts which exposed his servant to unusual peril, and concealed his knowledge, or failed to communicate it."

¹² Although a contractor was not required by his contract to lay the bottom for foundation walls, yet, where he knew, or the conditions were such that he should have known, that the bottom laid was insufficient for the erection of

the walls thereon, he may not negligently proceed with the work, and escape liability, as against an employee, for injuries caused by the fall of the walls due to such insufficient bottom. *Cochran v. Goss* (1900) 49 App. Div. 223, 62 N. Y. Supp. 1088.

¹³ In *Channon v. Sanford Co.* (1898) 70 Conn. 573, 41 L. R. A. 200, 40 Atl. 462 (already mentioned in note 1, *supra*), a plasterer had been sent by his employer to do some ornamental work in a church. When he arrived, a solid scaffold had for some time been in place and used by the employees of the contractor for the erection of the building and during the conversation which plaintiff had had with the defendant before starting, the latter, in reply to a statement of the former that he knew nothing about working on staging, and knew nothing about building it, assured him that the scaffold would be entirely safe. The plaintiff found that the scaffold already built was not high enough for his purpose, and requested the contractor to make an addition to it. This was done by a servant of the contractor, and the new piece of staging gave way under the plaintiff. The defendant was held not to be liable. The court, after referring to the principle that a master must use due care to provide a safe place of work, said: "If the defendant specially assumed any such duty, there was a fact to be found by the trial court, either expressly or by necessary implication. It is not found expressly nor by necessary implication. The question on this part of the case is whether, if no such duty rested upon the defendant by law, the facts found warrant the conclusion, as matter of law, that it assumed such a duty. The strongest thing in the finding in favor of such a conclusion is the fact that the defendant assured the plaintiff that the staging would be entirely safe; but this fact, taken either alone or with the other facts found, clearly does not war-

171. Employer held to be liable.— The servant's right to recover has frequently been affirmed in cases which involve circumstances which are either identical with, or not essentially dissimilar from, those mentioned in the preceding section. The broad ground relied upon is simply that, as between a servant and his employer, all appliances which he is authorized or directed to use ought, in fairness, to be placed upon the same footing as those which actually belong to the employer. In other words, the owner of the appliance and his servants are, for the purpose of determining the injured person's right of action, treated as being constructively the agents of that person's employer for the performance of a non-delegable duty incumbent on the latter. The mere fact that the employer, having no control over the appliance, is unable to remedy defective conditions is, in this point of view, manifestly insufficient to absolve him, since he always has it in his power to safeguard his servants by refraining from giving them orders which will put them in a position where their safety will be imperiled by those conditions.¹ See § 114, *ante*. It will be observed that, in some of the cases cited, the facts in evidence were such as to bring them very close to those discussed in the next section. Indeed, if the existence or absence of a power of control had not been treated as the differentiating factor by the courts whose decisions are cited in the last section, it would seem not unreasonable to take the position that, in all cases of this type, the employer adopts, *sub modo*, the appliances as a part of his own plant.

Some of the decisions in the servant's favor relate to the condition of appliances belonging to another employer doing work upon the same premises.² In others, the injury was caused by the condition of

rant any such conclusion, as matter of law. The assurance was given at the very time that the defendant told the plaintiff about the strong staging that had been already erected and in use in the building, and at the very time when plaintiff was informed that Caulfield, and not the defendant, was to 'see' to the staging. What the defendant said to the plaintiff, as detailed in the finding, falls far short of an agreement to be responsible for the staging already built, or to be built, by Caulfield or his servants. The most that can be said about the finding upon this point is that it contains evidential facts tending to prove such an agreement, but such facts do not, as matter of law, constitute such an agreement."

¹See *St. Armand v. Gibson* (1898) Vol. I. M. & S.—24.

Rap. Jud. Quebec, 13 C. S. 22, cited in next note.

²Where the remodeling of a bridge is being carried out partly by its owner and partly by an independent contractor, and, in the course of the work, the tools or appliances both of the owner and the contractor are used by the servants of each of them as occasion requires, the owner of the bridge is liable for an injury received by one of his servants by reason of the breaking of a defective chain belonging to the contractor. *Corinnton & C. Bridge Co. v. Goodnight* (1901) 22 Ky. L. Rep. 1242, 60 S. W. 415. An instruction that, where a master allowed an independent contractor to erect appliances on his premises for the use of the contractor, and the master adopted and used such

the track of a railway on which trains were operated by a licensee company.³ In others, the defendant was a railway company which had constructed a siding over the premises of another person, and the injury was caused by some object above or near it.⁴ In others, the plaintiff's employer was a railway company operating trains over a

appliance himself, or acquiesced in their use by his servants while engaged in his work, he was as responsible for his servants' safety as if he had erected the appliances himself, was proper, without submitting to the jury that such acquiescence must have been for such a period of time as would indicate an adoption by the master, since the word "acquiesced" was used by the court in the sense of "being satisfied with," and such acquiescence would amount to an adoption. *Rinake v. Victor Mfg. Co.* (1900) 58 S. C. 360, 36 N. E. 700. On the first appeal of this case it was held that a nonsuit should not be granted in an action by a night watchman against the company employing him, to recover for injuries sustained in falling from a wing to a gangway leading from the ground to the second story of one of its buildings, where there was evidence that, although the wing had been constructed by an independent contractor, it had been used by the company's employees, to the knowledge of its president. A contractor is liable to his own employees for defects in a scaffold erected by another contractor engaged on the same building, for the use of the latter's employees. *McBeath v. Ruile* (1901) 93 Ill. App. 212. An employer who puts an employee to work upon a barge, exposed to jets of scalding water and steam, is liable for injury occurring thereby to the servant, where it could have been prevented by the use of a shield or conducting pipe, as, although he had no control over the steamer, if the persons in command refused to put up such shield or pipe, the employer could have refused to do the work. *St. Arnaud v. Gibson* (1898) Rap. Jud. Quebec, 13 C. S. 22.

³In *Wisconsin C. R. Co. v. Ross* (1892) 142 Ill. 9, 31 N. E. 412, the position was distinctly taken that where the employee of a railway company is directed to use the road of another company in the business of his employer, he has the right to treat such road as the road of the company employing him; and every company whose employees use the road of another com-

pany under its direction or for its benefit owes it as a duty to such employees to see that such road is not in a condition which will unnecessarily endanger their lives or limbs. To the same effect are *Denver & R. R. Co. v. Sullivan* (1895) 21 Colo. 302, 41 Pac. 501; *S. v. Concord & M. R. Co.* (1900) 70 N. H. 354, 48 Atl. 288; *Gilpin v. Pattee & S. R. Co.* (1899) 93 Me. 80, 44 Atl. 341 (doctrine assumed); *Smith v. Memphis & L. R. Co.* (1883) 18 Fed. 304 (in charge to jury). In the last named case the track was used by the plaintiff's employer under a contract which bound it to pay a part of the expenses of maintenance. But it does not appear that this circumstance was regarded, or should be regarded, as a differentiating factor. In another case it was contended that the licensee company impliedly contracted that the servants of the licensor would observe strictly the rules adopted to secure safety in the running of trains over the common road. But the court declared that there was no warrant for such a theory, either in law or in any consideration that concerns the public welfare. *East v. Chicago, B. & Q. R. Co.* (1879) 92 Ill. 43.

⁴Where a switch track runs under the sheds of a brick kiln, the railroad company, though not owning the shed, owes its employees the duty of seeing that it is in a reasonably safe condition, and is liable to a brakeman on whom the roof of the shed fell by its own weight, while he was coupling cars thereunder. *Doule v. Toledo, S. & M. R. Co.* (1901; Mich.) 54 L. R. A. 457, 86 N. W. 524. Where a railway transfer company operates a spur track for the purpose of switching cars to and from a mill, steps leading down from a platform at the mill to the track are, as regards a train hand who has occasion to stand on them in the course of his duties, a part of the company's instrumentalities, which it is bound to keep in safe condition, irrespective of the question of ownership. *Harding v. Railway Transfer Co.* (1900) 80 Minn. 504, 83 N. W. 395.

private siding which proved to be defective.⁶ In others, the employer was a company licensed to use, for the support of its wires, the poles erected by another company for the same purpose.⁷

The defendant's liability is, in one of the cases cited, apparently based, in part at least, upon the servant's presumed ignorance of the fact that the instrumentality in question did not belong to his employer.⁷ But there seems to be no rational principle upon which it can be maintained in this instance, any more than under the theory which exempts the employer from liability (see last section), that the servant's knowledge or ignorance of the actual ownership can affect his rights either favorably or unfavorably.⁸

The present writer ventures to express the opinion that the decisions which declare the master to be liable in cases of this type are more consistent than the others with those general conceptions of pub-

⁶That a railway company is not entitled to send its servants on private sidings for their usual work, without making proper efforts to provide for their safety, was laid down in *Grand Trunk R. Co. v. Tennant* (1895) 14 C. C. A. 190, 21 U. S. App. 682, 66 Fed. 922. (See note 7.) In *Stettin v. Chicago & N. W. R. Co.* (1879) 46 Wis. 497, 1 N. W. 112, the court considered that the rule by which one railroad company using the tracks of another for the purposes of its business should be responsible to passengers and owners of property by reason of the defective condition of such tracks should apply between the railroad company and its employees. Here, the injury was received on a spur track on which the defendant delivered goods to the owner. It was held to be immaterial that a state statute required the delivery of goods at their destination over tracks not belonging to the carrier.

⁷A telephone company which, under a license from another company, strings its wires on the poles of the latter is bound to see that they are in such a condition that its linemen can ascend them safely. *McGuire v. Bell Teleph. Co.* (1901) 167 N. Y. 208, 52 L. R. A. 437, 60 N. E. 433, affirming (1900) 52 App. Div. 635, 66 N. Y. Supp. 1137. See also *San Antonio Edison Co. v. Dieck* (1897) 17 Tex. Civ. App. 320, 42 S. W. 1069, where a similar doctrine was enunciated in regard to the duty of an electric railway company which was using the poles of another company. The court remarked that the defendant was bound either to inspect the poles,

or get the other company to do it. *Dillon v. Western U. Teleph. Co.* (1895) 68 Fed. 630 (see notes 7 and 9 to preceding section), was distinguished on the ground that there the pole was not a structure on which the plaintiff's work had to be done, and that, as he ascended it for the purpose of removing a wire which obstructed the erection of a pole which he was helping to set up, his ascent was merely an incident of his work. This ground of differentiation, however, seems inadequate, except in so far as it bears on the questions whether the servant acted on his own responsibility or whether the master was bound to tolerate such a use of the pole.

Grand Trunk R. Co. v. Tennant (1895) 14 C. C. A. 190, 21 U. S. App. 682, 66 Fed. 922, where it was laid down that a railroad train hand employed in a branch of the service where no duty calls upon him to ascertain the limits of the company's road has a right to assume that any track upon which he is ordinarily sent in the performance of his duty, physically connected with the company's main line, is a part of its system, and he is entitled to the usual care and protection of the company while running over it.

⁸In a very recent case it has been expressly denied that the servant forfeits his right of action merely because he knew that the track over which his employer's trains were running belonged to another company, which was bound to keep it in good repair. *Stora v. Concord & M. R. Co.* (1900) 70 N. H. 364, 48 Atl. 288.

lie policy which are the ultimate foundation of his obligations to his servants. In many, perhaps most, instances there is no real ground for contending that his want of control over an instrumentality constitutes a serious obstacle to his obtaining sufficient knowledge of its condition to enable him to see whether it will unduly endanger his servants or not, and there would, therefore, be no hardship or injustice in requiring him to make such investigations as may be necessary for that purpose. Even where an adequate examination by his own employees is practically impossible,—as, where the injury was caused by defects in the track of a railway not belonging to him,—it seems not an unreasonable application of the doctrine of non-delegable duties to treat the servants of the owner as his agents. If he desires to protect himself from the consequences of the negligence of persons not in his service, or under his supervision, it is easy for him to do so by making specific arrangements with their master for indemnification in the event of his being obliged to pay damages. To relegate the servant to his action against the party who owns the instrumentality must, in many cases, be productive of serious inconvenience, and will occasionally deprive him of all remedy.⁹

172. Instrumentalities not owned by the employer, but controlled by him, and used by him as a part of his plant.— Both on principle and authority it is clear that a master is answerable for defects in any instrumentalities which he has temporarily taken over from the owner and made a part of his own plant. In such cases the elements of possession and the exercise of control are decisive. Manifestly, no distinction can logically be based upon the bare circumstance that he has a merely qualified right of property in them. So far as regards his obligations to his servants, he must be considered as the owner *pro tempore*. This principle is applicable whether he has borrowed the appliance in question,¹ or has hired it for a specific considera-

⁹ In the note in *Cleveland, C. C. & St. N. E.* 668 — it seems very questionable whether the servant could have recovered against the party actually responsible for the dangerous position of the injurious object. ¹ *Vincent v. Alden* (1901) 62 App. Div. 558, 71 N. Y. Supp. 149; 8 *Callington v. W. N. Flint Granite Co.* 894, 159 Mass. 587, 34 N. E. 1134. In the latter case it was held that the owner of a quarry using a car furnished by a railroad company to convey stone owes the same duty to its servants in respect to such car as if it were owned by it; and the cases where cars of other

tion,² or has taken possession of it for a definite or indefinite period, with a view to the performance of certain work in which he and the owner are both interested.³

173. Liability of railway companies for the condition of cars received from other roads; generally.—A large number of the cases which turn upon the liability of an employer for injuries caused by instrumentalities not belonging to him relate to the duties of a railway company respecting what are commonly termed "foreign" cars,—a convenient expression, used to denote cars which are received from connecting roads, to be forwarded, with or without a load, to some point on the company's own system, or to be transferred again to another line. As between the owner of the cars and the receiving company the transaction involved is merely a contract of bailment for the purposes of transportation. But owing to the manner in which that contract is necessarily performed, the cars, when taken into a train, virtually become, for the time being, a part of the receiving company's plant. In view of this fact it has been uniformly held that, in regard to such cars while in its possession and under its control, the receiving company is subject to certain obligations determined by the nature of that possession and control. A railway company is not only under no obligation to receive and place in charge of its employees a car with defective and dangerous equipments,¹ or of abnormally dangerous construction,² but is under a positive duty to reject such a car, or, if it is forwarded, to repair it sufficiently to make it reasonably safe.³ In

companies are received merely for forwarding were distinguished on this ground.

¹ *Higgins v. Williams* (1896) 114 Cal. 176, 45 Pac. 1041.

² Subcontractors employed in the construction of a railroad, of which they are in control for the purpose of construction, are liable for the death of an employee, due to the misplacement of a switch not otherwise securely guarded, and for which no lock had been provided. *Rombough v. Balch* (1900) 27 Ont. App. Rep. 32. A spur track made by a railroad company upon the land of a coal company, which graded the track and furnished the ties for it, but which the railroad company keeps in repair, is a part of the railroad, as between the company and its employees. *Little Rock & F. S. R. Co. v. Cagle* (1890) 55 Ark. 347, 14 S. W. 89. A railway company which permits a locomotive belonging to another company to be brought into its yard and used by its

servants must exercise reasonable care to see that it is in a reasonably safe condition. *Houston & T. C. R. Co. v. Milan* (1900; Tex. Civ. App.) 58 S. W. 735; judgment reversed, but not on this point, in (1901; Tex. Civ. App.) 60 S. W. 591.

³ *Pennsylvania R. Co. v. Snuder* (1896) 55 Ohio St. 342, 45 N. E. 559; *Moore v. Northern P. R. Co.* (1891) 46 Minn. 106, 48 N. W. 679; *Atchison, T. & S. F. R. Co. v. Myers* (1894) 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793.

² *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462, 3 N. E. 344; *Louisville & V. R. Co. v. Williams* (1893) 95 Ky. 199, 24 S. W. 1. See, however, § 175, *post*.

³ *Chicago, St. L. & P. R. Co. v. Fry* (1891) 131 Ind. 319, 28 N. E. 989; *Atchison, T. & S. F. R. Co. v. Myers* (1894) 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793; *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y.

several cases it has been declared that, where foreign cars are concerned, the responsibility of a railway company is to be measured with reference to the conception that the duty involved is merely that of inspection, and not that of furnishing safe and proper instrumentalities.⁴

The reason assigned in one case for this doctrine is that railway companies are compelled by statutory provisions to transport the cars of other roads, provided they appear to be in a reasonably safe condition (see § 176, *post*), while, as regards their own cars, they choose what they will use.⁵ Where such provisions are not an element, a like conclusion is supposed to be indicated by the fact that the receiving company does not select the cars or the material from which they were made.⁶

Two inferences have been deduced from this conception,—first, that the receiving company may assume that all the parts of such cars which appear to be in good condition are so, in fact;⁷ and, second, that its obligations are performed by the employment of a sufficient number of competent inspectors acting under proper superintendence, rules, and instructions.⁸ But in any jurisdiction where the duty of inspecting cars while *en route* is deemed to belong to the non-delegable class, it is clear that the latter proposition ought rather to be put in the form that a company receiving a foreign car can be held responsible by an employee who sustains an injury from its defects, only for failure to furnish a competent inspector, or for failure of the inspector to exercise due care in making the inspection.⁹

462. 3 N. E. 344; *Ohio & M. R. Co. v. Wangelin* (1902) 43 Ill. App. 324; and the cases cited below.

⁴ *Mackin v. Boston & A. R. Co.* (1883) 135 Mass. 201, 46 Am. Rep. 456; *Keith v. New Haven & N. Co.* (1885) 140 Mass. 175, 3 N. E. 28; *Bowers v. Connecticut River R. Co.* (1894) 162 Mass. 312, 38 N. E. 508; *Cincinnati, H. & D. R. Co. v. McMullen* (1888) 117 Ind. 439, 20 N. E. 287. It has been held that an instruction as to the general duty of a railroad company to furnish safe appliances to its employees is improper in an action for injuries received by an employee while engaged in returning a car of another road, rejected as defective. *Atchison, T. & S. F. R. Co. v. Meyers* (1906) 22 C. C. A. 268, 46 U. S. App. 226, 76 Fed. 443. So, also, it has been laid down that an instruction is erroneous which does not indicate the difference between the degrees of dili-

gence required in the case of foreign cars and those belonging to the defendant company. *Wabash R. Co. v. Farrell* (1898) 79 Ill. App. 508.

⁵ *Chicago & G. W. R. Co. v. Armstrong* (1895) 62 Ill. App. 228.

⁶ *Jones v. New York C. & H. R. R. Co.* (1880) 22 Hun. 284. This decision was affirmed in (1883) 92 N. Y. 628, but no opinion was filed, and it is impossible to say whether this doctrine was approved. It is not necessary for the support of the decision.

⁷ *Ballou v. Chicago, M. & St. P. R. Co.* (1882) 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. 559.

⁸ *Kelly v. Abbot* (1885) 63 Wis. 310, 53 Am. Rep. 292, 23 N. W. 890, and the cases cited in note 4, *supra*.

⁹ *Atchison, T. & S. F. R. Co. v. Myers* (1894) 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793.

The consequence seems to be that, assuming the distinction thus taken between the duties of inspecting and of furnishing appliances to be a sound one, it does not, in the last analysis, possess much practical importance, except in jurisdictions where the delegable quality of the former duty is affirmed.¹⁰ Even if the company be regarded as subject to the more extended obligations of the latter duty, a breach of it cannot be predicated unless the evidence shows that the unsafe conditions were such as a reasonably careful inspection, of the character defined by the cases cited in the following section, would have disclosed. See §§ 126, 156, *ante*. Manifestly, the logical situation is essentially the same as if the rights of the servant are gauged with reference to the theory that the only question to be considered is whether there was a breach of the duty of inspection. But that theory has been categorically rejected in one case,¹¹ and is discredited in several others which embody, more or less distinctly, the notion that, after a foreign car has been introduced into a train, the responsibility for any abnormally dangerous conditions which were discoverable by a reasonably careful examination is the same in character and extent as if the car belonged to the receiving company itself.¹²

¹⁰ As in Massachusetts. See cases cited in note 4, *supra*.

¹¹ A requested instruction in a suit against a railroad for injuries, that, if the jury found that the cars injuring plaintiff were foreign cars, "then it was only required of defendant to make an ordinary inspection for any defects discernible by ordinary examination," has been held to be properly refused, for the reason that the law requires a master to furnish suitable appliances, whether they are his property or that of another. *Youghblood v. South Carolina & G. R. Co.* (1900) 60 S. C. 9, 38 S. E. 232.

¹² In *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462, 3 N. E. 344, the plaintiff was held entitled to recover on the ground that the defect complained of (deadwoods of an unsafe pattern) was obvious, easily discoverable by the most ordinary inspection, and could have been easily remedied by simply nailing or fastening additional strips of wood to the ends of the cars, so as to give the bumpers sufficient width to afford the protection needed and intended. The obligation to remedy the dangerous condition was also recognized in *Goodrich v. New York C. & H. R. Co.* (1889) 116 N. Y. 398, 5 L. R. A. 750, 22 N. E. 397. See also

Eaton v. New York C. & H. R. R. Co. (1900) 163 N. Y. 391, 57 N. E. 609. Reversing, but not on this point (1897) 14 App. Div. 20, 43 N. Y. Supp. 666 (defective brake); *Jones v. New York C. & H. R. R. Co.* (1883) 92 N. Y. 628, Affirming (1882) 28 Hun. 364; *Miller v. New York C. & H. R. R. Co.* (1885) 99 N. Y. 657; *Dooner v. Delaware & H. Canal Co.* (1894) 164 Pa. 17, 30 Atl. 269; *Chicago, B. & O. R. Co. v. Avery* (1886) 109 Ill. 314, Affirming 8 Ill. App. 133; *Illinois C. R. Co. v. Barslow* (1900) 94 Ill. App. 206; *Mobile & O. R. Co. v. Harms* (1893) 52 Ill. App. 649; *Illinois C. R. Co. v. Price* (1895) 72 Miss. 862, 18 So. 415. In *St. Louis & S. E. R. Co. v. Valirius* (1877) 56 Ind. 511, the court approved an instruction to the effect that the use and employment of unsafe cars or appliances, whether owned by the employer or not, subjects him to the same liability for injuries caused by their defective condition as if he were the absolute owner. It is error to give a charge to the effect that a brakeman assumes the risk of unequal couplings on foreign cars. *Bender v. St. Louis & S. F. R. Co.* (1896) 137 Mo. 240, 37 S. W. 132. (But see § 175, *post*.) A railroad company is responsible to its employees for the condition of cars belonging to a re-

The basis of the liability thus imposed has been said to be the fact that the foreign car is handled and shifted by the orders of the employer.¹³ But this circumstance is certainly not regarded by all courts as the essentially differentiating factor in this class of cases. See § 166, *ante*, where the master's orders are an element in all the decisions cited.

Injuries caused by defects in foreign cars present one of those cases in which the liability of the delivering company would not be conceded by all courts. See the writer's note in 46 L. R. A. pp. 108 *et seq.* (*Cleveland, C. C. & St. L. R. Co. v. Berry*). But in two jurisdictions it has been held that the servant may bring suit against that company as well as his own employer.¹⁴

174. Obligation of receiving company to inspect foreign cars.—

As already stated in the preceding section, either of the theories which have been entertained as to the nature and extent of the receiving company's responsibility renders it liable for any injuries which its servants may receive as a result of the existence of abnormally dangerous conditions in a foreign car, provided those conditions were such as could have been discovered by the exercise of ordinary care. See chapter x., *ante*.¹ The standard of duty thus fixed is deemed to impose upon it the obligation of subjecting such car to an examination at least as thorough as is obligatory in the case of its own rolling stock while *en route*. See chapter xi., *ante*. As to this doctrine

fining company, which it requires them to shift from one place to another on the tracks and in the yard of the latter company. *Elkins v. Pennsylvania R. Co.* (1895) 171 Pa. 121, 33 Atl. 74 (holding the rule as to foreign cars to be applicable). In the recent case of *Caledonian R. Co. v. Mutholland* [1898] A. C. 216, 67 L. J. C. P. N. S. 1, 77 L. T. N. S. 570, it was conceded that a company which was permitted, for its own convenience, to haul the cars of another a short distance through a town to a point where the former company had agreed to deliver the load to a consignee was liable for injuries caused by defects in the brakes, which a reasonably careful inspection would have disclosed. The controverted point was the right of recovery against the bailor company. See p. 114 of the author's note in 46 L. R. A., *Cleveland, C. C. & St. L. R. Co. v. Berry* (Ind.). That a railroad company is not an insurer of the safety of a foreign car was laid

down in *Chicago & A. R. Co. v. Bragonier* (1882) 11 Ill. App. 516.

¹³ *Elkins v. Pennsylvania R. Co.* (1895) 171 Pa. 121, 33 Atl. 74.

¹⁴ *Pennsylvania R. Co. v. Snyder* (1896) 55 Ohio St. 342, 45 N. E. 559; *Moon v. Northern P. R. Co.* (1891) 46 Minn. 106, 48 N. W. 679.

¹ The mere fact that a railroad company has no right to repair a foreign car does not relieve it of the duty of inspecting it. *Atchison, T. & S. F. R. Co. v. Penfold* (1896) 57 Kan. 148, 45 Pac. 574. The duty of a railroad company to inspect cars coming from a connecting line is to be measured by what it ought to have done after the cars were in its possession, and not before, as the negligence of the connecting line before the delivery of the cars cannot be imputed to the company. *Illinois C. R. Co. v. Barslow* (1900) 94 Ill. App. 206, holding it to be immaterial, for this reason, whether a flaw in a coupling link was old or recent.

all the authorities are unanimous.² The application of this criterion indicates that the inspection should be something more than a "mere-

²"A railroad company is under a legal duty not to expose its employees to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train." *Baltimore & P. R. Co. v. Mackey* (1895) 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491. Affirming (1890) 8 Mackey, 282. "The cars used by a railroad company for the purpose of transporting freight are appliances, as to the condition of which the company owes a duty to its employee working upon them, which cannot be fulfilled without proper inspection." *McMullen v. Carnegie Bros. & Co.* (1893) 158 Pa. 518, 23 L. R. A. 448, 27 Atl. 1043. It is the duty of a railroad company to inspect cars owned by or received from another company, which the employees of the former are required to handle or use, where there is time and opportunity to do so; and it will be liable to its employees for injuries resulting from defects in such cars which an ordinary inspection would have discovered. It will not be excused for failure to perform that duty because such cars are only used for a brief time, or carried a short distance; nor will the mere fact that the company is not required to repair such defects relieve it from the obligation to inspect. (Syllabus by the court.) *Atchison, T. & S. F. R. Co. v. Penfold* (1896) 57 Kan. 148, 45 Pac. 574. It is error for a trial court to hold, as matter of law, that a trainman assumes the risks arising from the want of an inspector of foreign cars. *Bennett v. Greenwich & J. R. Co.* (1895) 84 Hun. 216, 32 N. Y. Supp. 457. For a total failure to make an inspection the company is only excused when the defect which such an inspection would have disclosed is one of which the injured servant had actual knowledge, or which he could easily have discovered. *Missouri P. R. Co. v. Barber* (1890) 44 Kan. 612, 24 Pac. 969. In *Guttridge v. Missouri P. R. Co.* (1887) 94 Mo. 468, 7 S. W. 476, the court, in rejecting the contention of the defendant that it had a right to assume that the car, being a foreign one, was reasonably safe and fit for the uses for which it was being used, said: "Cars coming from one road to another must necessarily be subjected to wear, and are liable to be rendered unfit for use

in the course of transportation, and this must be known to the receiving company. It is but the result of the most common observation."

In *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462, 3 N. E. 344, the court said, as to the defendant company: "It is bound to inspect foreign cars just as it would inspect its own cars. It owes the duty of inspection as master, and is, at least, responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects or refuse to take such cars; so much, at least, is due from it to its employees. The employees can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company. As to such defects the duty of the company is the same as to all cars drawn over its road. The rule imposing this responsibility is not an onerous or inconvenient or impracticable one. It requires, before a train starts and while it is upon its passage, the same inspection and care as to all the cars in the train." The last sentence but one is quoted with approval in *Jones v. New York, N. H. & H. R. Co.* (1897) 20 R. I. 210, 37 Atl. 1033. In addition to the phrases expressive of the obligatory character of the inspection which are used in the above statements, the following may also be quoted: "Ordinary inspection" (*Louisville & N. R. Co. v. Reagan* [1896] 96 Tenn. 128, 33 S. W. 1050; *Carruthers v. Chicago, R. I. & P. R. Co.* [1895] 55 Kan. 600, 40 Pac. 915; *Jones v. New York, N. H. & H. R. Co.* [1897] 20 R. I. 210, 37 Atl. 1033); "proper inspection" (*Atchison, T. & S. F. R. Co. v. Myers* [1894] 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793; *New Orleans & N. E. R. Co. v. Clements* [1900] 40 C. C. A. 465, 100 Fed. 415); "due inspection" (*Moon v. Northern P. R. Co.* [1891] 46 Minn. 106, 48 N. W. 679); "reasonably careful inspection" (*Moon v. Northern P. R. Co.* [1891] 46 Minn. 106, 48 N. W. 679; *Felton v. Bulard* [1899] 37 C. C. A. 1, 94 Fed. 781). The receiving company is also said to be responsible for such defects as may be discovered by "ordinary care" (*McDonald v. Fitchburg R. Co.* [1897] 19 App.

ly formal one."³ The controlling conception is that the receiving company is merely bound to make such inspection as the nature of the transportation requires,⁴ or, as it is also expressed, such an inspection as time, place, means, and opportunity and the requirements and exigencies of commerce will permit.⁵ There is, accordingly, no ob-

Div. 577, 46 N. Y. Supp. 600; *Bender v. St. Louis & S. F. R. Co.* [1896] 137 Mo. 240, 37 S. W. 132; *Louisville & N. R. Co. v. Williams* [1893] 95 Ky. 199, 24 S. W. 1; *Louisville, N. A. & C. R. Co. v. Bates* [1896] 146 Ind. 564, 45 N. E. 108; by "reasonable care" (*Eddy v. Prentice* [1894] 8 Tex. Civ. App. 58, 27 S. W. 1063; *Denver, T. & Ft. W. R. Co. v. Smock* [1897] 23 Colo. 456, 48 Pac. 681); "by reasonable skill and diligence" (*Allen v. Union P. R. Co.* [1891] 7 Utah, 239, 26 Pac. 297). The exercise of "reasonable precaution" is required. *Denver, T. & Ft. W. R. Co. v. Smock* (1897) 23 Colo. 456, 48 Pac. 681. The limit of a railroad company's duty as to a car received from a refrigerator company is "diligence to know that it is serviceable." *O'Connor v. Illinois C. R. Co.* (1891) 83 Iowa, 105, 48 N. W. 1002. The phrase "high degree of care" is used in some cases. *Indianapolis, B. & W. R. Co. v. Flanagan* (1875) 77 Ill. 365; *Chicago, B. & Q. R. Co. v. Avery* (1880) 8 Ill. App. 133. But this expression is stronger than is warranted by most of the authorities. It is obvious that ordinary care demands a more careful examination of an old or dilapidated car than of one in the appearance of which there is nothing unusual. *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564, 45 N. E. 108.

Beside the above cases the following also recognize the doctrine that, as regards inspection, there is no distinction between the extent of a company's liability for its own cars and for the cars of other companies. *Reynolds v. Boston & M. R. Co.* (1891) 64 Vt. 66, 24 Atl. 134; *Louisville & N. R. Co. v. Reagan* (1896) 96 Tenn. 123, 33 S. W. 1050; *Leak v. Carolina C. R. Co.* (1899) 124 N. C. 455, 32 S. E. 884; *Fay v. Minneapolis & St. L. R. Co.* (1883) 30 Minn. 231, 15 N. W. 241; *Chicago, B. & Q. R. Co. v. Avery* (1884) 109 Ill. 314; *Pennsylvania R. Co. v. Snyder* (1896) 55 Ohio St. 342, 45 N. E. 559; *Bender v. St. Louis & S. F. R. Co.* (1896) 137 Mo. 240, 37 S. W. 132; *Louisville & N. R. Co. v. Davis*

(1890) 91 Ala. 487, 8 So. 552; *Sack v. Dalese* (1890) 35 Ill. App. 636, affirmed on other grounds in (1891) 137 Ill. 129, 27 N. E. 62; *Bomar v. Louisiana North & South R. Co.* (1890) 42 La. Ann. 983, 1206, 8 So. 478, 9 So. 214; *Mateer v. Missouri P. R. Co.* (1891) Mo. 15 S. W. 970; *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698; *Brannett v. Northern P. R. Co.* (1891) 2 N. D. 112, 13 L. R. A. 465, 49 N. W. 408; *Railroad Co. v. McClunahan*, 3 Tex. Law Rev. 324, cited in *Gulf, C. & S. F. R. Co. v. Dorsey* (1886) 66 Tex. 148, 18 S. W. 444; *St. Louis, A. & T. R. Co. v. Putnam* (1892) 1 Tex. Civ. App. 142, 20 S. W. 1002; *International & G. N. R. Co. v. Kernan* (1890) 78 Tex. 294, 9 L. R. A. 703, 14 S. W. 668; *Eddy v. Prentice* (1894) 8 Tex. Civ. App. 58, 27 S. W. 1063; *Union Stock-Yards Co. v. Goodwin* (1898) 57 Neb. 138, 77 N. W. 357; *Chicago & N. W. R. Co. v. Gillison* (1897) 72 Ill. App. 207; *Jones v. Shaw* (1897) 16 Tex. Civ. App. 290, 41 S. W. 690.

³ *Atchison, T. & S. F. R. Co. v. Muers* (1894) 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793; *Chicago, St. L. & P. R. Co. v. Fry* (1891) 131 Ind. 319, 28 N. E. 989; *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564, 45 N. E. 108.

⁴ *Dooner v. Delaware & H. Canal Co.* (1894) 164 Pa. 17, 30 Atl. 269.

⁵ *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564, 45 N. E. 108; *Chicago, St. L. & P. R. Co. v. Fry* (1891) 131 Ind. 319, 28 N. E. 989; *Wabash R. Co. v. Farrell* (1898) 79 Ill. App. 508. In *Alabama G. S. R. Co. v. Carroll* (1898) 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 772, the court said: "There is no question but that railroad corporations should require, at their peril, cars, their couplings and appliances, to be reasonably inspected by competent agents, and that the ordinary employee may rely on such inspection; nor that this applies to cars received for through transit from other roads as well as its own; but it does not follow that what may be reasonable inspection

ligation to institute an examination sufficiently minute and searching to disclose secret or hidden defects, even though the defects may be of such a character that they could have been readily detected by the tests employed in the shops where rolling stock is periodically

for a home car shall be demanded as alone reasonable for a foreign car received for through transit. The time, place, and general opportunity for inspection, and the fact that the foreign car comes to hand as one actually on trial, showing its fitness, all should be considered, in view of the rapid transit now furnished by the railroad companies and demanded by the business public. Every trainman of ordinary intelligence and experience knows that there is and must be a decided difference in the inspection possible between the home cars and the foreign cars on through trains, and it is not unreasonable to hold that what necessary risks attend the inspection of the latter are risks of the service. We are aware that the adjudged cases are not wholly with us on the matter of the inspection required of foreign through cars, but, until the Supreme Court of the United States shall speak to the contrary, we must hold with those cases which recognize the actual situation,—the actual way the business is and must be carried on if carried on at all,—rather than with those cases which tend to make the railroad companies absolute insurers against all the risks of a well-known dangerous employment."

In *Richardson v. Great Eastern R. Co.* (1875) L. R. 10 C. P. 480, 33 L. T. N. S. 248. Reversed in (1876) L. R. 1 C. P. Div. 342, 35 L. T. N. S. 351, 24 Week. Rep. 907, the duty of a railway company to inspect foreign cars was exhaustively discussed. The plaintiff was a passenger, and, strictly speaking, the case does not fall within the scope of the present treatise, but the facts were such as to make the decision quite applicable in the present connection. In his opinion, delivered in the court of appeal (1876) L. R. 1 C. P. Div. 342, 35 L. T. N. S. 351, 24 Week. Rep. 907, Jessel, M. R., said: "A coal truck belonging to the Birmingham Wagon Company, but which had been let to a colliery company, came on to the defendants' line at Peterborough. The defendants are compelled by statute to forward foreign traffic, *i. e.*, through traffic, from other lines. It seems to me that the railway company are bound to

take reasonable care to ascertain that trucks belonging to other companies and persons so coming on their line are in such a state as to travel safely. They must, therefore, use due diligence in the examination of such trucks, and the question is whether, on the facts in this case, that obligation was discharged." As to this question the evidence was substantially this: At Peterborough there are, every week, a very great number of trucks sent along the defendants' line from other lines. They are subject to a "cursory" examination which is not of a very minute character, but such as is usually given in such cases, and generally found sufficient. By these usual precautions two defects were discovered, one being that a spring had lost its camber, and the other a crack in the woodwork, which was not so material. It being inconvenient to unload the truck, without which the latter defect could not be remedied, and as it did not interfere with the safety of the truck, it was left, but the spring was repaired at the owner's shop near by, and, on its return to the defendants, their servant ascertained that the repair had been done, and examined the truck in the usual way, to see that there was no other defect. It was then sent on, and the accident occurred through a defect in no way connected with the two defects previously mentioned, *viz.*, a defect in the axle, which might have been discovered by a sufficiently minute examination. Jessel, M. R., said: "We must look to what is reasonable, in reference to the exigencies of the case. The company cannot stop all foreign trucks and empty them for the purposes of a minute examination. If they were entitled to do so, it would practically destroy the right given by statute to other companies of having the through traffic forwarded, and give a monopoly to the company itself. The suggestion that they should do this is too absurd to bear discussion. It cannot be said that it is obligatory on the company so to treat the foreign trucks as to destroy the very object for which they were sent on to the line, *viz.*, for the purposes of through traffic. There must be some reasonable limit to the amount of exam-

overhauled.⁶ Compare §§ 162, 163, *ante*. Still less is it incumbent upon the receiving company to repeat the tests which are proper to be

ination required, and the substantial question was whether the mode of examination adopted by the company was reasonably satisfactory." To the question whether it was the duty of the defendants to examine the axle by scraping off the dirt and minutely looking at it,—so minutely as to enable them to see the crack,—and so to prevent or remedy the mischief, the jury answered "No." To the question whether it became their duty so to do upon discovering the other defects, the jury answered: "It was their duty to require from the Birmingham Wagon Company some distinct assurance that it had been thoroughly examined and repaired." But Jessel, M. R., said: "If the defects discovered were such as ought reasonably to induce a person of experience to think that some other defect existed, or was likely to exist, then there would be a duty to examine further; but if the defects discovered had no probable connection with any other undiscovered defect, then I see no reason why any further or other examination should be made. Now, I read the answer of the jury to the third question as meaning . . . that the defendants ought to have inquired. But there was no evidence on which they were entitled to find that such a duty existed, or that it had been neglected. . . . If it was the defendants' duty to inquire, it could only be because they were bound to satisfy themselves of the fitness of the trucks, and, if so bound, they could not exonerate themselves by mere inquiry of the wagon company. If it had been proved that they relied on mere inquiry, I am not sure that might not, *per se*, be evidence of negligence. I do not think we ought to give any effect to this finding of the jury, and the case for the plaintiff therefore fails. The judgment must, therefore, be reversed." The court of common pleas had taken the position that, under the circumstances, there had been a want of reasonable care on the defendants' part in not properly overhauling and repairing the car which had been found defective, the assumption apparently being that the case was one in which provision should have been made for general repairs. This theory, as was pointed out by Mellish, L. J., in the court of appeal, was based on a misap-

prehension of the facts, as there was really no question of repair at the junction station, other than with respect to the defects which the examination, as actually made, had disclosed.

⁶ *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462, 3 N. E. 344; *Gutridge v. Missouri P. R. Co.* (1887) 94 Mo. 468, 7 S. W. 476; *Wabash R. Co. v. Farrell* (1898) 79 Ill. App. 508; *Louisville & N. R. Co. v. Hinder* (1895) 16 Ky. L. Rep. 841, 30 S. W. 399 (defect in handle of lever on hand car could not have been discovered without removing the handle from the socket).

A judgment for the plaintiff will be reversed where it rests upon a special finding that, upon inspection made at different times and in different places, no defect was discovered in the brake staff of a foreign car, from which the plaintiff's injury resulted, and that such defects as existed could not have been discovered without taking the brake staff off the car and striking it with a hammer. *Chicago, St. L. & P. R. Co. v. Fry* (1891) 131 Ind. 319, 28 N. E. 989. An instruction to the effect that the defendant was "not bound to test its safety [the safety of a certain foreign car], but might have presumed that it was in good condition if it required close inspection to determine that it was not in good condition," is appropriate only to a case in which the defect was latent, and not discoverable by ordinary inspection. A request for such an instruction is therefore rightly refused where the defendant has taken the ground that the drawhead which injured the plaintiff was so battered on the outside as to indicate its defective condition, while the conductors of the incoming and substituted crews both admit that they were aware of the defect. *Louisville & N. R. Co. v. Reagan* (1896) 96 Tenn. 128, 33 S. W. 1050.

In *Ballou v. Chicago, M. & St. P. R. Co.* (1882) 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. 559, it was held that the plaintiff could not recover for injuries caused by the giving way of a round of a ladder. In the majority opinion Cassoday, J., said, in regard to the defect: "It was discoverable by taking out the bolts and looking beneath the slats or rounds. So, the sufficiency of the bolts, as to length as well as size, might have been determined by the application of

used in the original construction of the car. It may assume that all parts of the car which appear, upon ordinary examination, to be in good condition are in such condition.⁷ The receiving company, however, is not protected if a reasonable inspection, as the phrase is ordinarily understood in such cases, would have disclosed conditions which would have indicated the probable existence of a concealed defect.⁸

As regards the respective provinces of the court and jury in determining the sufficiency of the inspection, the general rule is that a court cannot undertake to say, as a matter of law, when, where, and how often a foreign car shall be inspected by a railroad company, or that it should not have been inspected at some time while the car was under the company's control.⁹ But evidence that the car in question

a heavy weight, or by a strong man or some machine wrenching the same. Assuming that some such test should have been applied, the questions would remain, when, by whom, and how frequently? If properly tested by the manufacturer, then is it to be repeated by the purchaser and everyone who uses the same? And, if so, shall he go beyond ordinary inspection while at rest or in use, to the extent of unmaking what has already been made? There is much propriety in the law exacting rigid tests to the different parts in the first instance and while a car is in the process of manufacture which would be impracticable, if not impossible, to repeat every time a loaded car passed from one railway company to another.

May not the company so receiving such loaded car, and without being chargeable with negligence, assume that all parts of such car which appear to be in good condition are in such condition? Is the law so exacting as to the management of railroad trains as to impute negligence in not discovering what ordinary care would fail to detect? The objection to the view taken by the majority of the court was, as Taylor, J., pointed out in a lengthy dissenting opinion, that the essential question really was whether the trial judge was warranted in deciding, as a matter of law, that a reasonably careful inspection would not have disclosed the defect. He considered that, as the evidence stood, it could not be affirmed by a court of review that this ruling was correct. The principles laid down in the opinion of the majority were approved in *Atchison, T. & S. F. R. Co. v.*

Ledbetter (1885) 34 Kan. 326, 8 Pac. 411.

⁷ *Louisville, V. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564, 45 N. E. 108. A receiving company is entitled to the benefit of the presumption that such car had been properly constructed of suitable material, and had passed the inspection of someone of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted when so received. *Baldwin v. Chicago, R. I. & P. R. Co.* (1879) 50 Iowa, 689. "The care to be exercised is not such as would require the company receiving the car to test the strength of the metal or the material out of which it was constructed, or to make that rigid examination into the car's condition as could only be arrived at by actual tests; but the care must be at least an ordinary inspection by one competent to know whether or not the car is in a safe condition for transportation, and can be handled by a subordinate who will exercise ordinary care, without danger." *Louisville & V. R. Co. v. Williams* (1893) 95 Ky. 199, 24 S. W. 1.

⁸ *Missouri, K. & T. R. Co. v. Chambers* (1897) 17 Tex. Civ. App. 487, 43 S. W. 1090, holding that the fact of the car being sealed was no excuse for failing to examine it on the inside, there being indications on the outside that a ladder was defective; citing *Baltimore & P. R. Co. v. Mackey* (1894) 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491.

⁹ *Braun v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5. As to how often inspection should be made, see, generally, § 156,

was duly inspected at a regular inspecting station a short time before the accident is regarded as conclusively negating the inference of culpability.¹⁰ Nor can the plaintiff recover for injuries caused by a defective foreign car, unless he offers some evidence tending to show that the defect might have been discovered by the exercise of ordinary care.¹¹

Some unsuccessful attempts have been made to exclude from the operation of the general principle which requires inspection, those cases in which the cars are handled for a very brief period at one particular point.¹²

ante. If, at the time the eyebolt in a brake staff gives way, the car has run such a short distance from the place of the last inspection that a doubt arises whether the inspection was made with due care, that question should be left to the jury. *Sheedy v. Chicago, M. & St. P. R. Co.* (1893) 55 Minn. 357, 57 N. W. 60.

¹⁰ *Chicago & A. R. Co. v. Pratt* (1883) 14 Ill. App. 346.

¹¹ *Carruthers v. Chicago, R. I. & P. R. Co.* (1895) 55 Kan. 600, 40 Pac. 915. In his argument in this case, counsel for the plaintiff cited *Guthrie v. Maine C. R. Co.* (1889) 81 Me. 572, 18 Atl. 295, as tending to establish the proposition that if a car with defective appliances is taken into a train, and an injury to an employee results from it, the company will be liable without proof of notice of the defect, or its equivalent. But the court did not think that case would bear such a construction, for the drawbar and bumpers of the car which was the instrument of the injury had been broken off before the casualty complained of, and this was a patent defect, of which the railroad company was bound to take notice.

¹² In *Texas & P. R. Co. v. Archibald* (1896) 21 C. C. A. 520, 41 U. S. App. 567, 75 Fed. 802. Affirmed in (1898) 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, it was held that the amount of care required of a railroad company in inspecting cars switched from other roads, to be merely loaded and returned, is not less than that as to cars to be sent out upon its own road. In expressing its approval of the trial judge's refusal to give an instruction to the contrary effect, the Supreme Court said: "The proposition is that, where a car is received by a railroad only for the purpose of being locally handled, the railway, as to such local business, is dis-

pensed from all duty of looking after the condition of the cars by it used, and may, with complete legal impunity, submit its employees to the risk arising from its neglect of duty. . . . The argument wants foundation in reason and is unsupported by any authority. In reason, because, as the duty of the company to use reasonable diligence to furnish safe appliances is ever present and applies to its entire business, it is beyond reason to attempt, by a purely arbitrary distinction, to take a particular part of the business of the company out of the operation of the general rule and thereby to exempt it, as to the business so separated, from any obligation to observe reasonable precautions to furnish appliances which are in good condition. Indeed, the argument by which the proposition is supported is self-destructive, since it admits the general duty of the employer just stated and affords no reason whatever for the distinction by which it is sought to take the case in hand out of its operation." In *Elkins v. Pennsylvania R. Co.* (1851) 171 Pa. 121, 33 Atl. 74, it was contended that the rule which makes a railroad company responsible to its employees for the condition of the cars it receives for transportation over its own lines was not applicable in regard to cars which it requires them to shift from one place to another on the tracks and in the yard of a shipper. This contention did not prevail, the court saying: "They are as clearly in its service in the latter case as in the former; their work is of the same nature in one case as in the other, and the risks attending it are the same. No sufficient reason appears for discriminating between the liability of a railroad company for injuries to its employees in handling upon its own line the cars of another corporation which are 'faulty in construction or

The receiving company cannot relieve itself from its obligations to its employees by a contract with the company which owns the cars, under which each company is bound to keep its own cars in good repair, even though such contract is known to the servant.¹³

As to the inspection of loads on foreign cars, see chapters xv., and xxxii. D, *post*.

175. Manner in which foreign cars are constructed; how far a source of liability.— There is no difference of opinion with regard to the correctness of any of the abstract principles which have been relied upon by the courts in determining the extent of a receiving company's liability for injuries received by its servants in handling foreign cars of a different construction from its own. But, considered as decisions with regard to the specific facts involved, the cases on this subject are not altogether harmonious.

In far the larger number of those reported, the servant's right of recovery has been denied. The reason most commonly assigned for this conclusion is that the risk of handling such a car is one of those which are obviously incident to the work of a railway servant. From this standpoint the doctrine may be regarded as an application either of the principle that negligence cannot be predicated of the exposure of a servant to a risk which he appreciates (see chapter vii., *ante*), or of the principle that the servant is conclusively presumed to have agreed not to claim compensation for any injuries resulting from hazards which he appreciates (see chapter xvii., *post*). In their judgments the courts sometimes seem to waver between these two conceptions; but from the language used in nearly all of them it is quite manifest that the risk of handling foreign cars of the particular construction shown was regarded not merely as an obvious one, but also as an ordinary or normal one. In the ultimate analysis, therefore, these cases must be regarded as belonging to that class which is concerned with ordinary risks which a servant of mature years and

dangerously out of repair;" and its liability to them for injuries in handling such cars, by its order, elsewhere. It is not the ownership of the cars or of the line on which they are moved that imposes the liability upon the company, but it is the handling or shifting of them by its orders. . . . The defendant company was not bound to shift the cars in the yard of the refining company without a previous inspection of them. If the latter refused to allow an inspection the former could have properly declined to engage in the work of

shifting them. But, having done the work, it is responsible to its employees for injuries caused by the unsafe condition of the cars they were required to handle." That the cars are only used by the receiving company for a short time, or carried a short distance, will not relieve it of its duty to its employees of inspecting such cars, was also laid down in *Atchison, T. & S. F. R. Co. v. Penfold* (1896) 57 Kan. 148, 45 Pac. 574.

¹³ *Chicago, B. & Q. R. Co. v. Avery* (1884) 109 Ill. 314.

average intelligence is bound to understand, and not to that class which is concerned with extraordinary risks, his knowledge of which must be established by positive evidence before his action is barred.¹ The reason thus relied upon plainly ceases to be operative, however, where the servant does not understand the danger incident to handling the different patterns of cars. Under such circumstances, therefore, the receiving company is held liable either on the general ground explained in § 58, *ante*, or on the ground of a breach of the specific duty to give the servant proper instruction.² See chapter XVI., *post*.

Another reason which has been put forward in some of the decisions as being fatal to the servant's claim for damages is that negligence cannot be predicated of receiving and forwarding a foreign car, merely on the ground that it is not constructed with the safest possible appliances, or appliances of the latest and most improved

¹ In *Kohn v. McNulta* (1893) 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298, where a servant was held unable to recover for an injury caused by a deadwood of unusual length, the court, dealing with the contention of the plaintiff that none of his employer's cars had these deadwoods, said: "Inasmuch as he had in fact seen and coupled cars like the ones that caused the accident, and that more than once, and as the deadwoods were obvious to anyone attempting to make the coupling, and the danger from them apparent, it must be held that it was one of the risks which he assumed in entering upon the service. A railroad company is guilty of no negligence in receiving into its yards, and passing over its line, cars—freight or passenger—different from those it, itself, owns and uses. It is not pretended that these cars were out of repair or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods or bumpers of unusual length to protect the drawbars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervenor was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to anyone. Under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer." To the same effect, see *Woodworth*

v. St. Paul, M. & M. R. Co. (1882) 5 McCrary, 574, 18 Fed. 282 (dissimilar drawheads); *Tahda, W. & W. R. Co. v. Black* (1878) 88 Ill. 112 (coupling bars of different heights, bumpers on foreign cars, none on defendant's); *Thomas v. Missouri P. R. Co.* (1891) 109 Mo. 187, 18 S. W. 980 (peculiar pattern of couplings); and the following cases, in which the foreign cars were equipped with double bumpers or deadwoods, there being none on defendant's own cars: *Hathaway v. Michigan C. R. Co.* (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634; *Michigan C. R. Co. v. Smithson* (1881) 45 Mich. 212, 7 N. W. 791; *Northern P. R. Co. v. Blake* (1894) 11 C. C. A. 93, 27 U. S. App. 190, 63 Fed. 45; *Louisville & N. R. Co. v. Boland* (1892) 96 Mo. 626, 18 L. R. A. 260, 11 So. 667; *Baldwin v. Chicago, R. I. & P. R. Co.* (1879) 50 Ill. 680; *Kelly v. ...* (1885) 63 Wis. 307, 53 Am. Rep. ... 23 N. W. 890 (couplings of unequal height overlapped, and servant was caught between the platform of a ... and the end of the foreign car); *Chicago, B. & Q. R. Co. v. Curtis* (1897) 51 Neb. 442, 71 N. W. 42; *Indianapolis, B. & W. R. Co. v. Flanigan* (1875) 77 Ill. 365 (double deadwoods).

² The latter ground was relied on by the plaintiff in *Illinois C. R. Co. v. Price* (1895) 72 Miss. 862, 18 So. 415, and *Michigan C. R. Co. v. Smithson* (1881) 45 Mich. 212, 7 N. W. 791. But in the second case the obligation to instruct was denied to exist under the circumstances.

pattern.³ But it has already been pointed out (§ 36, *ante*) that the principle thus relied upon is based essentially upon the servant's presumed comprehension and acceptance of the hazards incident to the use of the inferior kind of appliance. It can hardly be said, therefore, that the rights of the parties are, in a logical point of view, affected by the introduction of this factor. In the last analysis it is nothing more than an application in a special form of the theory just noticed. Moreover, so far as this reason is concerned, it is clear that, as a matter of fact, very few cases of difference of construction are likely to present themselves, in which the difference goes beyond the limit which would be allowable if both cars had belonged to the receiving company. There is plainly no ground upon which culpability can be predicated where this limit is not exceeded, and so it has been held.⁴

The statements of the doctrine mentioned in the preceding paragraph are sometimes supplemented by a declaration that the receiving company is at liberty to operate cars with such coupling appliances as are in general use at the time, and such as are regarded by competent experts in railway management as ordinarily safe and fit to be handled.⁵ But the conclusive effect thus ascribed to general usage is not conceded in all jurisdictions. See chapter VI., *ante*.

Still another reason for denying the servant's right of action has been found in the declared ability of the servant to protect himself, under the circumstances, by the exercise of due care.⁶

³ *Northern P. R. Co. v. Blake* (1894) 11 C. C. A. 93, 27 U. S. App. 190, 63 Fed. 45 (double deadwoods); *Simms v. South Carolina R. Co.* (1886) 26 S. E. 490, 2 S. E. 486 (bumper of foreign car was so constructed that it was unsafe to stand between it and the car to which it was being coupled); *Baldwin v. Chicago, R. I. & P. R. Co.* (1879) 50 Iowa, 680 (double deadwoods). In the last of these cases the court said: "The occasional or frequent use of such cars on any road, in the ordinary course of business, is one of the ordinary risks an employee assumes. He knows or is bound to know that cars from other roads are being constantly hauled over the road whose employee he is. The most ordinary observation will teach him this. He must know these cars may be differently constructed. To our knowledge, at least, there is no general rule in relation thereto, and the evidence in this case discloses the fact that none such exists. He may well require

that the cars provided by the company whose employee he is should have all the modern appliances, but it is not reasonable that he, at the expense of the commerce of the country, should require this as to all other cars that may be transported in the usual and ordinary course of business."

⁴ *Louisville & N. R. Co. v. Williams* (1893) 95 Ky. 199, 24 S. W. 1; *Pittsburgh & L. E. R. Co. v. Healy* (1891) 48 Ohio St. 608, 15 L. R. A. 384, 29 N. E. 575.

⁵ *Northern P. R. Co. v. Blake* (1894) 11 C. C. A. 93, 27 U. S. App. 190, 63 Fed. 45; *Dooner v. Delaware & H. Canal Co.* (1895) 171 Pa. 581, 33 Atl. 415.

⁶ In *Louisville & N. R. Co. v. Boland* (1892) 96 Mo. 626, 18 L. R. A. 260, 11 So. 667, the court said: "In determining the question of negligence on the part of the company in such cases, the question is not whether the couplings of the cars so received upon its road are different from those on its own cars, or

In a few cases presenting facts of the same description as those mentioned in the cases already cited, the servant was held entitled to maintain the action on the ground that it was for the jury to determine whether the construction of the foreign car was such as to admit of the servant's doing his work with reasonable safety.⁷ Under this theory, it is manifest that the servant is presumed to be ignorant of the risk to which the difference of construction exposes him. In the absence of evidence overcoming that presumption, therefore, an independent ground of liability may be predicated as to the master's omission to inform him of that risk.⁸

176. Effect of statutory and constitutional provisions requiring railway companies to transport foreign cars.— The various statutory and constitutional provisions by which, in most, if not all, of the American states, railway companies are required to receive and forward cars from connecting lines have abrogated that right of arbitrary rejection, which, in the absence of some contractual obligation, the companies are under no duty to exercise, and have imposed upon them a peremptory duty to transport all such cars diligently and impartially.⁹ The result of predicated this duty is that a servant of a receiving company is sometimes placed in a less favorable position than that which he occupies with regard to cars which belong to his

whether they are the best in use, or whether they increase the hazard of coupling cars, but whether they are reasonably suited or adapted to the use to which they are applied. To say that a certain style or pattern of coupling increases the hazard, if it is reasonably adapted to the purpose intended, or one that a railway company in the exercise of reasonable care and prudence would adopt, is simply to say that it requires greater care and skill on the part of the brakeman in using it than a coupling of a different pattern." For another reference to the same consideration, see *Pennsylvania R. Co. v. Ebbagh* (1895) 144 Ind. 687, 43 N. E. 936 (double dead-woods).

⁷ *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462, 3 N. E. 344, (bumpers of insufficient length); *Missouri P. R. Co. v. White* (1890) 76 Tex. 102, 13 S. W. 65 (double dead-woods); *Ohio & M. R. Co. v. Wagoner* (1892) 43 Ill. App. 324 (drawbars of different heights overlapped). It is negligent to receive into a train a foreign car so high that a man could not pass under an overhead bridge while standing upright upon it. *Southern R.*

Co. v. Durall (1900) 22 Ky. L. Rep. 56, 56 S. W. 988. It is negligence for a railroad company to accept from another company a freight car having an oval top not having a runway upon it where the train is not equipped with air brakes, so that a brakeman will have to move about over the top of the cars. *Rogers v. Louisville & N. R. Co.* (1898) 88 Fed. 462. In *O'Neil v. St. Louis, I. M. & S. R. Co.* (1881) 3 M. Cray, 423, 9 Fed. 337, where the injury was caused by deadwoods which extended out too far, the court formulated the following rule: "If the employer introduces, without notice to the employee, some new and unusual machinery involving an unexpected or unanticipated danger, through the introduction of which the employee, while using care and diligence incident to his employment, meets with an accident, the employer must respond in damages."

⁸ See *O'Neil v. St. Louis, I. M. & S. R. Co.* (1881) 3 M. Cray, 423, 9 Fed. 337; *Missouri P. R. Co. v. White* (1890) 76 Tex. 102, 13 S. W. 65.

⁹ *Smith v. Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273.

employers. If the car offered satisfies the standard of safety fixed by common usage and the various other considerations which are applicable to all employers in this line of business, culpability cannot be predicated of its introduction into the trains of the receiving company, in compliance with the legislative mandate, although that company itself has adopted a kind of rolling stock which is safer to handle.² Moreover, as these enactments, either by their express terms or upon a reasonable construction, require that no unnecessary delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable despatch,³ it is evident that the result of complying with them may conceivably be that an inspection of a foreign car will be sufficient, although it is less thorough than that which the receiving company deems it proper to make in the case of its own rolling stock. In practice, however, this effect of the enactment is not likely to be exemplified, as the system of examining cars while they are *en route* is virtually the same in all parts of the Union.

On the other hand, these provisions do not take away from a servant of the receiving company any rights which the common law gives him. They cannot be construed as a direction to receive a foreign car irrespective of the question whether it is or is not of an abnormally dangerous construction or in bad repair. It has been uniformly held that the duty which they create is not enforceable unless the cars transferred are in good repair, and not of such a construction as to be unreasonably dangerous to persons who may be obliged to work on them or to handle them.⁴ Plainly, no other conclusion was

² As regards one particular appliance, and public policy alike demand that this point of view is thus discussed in the somewhat recent decision of *North-
P. R. Co. v. Blake* (1894) 11 C. C. A. 93, 27 U. S. App. 190, 63 Fed. 45. "The fact that railroad companies are now very generally required by statutory enactments to receive and transport cars which are tendered to them by connecting carriers has led several courts to decide, after a very full and careful consideration of the question, that it is the right and duty of a railway company to receive and transport double deadwood cars, such as are, at the time, in use on other railroads, if they are in good condition and free from defects, even though the use of such cars may enhance the risk to which a brakeman is exposed in the act of making couplings. It has been held, in effect, that the necessities of commerce

and public policy alike demand that such cars should be received and transported by a railroad company, even though it does not make use of such coupling appliances on cars of its own construction, so long as such cars are in general use on other leading lines of railroad, and so long as many content persons justify the use of such coupling appliances on the ground that they are not unnecessarily dangerous and that certain advantages result from that method of construction." See also the reasoning of the court in *Tennant v. Missouri P. R. Co.* (1891) 109 Mo. 187, 18 S. W. 990; *Baldwin v. Chicago, R. I. & P. R. Co.* (1879) 50 Iowa, 689.

³ See *Smith v. Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 270.

⁴ In *Dooner v. Delaware & H. Canal Co.* (1894) 166 Pa. 17, 30 Atl. 269, referring to the mandate of § 1, art. 17,

possible in the absence of some explicit declaration of the legislative will. As was pointed out in one case, there is no reason why the rule should not be the same, whether the transportation of the foreign cars is carried out in obedience to a statute, or by virtue of a mutual agreement.⁵

of the Pennsylvania Constitution, to "receive and transport . . . cars, loaded or empty, without delay or discrimination." of another connecting road, the court said: "By no reasonable construction can that be held to mean cars of another road not in a condition for transportation, or not provided with the appliances which ordinary care requires for the reasonable safety of train crews in properly handling them. The obvious purpose of the section was to prohibit common carriers from discrimination in transportation between their own cars and those of other roads. All were to be moved over the lines of each other, with the same promptness and impartiality. But the Constitution no more commands one road to move defective cars from other roads, than to move its own cars when defective." In *Illinois C. R. Co. v. Price* (1895) 72 Miss. 862, 18 So. 415, the court said: "The constitutional provision which requires all railroads to receive and transport each other's cars, etc., without unnecessary delay or discrimination, is a simple corollary from the previous declaration of the same section of the Constitution, that railroads are public highways. It is impossible to conceive that it was the intent of the Constitution framers to exempt from liability a railway so negli-

gent to its servants as to furnish them dangerous machinery and appliances, when, in every other line of that instrument relating to railways and their employees, the declared purpose to widen and enlarge the accountability of the railway went to the extent of almost wholly destroying the fellow-servant doctrine. Being the owners of public highways in this state, railroads are very properly required to receive from each other cars to be transported without unnecessary delay; but it is impossible to believe that they are thereby required to receive and transport cars, however obviously defective and dangerous, and thereby subject its servants, and the traveling public on its trains, to certain peril and disaster." To the same effect, see *Smith v. Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273; *Michigan C. R. Co. v. Smithson* (1881) 45 Mich. 212, 7 N. W. 791; *Thomas v. Missouri P. R. Co.* (1891) 109 Mo. 187, 18 S. W. 980; *Bender v. St. Louis & S. F. R. Co.* (1896) 137 Mo. 240, 37 S. W. 132; *Louisville & N. R. Co. v. Williams* (1893) 95 Ky. 199, 24 S. W. 1; *Chicago, B. & O. R. Co. v. Curtis* (1897) 51 Neb. 442, 71 N. W. 42.

⁵ *Pennsylvania R. Co. v. Snyder* (1896) 55 Ohio St. 342, 45 N. E. 559.

CHAPTER XIII.

MASTER'S DUTY WITH RESPECT TO THE EMPLOYMENT OF SERVANTS.

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Duty of hiring deemed to be non-delegable, see chapter xxxi., *post*.

That the master is not liable, even if the servant was incompetent, unless such incompetency was the efficient cause of the accident, see chapter xlii., *post*.

As to the duty in relation to statutes passed for the protection of the servant, see chapters xxxvii., xlv., *post*.

The usage of other employers as a test of the defendant's performance of his duty is discussed in § 45, *ante*.

A. GENERAL PRINCIPLES.

177. Nature and extent of the duty; generally.— The obligations of a master to see that the servants hired by him possess the qualifications, mental, moral, and physical, which will enable them to perform their duties without exposing themselves and their coemployees to greater dangers than the work necessarily entails, are, in their broad features, similar to the obligations which are incumbent upon him with regard to the other agencies of his business. It is manifest, however, that, in their specific application to human beings, the general principles which define the nature and extent of those obligations must assume a shape somewhat different from that which they bear in their relation to the lower animals, or to inorganic instrumentalities. It is, in fact, apparent that the duty of a master to use care in hiring servants is very closely associated with, if not a special form of, his duty to adopt a safe system in the conduct of his business; that is to say, the duty of seeing that the unreasoning agencies used by him perform their functions.¹ The essential distinction

¹This conception emerges in statements like that which we find in a recent case that "the law will not allow an employer, whose duty it is to provide reasonably safe appliances, to escape liability by employing incompetent or unsuitable persons to discharge it." *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874. Compare, also, such cases as *Stewart v. New York, O. & W. R. Co.* (1889) 28

N. Y. S. R. 215, 8 N. Y. Supp. 19, where it was held to be negligence to intrust the work of thawing dynamite to inexperienced workmen who did not understand the danger involved in applying the heat in a certain manner. These facts manifestly suggest the conception of an unsafe method of work, the unsafety of which results from the inefficiency of the person by whom it is done. See also subtitle D, *infra*.

tions suggested by this consideration render it proper to treat the cases dealing with the duty of hiring servants as a distinct division of the general subject, separate from the discussion of the duty to furnish a safe place of work and safe appliances. The cross-references at the head of the chapter indicate the instances in which the balance of advantage has seemed to the writer to be in favor of departing from this arrangement.

The rule established by the cases to be reviewed in this chapter may be stated in formal terms as follows: The hiring or retention of a servant whose unfitness for his duties, whether it arise from his want of skill, his physical and mental qualities, or his bad habits, is known, actually or constructively, to the master, is culpable negligence, for which the master must respond in damages to any other servants who may suffer injury through that unfitness.² The essential ground upon which the liability thus predicated is based is that "the master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service."³ A master, therefore, is not liable for injuries caused by the negligent act of an incompe-

²"If, acting through appropriate officers, it [i. e., the defendant company] knowingly or negligently employs incompetent servants, it is liable for an injury occasioned to a fellow servant by their incompetency. If it continues in its employment an incompetent servant after his incompetency is known to its officers, or so manifest that its officers, using due care, would have known it, such continuance in employment is as much a breach of duty and a ground for liability as the original employment of an incompetent servant." *Gilman v. Eastern R. Co.* (1866) 13 Allen, 433, 90 Am. Dec. 210. "A master is liable to his servant for an injury caused by the incompetency or want of skill of a fellow servant, whether it existed when the fellow servant was hired, or has come upon him since the hiring, the fellow servant having been in the first instance hired, or afterward continued in the service, with notice or knowledge, or the means of knowledge, of this lack." *Laning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417. "The same care requisite in hiring a servant in the first instance must still be exercised in continuing him in the service; otherwise, the employer will become responsible for his want of care or skill. The employer will be equally

liable for the acts of an incompetent or careless servant, whom he continues in his employment after a knowledge of such incompetency or carelessness, or when, in the exercise of due care, he should have known it, as if he had been wanting in the same care in hiring." *Shanny v. Androscoquin Mills* (1876) 66 Me. 420. For similar language, see *Michigan C. R. Co. v. Dolan* (1875) 32 Mich. 510; *Poirier v. Carroll* (1883) 35 La. Ann. 699; *Eransville & T. H. R. Co. v. Gayton* (1888) 115 Ind. 450, 17 N. E. 101; *Hills v. Chicago & G. T. R. Co.* (1885) 55 Mich. 437, 21 N. W. 878. Where an employee was injured through the negligence of a coemployee, evidence that the latter had frequently shown his recklessness and unfitness, and, notwithstanding complaints against him, was retained by the master, makes a case on which the plaintiff is entitled to recover, unless it is overthrown by a successful defense. *Northern P. R. Co. v. Mares* (1887) 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321; *Loc v. Chicago, R. I. & P. R. Co.* (1894) 57 Mo. App. 350.

³*Snow v. Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720. Compare the phraseology used in *Stewart v. Philadelphia, W. & B. R. Co.* (1889) 8 Houst. (Del.) 450, 17 Atl. 639.

tent servant, where that act was not one of those which he was authorized to do.⁴

It should be observed that, in some states of the evidence, a servant may be entitled to recover either on the ground that the instrumentality furnished was defective, or on the ground that the employee to whom the duty of furnishing it was assigned was not competent for that duty.⁵ If the latter ground is relied upon, the essence of the servant's claim is that he was injured by the negligence of an employee who was charged with the performance of a non-delegable duty. The cases illustrative of this point of view are collected in chapters XXXI., XXXII., *post*.

178. Duty considered as creating an exception to the doctrine of common employment.— It is important to note that the rule stated in the last section was originally introduced into Anglo-American law, and is still frequently referred to by the courts, as an exception to the doctrine which declares a master to be exempt from responsibility for injuries caused to one servant by the negligence of another. From this point of view, it may be enunciated thus: "While a railroad company is not responsible to one employee for an injury resulting from the mere negligence or incompetence of a coemployee in the same general employment, it is liable in such a case where the company has been guilty of negligence in the employment of, or, after notice, continuing in the employment, the negligent or incompetent employee, thereby conducing to the injury."⁶ In other words, the wrongful hiring of incompetent servants is not one of the common and obvious

⁴ *Southern Cotton-Oil Co. v. Derond* (1894; Tex. Civ. App.) 25 S. W. 43; *Smith v. St. Louis & S. F. R. Co.* (1899) 151 Mo. 391, 48 L. R. A. 368, 52 S. W. 378 (engine wiper undertook to operate the engine; supervisors had no knowledge that he had ever before attempted to do so).

⁵ See, for example, *Bunnell v. St. Paul, M. & M. R. Co.* (1882) 29 Minn. 305, 13 N. W. 129. There, a breach of the latter duty was relied on, but a breach of the former duty might also have been made the gravamen of the action, the cause of the injury having been a defective scaffold.

⁶ *Ohio & M. R. Co. v. Collarn* (1881) 73 Ind. 261, 38 Am. Rep. 134. "Though we have said," remarked Alderson, B., in a leading English case, "that a master is not, in general, responsible to one servant for an injury occasioned to him by the negligence of a fellow servant

while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. The servant, when he engages to run the risks of his service, including those arising from the negligence of fellow servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care; and the object of the plea in this case is to show that the defendants had discharged this duty, the omission to discharge which might have made them responsible to the deceased. The plea, therefore, appears to us not to be open to the objection insisted on." *Holmes v. York, V. & R. R. Co.* (1850) 5 Exch. 343, 19 L. J. Exch. N. S. 296, 14 Jur. 837. It would be a work of supererogation to attempt to cite all

hazards of an employment which is assumed by other servants.² It is error to take the case from the jury where there is evidence that

the cases in which this conception is adverted to. The following list will suffice: *Morgan v. Vale of North R. Co.* (1864) 5 Best & S. 723, L. R. 1 Q. B. 149, 35 L. J. Q. B. N. S. 23, 13 L. T. N. S. 564, 14 Week. Rep. 141; *Wiggott v. For* (1856) 11 Exch. 832, 2 Jur. N. S. 955, 25 L. J. Exch. N. S. 188; *Tarrant v. Webb* (1856) 18 C. B. 797, 25 L. J. C. P. N. S. 261; *Burtonshill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767; *Searle v. Lindsay* (1861) 11 C. B. N. S. 429, 31 L. J. C. P. N. S. 106, 8 Jur. N. S. 746, 5 L. T. N. S. 427, 10 Week. Rep. 89; *Hill v. Johnson* (1865) 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week. Rep. 411; *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30; *Walker v. Bolling* (1853) 22 Ala. 294; *Alabama & F. R. Co. v. Waller* (1872) 48 Ala. 459; *Tyson v. South & North Ala. R. Co.* (1878) 61 Ala. 554, 32 Am. Rep. 8; *Mobile & O. R. Co. v. Thomas* (1868) 42 Ala. 672; *Hogan v. Central P. R. Co.* (1874) 49 Cal. 129; *Stephens v. Doe* (1887) 73 Cal. 26, 14 Pac. 378; *Congrave v. Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175; *Keith v. Walker Iron & Coal Co.* (1888) 81 Ga. 40, 7 S. E. 166; *Chicago & N. W. R. Co. v. Swett* (1867) 45 Ill. 197, 92 Am. Dec. 206; *Chicago & N. W. R. Co. v. Taylor* (1873) 69 Ill. 461, 18 Am. Rep. 626; *Chicago & A. R. Co. v. Sullivan* (1872) 63 Ill. 293; *Columbus, C. & I. C. R. Co. v. Troesch* (1873) 68 Ill. 545, 18 Am. Rep. 578; *Toledo, W. & W. R. Co. v. Durkin* (1875) 76 Ill. 395; *Chicago & A. R. Co. v. Rush* (1877) 84 Ill. 570; *Chicago & A. R. Co. v. Keefe* (1868) 47 Ill. 108; *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92; *Thayer v. St. Louis, A. & T. H. R. Co.* (1864) 22 Ind. 26, 85 Am. Dec. 409; *Chicago & G. E. R. Co. v. Harney* (1867) 28 Ind. 28, 92 Am. Dec. 282; *Lake Shore & W. S. R. Co. v. Stupak* (1886) 108 Ind. 1, 8 N. E. 630; *Hobbs v. New Orleans & C. R. Co.* (1851) 6 La. Ann. 296, 54 Am. Dec. 565; *Satterly v. Morison* (1883) 35 La. Ann. 1166; *Poirier v. Carroll* (1883) 35 La. Ann. 399; *Portland v. Portland Co.* (1860) 48 Me. 294; *Donnell v. Booth Bros. & H. L. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874; *Cayzer v. Taylor* (1857) 10 Gray, 274, 60 Am. Dec. 317; *Farwell v. Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339; *Curran v. Merchants' Alg. Co.* (1881) 130 Mass. 374, 39 Am. Rep. 457; *New Orleans, J. & G. N. R. Co. v. Hughes* (1873) 49 Miss. 258; *Hard v. Mississippi C. R. Co.* (1874) 50 Miss. 178, 192; *Melhermott v. Pacific R. Co.* (1860) 30 Mo. 116; *Harper v. Indianapolis & St. L. R. Co.* (1871) 47 Mo. 567, 4 Am. Rep. 353; *Nash v. Nashua Iron & Steel Co.* (1882) 62 N. H. 406; *Pittsburg, Ft. W. & C. R. Co. v. Deviney* (1867) 17 Ohio St. 197; *Weaver v. Pennsylvania R. Co.* (1867) 55 Pa. 460; *Walton v. Bryn Mawr Hotel Co.* (1894) 160 Pa. 3, 28 Atl. 438; *Boutwright v. Northeastern R. Co.* (1886) 25 S. C. 128; *Nashville & C. R. Co. v. Elliott* (1860) 1 Coldw. 611, 78 Am. Dec. 506; *Knoxville Iron Co. v. Dobson* (1881) 7 Lea, 367; *Dallas v. Gulf, C. & S. F. R. Co.* (1884) 61 Tex. 196; *Baird v. Dunn* (1895) 33 N. B. 156; *Bossout v. Rome, W. & O. R. Co.* (1890) 32 N. Y. S. R. 884, 10 N. Y. Supp. 602; *Pennsylvania Co. v. Roney* (1883) 89 Ind. 453, 46 Am. Rep. 173.
² *Hall v. Bedford Quarries Co.* (1901) 156 Ind. 460, 60 N. E. 149. A statement of plaintiff's counsel, in an action by an employee, showing that the injuries complained of were occasioned by a coemployee, is not sufficient to show that there is no cause of action. It must also appear by the affirmative testimony of the employer that the coemployee was a competent person for the position he occupied, and that necessary appliances were furnished by the employer. *Haley v. Western Transit Co.* (1890) 76 Wis. 344, 45 N. W. 16. A railway company which is negligent in employing an unskilful engineer, or allowing such engineer to turn over the engine to a fireman who is not qualified to manage it, damage resulting from the conduct of the engineer or fireman, is liable, although the injured servant is the conductor of the train. *Connor v. Chicago, R. I. & P. R. Co.* (1875) 59 Mo. 285. In *Chicago, St. L. & P. R. Co. v. Champion* (1894) 9 Ind. App. 526, 37 N. E. 21, denying rehearing in 9 Ind. App. 511, 36 N. E. 221, it was held error to give an instruction to the effect that, if it ever becomes necessary to take into the service an inexperienced employee, the neg-

there was negligence in the selection or retention of the coservant whose act caused the injury.³

A complaint which alleges that the master was negligent in selecting the fellow servant whose act caused the injury is not demurrable.⁴ On the other hand, a complaint is insufficient which on its face shows that the injury in suit was caused by the act of a fellow servant, unless it avers negligence in respect to the selection or retention of that servant.⁵

The distinction between the negligence of a competent fellow servant and the unskilfulness of an incompetent fellow servant should be clearly pointed out to the jury by the trial judge, in any case where there is a possibility of their misapprehending the true rule.⁶

ligence of that employee is a risk assumed by his coservants. The majority of the court said that, should such a necessity arise, the other servants had a right to assume that they would be informed of that fact, or at least be given a reasonable opportunity to learn it, before being placed in a perilous position. Ross, J., dissented on the ground that the majority of the court confused the terms "inexperienced" and "incompetent," as a servant may be inexperienced, and yet not incompetent.

³*Brickner v. New York C. R. Co.* (1870) 2 Lans. 506.

⁴*Voss v. Delaware, L. & W. R. Co.* (1898) 62 N. J. L. 59, 41 Atl. 224; *Chandler v. Atlantic Coast Electric R. Co.* (1898) 61 N. J. L. 380, 39 Atl. 674; *Hall v. Bedford Quarries Co.* (1901) 156 Ind. 460, 60 N. E. 149. A petition alleging that the employment of a fellow servant was careless and negligent, and that, in consequence thereof, an incompetent servant was taken into the company's service, who caused the injury by his incompetency, is a sufficient allegation of negligence in his employment. *Galveston Rope & Twine Co. v. Burkett* (1893) 2 Tex. Civ. App. 308, 21 S. W. 958. A complaint is sufficient which charges the death of the baggage master through the act of the conductor, alleging that he was not a careful, skilful and attentive conductor for a passenger train, which was known to defendant, and that the death of plaintiff's intestate was caused by such conductor's negligence. *Kerlin v. Chicago, P. & St. L. R. Co.* (1892) 50 Fed. 185.

⁵*Indiana, R. & W. R. Co. v. Dailey* (1886) 110 Ind. 75, 10 N. E. 631; *Lanier v. Androscoggin R. Co.* (1873) 62

Me. 463, 16 Am. Rep. 492; *Collier v. Steinhart* (1875) 51 Cal. 119; *Bauer v. Fitzpatrick* (1881) 80 Ind. 527; *Boquet v. Louisville, E. & St. L. R. Co.* (1884) 100 Ind. 491; *Lake Shore & M. S. R. Co. v. Stupak* (1886) 108 Ind. 1, 8 N. E. 630; *Albro v. Aquacum Canal Co.* (1850) 6 Cush. 75; *Dow v. Kansas P. R. Co.* (1871) 8 Kan. 642; *Pilkinton v. Gulf, C. & S. F. R. Co.* (1888) 70 Tex. 226, 7 S. W. 805; *Kindel v. Hall* (1896) 8 Colo. App. 63, 44 Pac. 781; *Melchmott v. Pacific R. Co.* (1860) 30 Mo. 115; *Southwest Virginia Improv. Co. v. Andrew* (1889) 86 Va. 270, 9 S. E. 1015; *Kersey v. Kansas City, St. J. & C. B. R. Co.* (1883) 79 Mo. 362.

⁶*Ingram v. Hilton & D. Lumber Co.* (1899) 108 Ga. 194, 33 S. E. 961. In *Cayzer v. Taylor* (1857) 10 Gray, 274, 277, 69 Am. Dec. 317, the following instruction was held correct: "It is contended that the defendant was negligent in the selection of an incompetent engineer, and negligent in continuing him in his employment. There are two inquiries here: 1. Was the engineer competent or incompetent? 2. If he was not, had the master reason to know it? If he had reason, and if he knowingly, or having good reason to know, and without due care and prudence, employed or continued in his employment such incompetent person, and the accident happened or injury arose by reason of such incompetency, and the plaintiff has satisfied you of this, the burden being on him, he is entitled to recover. If he was not negligent in this respect, or had not reason to know of this incompetency, and the injury did not arise from incompetency, he is not liable on this ground. If it was the careless act

Any charge is erroneous which does not distinguish clearly between the liability of the defendant by reason of negligence in the furnishing of proper apparatus or in the employment of competent co-servants, and his nonliability for a want of proper care on the part of the fellow servant at the time of the accident.⁷

The defendant is not entitled to an unqualified instruction that the plaintiff cannot recover if he was injured by his own carelessness or that of his fellow servants.⁸

179. Standard of care obligatory upon the master in regard to the selection of his servants.—As in the case of the other agencies of the master's business, the question whether he has performed his duty with respect to the employment of servants is sometimes considered with reference to the general standard furnished by the supposed conduct of a man of average prudence and intelligence under the circumstances, and sometimes with reference to the actual qualifications of the servant hired.

The former point of view is apparent in the doctrine that an employer is in no case held to an undertaking to select absolutely competent and careful servants. The rule requires of him no more than the exercise of reasonable care in either case,—such care only as men of reasonable and ordinary prudence exercise,—and, when he has complied with this requirement, he cannot be held responsible for injuries which result from the incompetency of the servants so selected.¹

of an incompetent engineer, negligently and knowingly employed by the defendant, he would be liable; if it was the careless act of a competent engineer, he would not be liable."

⁷ *Houston & T. C. R. Co. v. Willie* (1880) 53 Tex. 318, 37 Am. Rep. 756.

⁸ *International & G. N. R. Co. v. Cook* (1897) 16 Tex. Civ. App. 386, 41 S. W. 665.

¹ *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524. "The extent of the undertaking is that the company will exercise reasonable care in the selection of an employee, and, if his incompetency is discovered, it will dismiss him from its service." *Columbus, C. & I. C. R. Co. v. Truesch* (1873) 68 Ill. 545, 18 Am. Rep. 578. The phrase "reasonable care" also occurs in *Wright v. New York C. R. Co.* (1858) 28 Barb. 80; *Chicago & G. E. R. Co. v. Harney* (1867) 28 Ind. 28, 92 Am. Dec. 282; *Rogers v. Ludlow Mfg. Co.* (1887) 144 Mass. 198, 59 Am.

Rep. 68, 11 N. E. 77; *Webster Mfg. Co. v. Schmidt* (1897) 77 Ill. App. 49. The phrase "reasonable care, prudence, and discretion" is used in *Norfolk & W. R. Co. v. Nuckols* (1895) 91 Va. 193, 21 S. E. 342. "The duty of a railway corporation is to exercise due, that is, ordinary, care, in the selection and employment of its servants and agents, having respect to their particular duties and responsibilities, and the consequences that may result from their want of competence, skill, or care in the performance of their duties." *Bantec v. New York & H. R. Co.* (1874) 59 N. Y. 356, 17 Am. Rep. 325. The phrase "ordinary care" is also used in *Lindvall v. Woods* (1891) 44 Fed. 855; *Ex parte Johnson* (1883) 19 S. C. 492; *Matthews v. Bull* (1897; Cal.) 47 Pac. 773. In *Ohio & M. R. Co. v. Collarn* (1881) 73 Ind. 261, 38 Am. Rep. 134, the two adjectives, "reasonable" and "ordinary," are coupled together. In *Alabama & F. R. Co. v. Waller* (1872) 48 Ala. 459, it

The latter point of view is observable in the statements that the master is bound to provide servants that are "fit and competent,"² "efficient,"³ "of competent skill and prudence,"⁴ but not "absolutely competent and careful servants."⁵

A blending of these two conceptions produces the more complete formula that a master is bound to exercise reasonable or ordinary care in the selection and retention of sufficient and competent servants.⁶ In instructing a jury, this extended form of statement should always be used; for otherwise the jury might be led to suppose that the master was an insurer of the servant's competency.⁷ Compare the similar doctrine in the case of other agencies, § 25, *ante*.

180. Unfitness injurious to the unfit servant himself.— In most instances the injured party is a coemployee of the servant whose unfitness is complained of. But such unfitness may conceivably create a cause of action in favor of the unfit servant himself. The reason why recovery on this ground is so rarely sought is doubtless that, in the nature of the case, the unfit servant is almost always aware of his unfitness. The effect of his knowledge is to bring the situation within the scope of the principle that, if a person of apparently full age and complete understanding undertakes certain duties, he is presumed to appreciate and accept the risks incident to those duties.¹ Or, from

was said that the master was bound to use "due or reasonable" care and diligence, the exercise of "ordinary" care and diligence not being sufficient to absolve him from liability. But the ruling suggests a distinction which does not seem to be warranted by the authorities. In *Sizer v. Syracuse, B. & N. Y. R. Co.* (1872) 7 Lans. 67, the expression "highest care" was used, but this was *obiter*, and is, in any case, too strong, as the above authorities show.

²*Ardesco Oil Co. v. Gibson* (1869) 63 Pa. 146.

³*Norfolk & W. R. Co. v. Ampen* (1896) 93 Va. 108, 25 S. E. 226 (not error to substitute this word for competent in an instruction).

⁴*Wander v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143.

⁵*Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524.

⁶*Matthews v. Bull* (1897; Cal.) 47 Pac. 773. For similar language, see *Rogers v. Ludlow Mfg. Co.* (1887) 144 Mass. 198, 59 Am. Rep. 68, 11 N. E. 77; *Tommesen v. Ross* (1890) 58 Hun. 415, 12 N. Y. Supp. 150; *Thompson v. Ross* (1890) 35 N. Y. S. R. 271, 12 N. Y.

Supp. 151 (same facts); *Laning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417; *Brown v. The D. S. Cogs* (1872) 1 Woods, 401, Fed. Cas. No. 2,002.

⁷*Lewis v. Emery* (1896) 108 Mich. 641, 66 N. W. 569 (condemning a charge that "the law imposes upon every man that runs a sawmill the duty to employ reasonably skilful employees"); *Gulf, C. & S. F. R. Co. v. Schwabbe* (1892) 1 Tex. Civ. App. 573, 21 S. W. 706 (disapproving the statement that a railway company is bound to "furnish competent and qualified men to handle its engines and trains").

¹Accordingly, an employer who is hiring a man twenty years of age is not bound to examine him as to his experience and capacity with a view to ascertaining whether he needs instruction as to the dangers of the work. *O'Neil v. Chicago & I. Coal R. Co.* (1892) 132 Ind. 110, 31 N. E. 669. See also, to a like effect, *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187. A servant not hired for any special duties, who is directed to couple two cars, and receives an injury because he undertakes to do this on the inside

another standpoint, he may be regarded as being guilty of contributory negligence in undertaking work for which he knows himself to be unfitted,² especially where his culpability takes the form of an omission to inform the master of his unfitness.³ But if this element of the incompetent servant's knowledge be abstracted, his right to recover for injuries received by himself is indisputable, the situation being essentially the same as where a servant, without being taken outside the scope of the duties defined by his contract (see chapter xxv., *post*), is assigned to work which is beyond his capacity, or which exposes him to unusual perils by reason of some physical or mental defect.⁴ Most of the cases under this head relate to the master's liability for the employment of minors. See §§ 18-20, *ante*.

B. CIRCUMSTANCES BEARING UPON THE QUESTION OF A SERVANT'S COMPETENCY.

181. Generally.—The first step in the establishment of the plaintiff's case is to adduce sufficient evidence that the coservant whose

of a curve cannot recover damages on the theory that he was unskilled in such work, where there is no evidence that his want of skill was known to the master or the master's representative. *Whittaker v. Coombs* (1884) 14 Ill. App. 498. *Crowley v. Appleton* (1888) 148 Mass. 98, 18 N. E. 675, was an action to recover for personal injuries occasioned to the plaintiff, while in the defendant's employ, by being placed by him in a position of peculiar danger. Evidence was given that the plaintiff was subject to epileptic fits, and was ignorant of the fact. The judge, after instructing the jury that the plaintiff must show that he was subject to such fits, that he did not know this, that the defendant did, and further, that the defendant "knew or had cause to know that plaintiff did not know anything about it," amplified the last clause, stating that, whether the defendant knew that the plaintiff was ignorant of his malady might be proved by circumstantial, as well as by direct, evidence. The plaintiff excepted to this statement, and, without asking for any instruction as to the defendant's duty, if only he "had cause to know" the plaintiff's ignorance, requested an instruction making the defendant responsible if the plaintiff was ignorant of, and the defendant was acquainted with, the malady, without regard to the inquiry as to

whether the defendant knew or had cause to know the plaintiff's ignorance. Held, that the instruction as given was correct, and that the one requested was properly refused. In *Parlin v. Finfronck* (1895) 65 Ill. App. 174, it was held that the owner of a blast furnace is not liable for injuries to an employee from the inhalation of gas not sufficient in quantity to affect an ordinary man, because the lungs of such employee were over-sensitive from previous illness, where his employer had no reason to suppose that he was not sufficiently strong to endure the gas without risk. Compare § 144, *ante*.

² It is laid down that by applying for work, a servant holds himself out as possessing competent knowledge and skill, and that, if these qualifications are lacking, any injury which results from his unfitness is to be attributed to his own fault. *Huber v. Jackson & S. Co.* (1895) 1 Marv. (Del.) 374, 41 Atl. 42.

³ *Whittaker v. Coombs* (1884) 14 Ill. App. 498.

⁴ The act of a foreman in directing a common laborer employed to break stone and drill holes, to draw a charge from a blast, without ascertaining what his knowledge or experience is, constitutes negligence. *Vitto v. Farley* (1895) 15 Misc. 153, 36 N. Y. Supp. 1105.

negligence caused the injury was unfit for the duties assigned to him. In the absence of evidence tending to prove that an employee whose retention is alleged to be culpable had ever shown any lack of skill or efficiency in the performance of his duties before the accident occurred in which the plaintiff was hurt, a nonsuit is properly granted.¹

Incompetency connotes the converse of reliability in "all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment."²

The servant should be discharged for the same measure of negligence which would have unfitted him for the original employment.³

The question whether the delinquent servant was competent for the duties he was performing when the accident occurred must be determined with reference to that time, and not to the time when he first assumed the duties.⁴

¹ *Curran v. Merchants' Mfg. Co.* (1881) 130 Mass. 373, 39 Am. Rep. 457; *Reese v. Biddle* (1886) 112 Pa. 72, 3 Atl. 813; *Dysart v. Kansas City, Ft. S. & M. R. Co.* (1898) 145 Mo. 83, 46 S. W. 751. See also chapter XLIII, B, post. ² *Maitland v. Gilbert Paper Co.* (1897) 97 Wis. 476, 72 N. W. 1124. That the master is not absolved by the mere fact that the servant hired was careful and prudent, where, as a matter of fact, he was unable to perform his duties properly owing to his ignorance and want of skill, and the injury resulted from that incompetency was long ago settled in *Wright v. New York C. R. Co.* (1858) 28 Barb. 80, and does not seem to have been since disputed. It has recently been laid down that a master may be liable to a servant by reason of the unfitness and incompetency of an engineer, although the latter exercises extreme care within the limitation of his knowledge. *Nofsinger v. Goldman* (1898) 122 Cal. 609, 55 Pac. 425.

³ *Harper v. Indianapolis & St. L. R. Co.* (1869) 44 Mo. 488, holding erroneous an instruction that, if the servant employed by the defendant was competent at the time of the original employment, then defendant would not be liable for his negligent acts unless his subsequent negligence was known to his employer, and was also "gross" in its character. Under ordinary circumstances a master is allowed a reasonable time to discharge the servant after his inefficiency has become known. *Lake*

Shore & M. R. Co. v. Stupak (1889) 123 Ind. 210, 23 N. E. 246 (finding that defendant knew of servant's careless habits the day before the accident does not warrant entry of judgment that master's retention of him was negligent). This ruling was made the basis of a later decision, that a special verdict, including a finding that the master knew of the servant's unfitness before the accident, but not stating how long before the accident that knowledge was acquired, does not warrant the entry of a judgment for the plaintiff. *Louiseville, N. A. & C. R. Co. v. Breed* (1894) 10 Ind. App. 657, 38 N. E. 357.

⁴ The unfitness of the servant to act as switchman where, for three months previous to the injury, he had had exclusive control of the switches for twelve hours every day, and, so far as the evidence discloses, he had performed this duty to the satisfaction of the company, and without fault or neglect on his part, is denied in *Harren v. N. York C. & H. R. R. Co.* (1882) 88 N. Y. 481. Evidence that the delinquent servant was not competent to take charge of an engine five years before the accident is irrelevant. *East Tennessee, V. & G. R. Co. v. McKenney* (1886) Tenn.) 1 S. W. 500. A verdict for the plaintiff should be set aside where the only evidence that the delinquent servant was addicted to intemperate habits referred to a period four years previous to the accident. *Zumwalt v. Chicago & A. R. Co.* (1889) 35 Mo. App. 661.

Whether a servant is competent for the duties assigned to him is primarily a question for the jury.⁵

182. Bodily qualities.— (See also § 197, *post.*)—A servant's unfitness may be inferred where he is of insufficient size and strength for the duties to be performed,¹ or is maimed,² or has defective sight,³ or is deaf,⁴ or is too old for the duty assigned to him,⁵ or is afflicted with some serious malady.⁶

That the appearance and manner of the servant while testifying do not constitute circumstances from which, apart from other evidence, a jury ought to be allowed to infer that he was unfit for his duties, is a rule no less conformable to principle than to authority.⁷

But evidence, it has been held, tending to show the servant's accustomed disobedience of orders and habitual drunkenness, and his reputation for unfitness, is competent, though it relates to a time two years before the accident. *Huntington & B. T. Mountain R. & Coal Co. v. Becker* (1876) 82 Pa. 119. No reasons are assigned for this decision, which scarcely seems reconcilable with the decisions just cited.

¹ *Derine v. Tarrantown & L. Union Gas-light Co.* (1880) 22 Hun, 26; *Papels v. Meyer* (1899) 88 Ill. App. 169; *Webster Mfg. Co. v. Schmidt* (1898) 77 Ill. App. 49; *Scott v. Utah Consol. Min. & Mill. Co.* (1899) 18 Utah, 486, 56 Pac. 305.

² *Hunter v. Kansas City & M. R. & Bridge Co.* (1898) 29 C. C. A. 206, 54 U. S. App. 653, 85 Fed. 379.

³ The incapacity of a yard master, charged with the duty of having cars needing repairs run in upon repair tracks, to discharge such duty in person, may be inferred from the fact that he had only one arm. *Louisville & V. R. Co. v. Davis* (1890) 91 Ala. 487, 8 So. 552.

⁴ Whether a motorman on a street car is incompetent is a question for the jury, where, on the one hand, he himself testifies that his eye-sight was defective, and that he often passed people on the street without recognizing them; and, on the other hand, the evidence generally goes to show that he was not unfit for his duties. *Irvin v. Brooklyn Heights R. Co.* (1901) 59 App. Div. 95, 69 N. Y. Supp. 80. Where the incompetency relied upon is the old age and defective vision of an engineer, and his ignorance of the road, it is error to admit evidence going to show that, after the accident complained of had occurred, he ran his train a distance of

several miles without a brakeman, and ditched his engine. Such evidence may show negligence after the accident, but is not proof of the alleged defects. *Russier v. Minneapolis & St. L. R. Co.* (1883) 30 Minn. 215, 14 N. W. 883. The fact that a person is near-sighted does not necessarily render him incompetent to be engineer of a locomotive, if he can see with glasses, and uses them. *Texas & P. R. Co. v. Harrington* (1884) 62 Tex. 597.

⁵ It is not negligence to employ, for the purpose of testing a boiler for broken stay bolts, an inspector who is partly deaf in one ear, but whose hearing is good enough to determine whether a bolt struck with a hammer is sound or broken. *Chicago & A. R. Co. v. Du Bois* (1896) 65 Ill. App. 112.

⁶ *Hallen v. New York C. & H. R. R. Co.* (1882) 88 N. Y. 481, where the court remarked upon the fact of a switchman's being only fifty-six years old as one which was favorable to the master. See also note 3, *supra*.

⁷ A brakeman who is subject to epileptic fits is not competent for his position. *Baird v. New York C. & H. R. R. Co.* (1901) 64 App. Div. 14, 71 N. Y. Supp. 734.

⁸ In *Corson v. Maine C. R. Co.* (1884) 76 Me. 244, the court held that if the jury undertook to decide that a person was unfit to be employed as a brakeman on account of what they saw, or supposed they saw or could read, in his face and manner while testifying before them as a witness, they fell into a very grave error, and said: "As well might a jury find a man guilty of murder because, in their opinion, they could see guilt in his face. The law does not recognize physiognomy as an art or science sufficiently reliable to found a verdict

But it can scarcely be denied that a considerable risk of injustice may be the result of recognizing the competency of such evidence, even to the qualified extent of allowing it to be given to the jury when supported by corroborative testimony. Men who, as employees, may be perfectly efficient, often appear to great disadvantage as witnesses when under the influence of the nervous embarrassment which is apt to be produced in a greater or less degree by the unfamiliar surroundings of a courtroom. At the very most, it is submitted, a jury should not be allowed to draw any conclusions from their view of a witness, except in the most extreme cases of glaring mental and physical defects which any reasonable person would concede to be incompatible with efficiency. But even in these cases, it would, upon general principles, be necessary to show by independent testimony that the defects existed at the time of the accident. It is difficult, therefore, to see why, if that testimony must ultimately be relied upon, the jury should be permitted at all to consider the demeanor and appearance of the delinquent servant on the witness stand. The present writer ventures to think that the obvious perils of the doctrine applied by the Massachusetts court do not seem to be counterbalanced by the consideration that the circumstances which it introduces into the case possess some probative force.

183. Mental qualities.—Unfitness may be predicated wherever the mental capacity of the delinquent servant was inferior to that which was requisite for the proper performance of the duties assigned to him.¹ Unfitness of this description is obviously aggravated by the

upon,—not even against a railroad corporation." In *Keith v. New Haven & N. Co.* (1885) 140 Mass. 175, 3 N. E. 28, the court declined to rule that the appearance and conduct of a car inspector in the presence of a jury, when considered together with other testimony tending to show his unfitness, might not be legally sufficient to satisfy them that he was an incompetent person. In *Peaslee v. Fitchburg R. Co.* (1890) 152 Mass. 155, 25 N. E. 71, it was argued that the jury had a right to determine from the appearance of a witness that he was so manifestly incompetent that the defendant was negligent in employing him as engineer. The court said there was nothing in the exceptions to show that there was anything in his appearance that would justify such an inference, and that it could not be presumed that there was. *Keith v. New Haven & N. Co.* (1885) 140 Mass. 175, 3 N. E. 28, was distinguished

on the ground that there was other evidence of incompetency in that case while in the case at bar the only evidence of incompetency was the single act of negligence.

¹ *Coppin v. New York C. & H. R. R. Co.* (1890) 122 N. Y. 557, 25 N. E. 1015. The case was held to be one for the jury, where the delinquent servant was a Mexican of a low order of intellect, who could not understand English. *Brady Sons v. Lourie* (1900) Tex. Civ. App. 58 S. W. 837. The question whether the delinquent servant was bright and intelligent is too general to be admissible in relation to the issue of his unfitness to act as helper of a car repairer. The witnesses should be interrogated with a view to showing what his duties were, and what was his capacity, as inferred by the witnesses from seeing him perform the sort and kind of duties. *Lafrenouille v. Beaumont & R. R. Co.* (1891) 63 Vt. 336, 22 Vt.

for that the servant has not received a sufficient general education to qualify him for his duties.²

The fact that a servant is extremely cautious in doing his work is not evidence of incompetency.³

In some cases a jury will be warranted in finding that a bad tempered man is unfit to be put in a position of control.⁴

Unfitness may arise from inability of the servant to control the nervous system in such a manner as to preserve his presence of mind at critical moments. But his incapacity under this head must, it would seem, be of an exceptional nature to justify the inference of negligence on the master's part.⁵

The fact that a workman had been an inmate of a lunatic asylum

²⁵⁶ Evidence that an employee in and switches. It was his duty to re-
ceive of an elevator was forgetful, and
of a habit of screaming without cause,
admissible in an action for the death
of an employee killed through his neg-
ligence, to show his general unsuitabil-
ity for the service in which he was em-
ployed. *Ledridge v. Hathaway* (1898)
170 Mass. 348, 49 N. E. 656.

²⁵⁷ *Hobbs & O. R. Co. v. Thomas*
(1868) 42 Mo. 672 (switchman who
cannot read the timetable of the train,
incompetent); *Taylor v. Western P. R.*
Co. (1873) 45 Cal. 323 (same point).

²⁵⁸ *Bruce v. Penn. Bridge Co.* (1900)
197 Pa. 439, 47 Atl. 354.

²⁵⁹ *Lamb v. Littman* (1901) 128 N. C.
361, 53 L. R. A. 852, 38 S. E. 911 (em-
ployer held liable for injuries received
by a boy who was violently handled by
his foreman).

²⁶⁰ Evidence which is merely to the ef-
fect that an employee, in the excitement
caused by the breaking out of a fire in
a factory, neglected the usual precau-
tion of shifting a belt from a tight to a
loose pulley before the machine was
stopped does not justify the submission
of the question of her competency to
the jury, in an action for injuries to a
fellow servant from the starting of the
machine, where it appears that she
knew how to shift the belt and was ac-
customed to do so. *Gilmore v. Mittin-*
gum Paper Co. (1897) 169 Mass. 471,
48 N. E. 623. In *Burke v. Syracuse, B.*
& N. Y. R. Co. (1893) 69 Hun, 21, 23
N. Y. Supp. 458, a railroad company
employed in charge of a telegraph sta-
tion at a single-track siding and high-
way crossing a robust boy of seventeen,
who was familiar with railroad tracks

and switches. It was his duty to re-
port trains, receive and carry out tele-
graphic instructions, flag the crossing,
and operate a "safety Wharton switch,"
which connected the main track with the
siding. He had become familiar with
the operating of this switch, which was
simple, the switch, of itself, keeping the
main track closed, and requiring the
lifting of a heavy iron ball on a lever
to open the siding. He had managed
the switch for about two and a half
months. Then, on a certain occasion,
when a train which should have been
kept on the main track was approach-
ing, he was suddenly seized with the
thought that the switch was set wrong,
and impulsively, and with a view of
preventing a catastrophe, rushed to the
switch and raised the lever, sending the
train upon the siding, where it collided
with a waiting train, causing the death
of the engineer of the moving train,
whose legal representative sued the com-
pany for damages. The court held the
company not liable, saying: "Upon the
occasion of the injuries, no duty rested
upon Clark to open the switch. His
act in raising the ball and breaking the
main track was voluntary, thoughtless,
and mistaken. Nothing appears in the
case showing that he had not physical
power to perform all the acts and du-
ties required of him at the station, or
that he was not mentally fit for the po-
sition assigned to him by the defendant.
Judged by the rule laid down in *Cop-*
pius v. New York C. & H. R. R. Co.
(1890), 122 N. Y. 557, 25 N. E. 915, the
evidence fails to show a want of compe-
tency on the part of Clark to perform
the duties required at the station."

is not sufficient of itself to prove that he was wanting in the necessary skill to perform a simple form of manual labor.⁰

184. Disposition with which the work is done.— (Compare § 188, *c. post.*)—Incompetence exists, not alone in physical or mental attributes, but in the disposition with which a servant performs his duties. Although he may be physically and mentally able to do all that is required of him, his disposition toward his work, and toward the general safety of the work of his employer and of his fellow servants, may make him an incompetent man.¹

185. Bad habits.—Incompetency is inferable where a servant is addicted to vicious habits, which diminish his physical and mental efficiency and render him less trustworthy; the most common kind of incompetency under this head being that caused by intemperance in the use of intoxicating liquors.¹

⁰ *Thompson v. Clark* (1901) 132 Cal. 476, 64 Pac. 769 (tearing down a brick wall).

¹ *Coppins v. New York C. & H. R. R. Co.* (1890) 122 N. Y. 557, 25 N. E. 915. Affirming (1888) 48 Hun. 292 (habitual neglect of duties); *Cameron v. New York C. & H. R. R. Co.* (1895) 145 N. Y. 400, 40 N. E. 1; *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447, 67 N. W. 358; *Senior v. Ward* (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261 (habitual disregard of a rule); *Huntingdon & B. T. Mountain R. & Coal Co. v. Decker* (1876) 82 Pa. 119 (habitual drunkenness and disobedience to orders); *Hughes v. Baltimore & O. R. Co.* (1894) 164 Pa. 178, 30 Atl. 383 (habitual carelessness); *Malay v. Mt. Morris Electric Light Co.* (1899) 11 App. Div. 574, 58 N. Y. Supp. 659; *Walker v. Bolling* (1853) 22 Ala. 291 (habitual recklessness); *Maitland v. Gilbert Paper Co.* (1897) 97 Wis. 476, 72 N. W. 1124 (carelessness in regard to compliance with rules). An engineer who has no idea of speed, and runs his train down hill "as fast as he can turn a wheel," is incompetent for his duties. *Galveston, H. & S. A. R. Co. v. Davis* (1898) 92 Tex. 372, 48 S. W. 570. Reversing (1898; Tex. Civ. App.) 45 S. W. 956. Where an employee was injured through the negligence of an engineer, evidence that the latter had frequently shown his recklessness and unfitness, and, notwithstanding complaints against him, was retained by the master, makes a case on which the plaintiff is entitled to recover, unless

it is overthrown by a successful defense. *Northern P. R. Co. v. Mares* (1887) 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321. Compare *Loe v. Chicago, R. & N. P. R. Co.* (1894) 57 Mo. App. 350. In a suit against a railroad company by a brakeman to recover damages for injuries received while coupling cars, evidence that the engineer, shortly before, had declared to the plaintiff that he "would as soon run over him as not" is admissible as bearing upon the question whether the company selected an unsuitable man for engineer; but the jury should be charged that, if the malice of the engineer toward the plaintiff was the cause of the injury, there could be no recovery. *Houston & T. C. R. Co. v. Wallie* (1880) 53 Tex. 318, 37 Am. Rep. 756. It has been held that negligence of a railroad company in retaining a brakeman in its employ is not to be inferred where the only evidence on the point is that he was slow and lazy, and that the company knew this, but the same witness testifies that he was always careful about his work. *Carson v. Maine C. R. Co.* (1884) 76 Me. 244. But this ruling seems contrary to principle and authority, if it is meant to be taken as expressive of a general principle. There are many kinds of work in which the safety of other servants would be constantly imperiled by a want of alertness and activity.

¹ *Michigan C. R. Co. v. Gilbert* (1880) 46 Mich. 176, 9 N. W. 243; *Campbell & Z. Co. v. Roediger* (1894) 78 MI. 607, 28 Atl. 901; *Gilman v. Eastern P. C. Co.* (1865) 10 Allen, 233, 87 Am. Dec. 635; *Brickner v. New York C. R. Co.* (1879)

186. Previous experience of the servant.— Whether the master is chargeable with negligence on the ground that he should have seen that the servant's previous experience was not such as to qualify him for the duties to which he was assigned is a question the answer to which is obtained by considering two variable factors, viz., the character of the duties, and the extent of the servant's experience in the same or similar duties. It is manifest that a question dependent upon factors which may assume such infinitely diverse forms as these is pre-eminently one for the jury.¹

The essential question is the capacity of the servant to perform properly the work assigned to him. Hence, if the work may be well done by the unskilled and inexperienced, the master is not lacking in the measure of care he owes to other employees, if he employs unskilled and inexperienced men upon it.²

² *Lans*, 515; *Huntingdon & B. T. R. & Coal Co. v. Decker* (1877) 84 Pa. 419; *Kenn v. Detroit Copper & Brass Rolling Mills* (1887) 66 Mich. 277, 33 N. W. 395; *Nelson v. Kansas City, St. J. & C. R. R. Co.* (1885) 85 Mo. 599; *Marshall v. Hannibal & St. J. R. Co.* (1884) 85 Mo. 95; *Williams v. Missouri P. R. Co.* (1891) 109 Mo. 475, 18 S. W. 1098; *Loring v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417. Intemperate habits may be proved under an allegation of injuries caused by the unskilful act of a co-servant (*Lyons v. New York C. & H. R. R. Co.* [1886] 39 Hun. 385); or under a general allegation of negligence (*Huntingdon & B. T. R. & Coal Co. v. Decker* [1877] 84 Pa. 419; *Hobson v. New Mexico & A. R. Co.* [1886; Ariz.] 11 Pac. 545). The fact that the servant was intoxicated at the time of the accident is competent evidence on the question whether the master was in fault in employing him. *Probst v. Delamater* (1885) 100 N. Y. 266, 3 N. E. 184; *Huntingdon & B. T. R. & Coal Co. v. Decker* (1877) 84 Pa. 419. The contract of a railway engineer with the company, not to go into saloons or drink whiskey while in the "employ" of the company, covers the time between trips, or the time from his arrival one day to his departure the next. *Kansas C. & B. R. Co. v. Phillips* (1893) 58 Ala. 159, 13 So. 65. Under a general allegation of negligence, evidence that the servant was drunk when the accident occurred is admissible as part of the *res gestæ*. *Hobson v. New Mexico & A. R. Co.* (1886; Ariz.) 11 Pac. 545.

¹ Hence it is error to instruct a jury that "proof of the employment of one who had always been a manual laborer or a mule driver to run a steam engine raises a presumption of negligence of the master, without showing that he had actual notice of the servant's antecedents." *Joch v. Bankhardt* (1877) 85 Ill. 331. This instruction, which follows the rule formulated in *Shearman & Redfield on Negligence*, § 193, was, however, approved by the court, *arguendo*, in *Harper v. Indianapolis & St. L. R. Co.* (1871) 47 Mo. 567, 4 Am. Rep. 353. The incompetency of a servant may arise from the fact that he has not worked at the employment for several years, as well as from unfamiliarity with it. *Curran v. A. H. Stange Co.* (1898) 98 Wis. 598, 74 N. W. 377. The fact that a locomotive engineer had been engaged as such for twenty three years prior to his employment by defendant is prima facie evidence of his competency when defendant employed him. *Chicago & E. L. R. Co. v. Myers* (1898) 83 Ill. App. 469. Competency is established where a witness called by the plaintiff testified that he considered the servant whose act caused the injury a "very competent" employee for the position he held, and this statement is corroborated by the testimony of that servant himself as to his previous training, and is not rebutted by any opposing evidence. *White v. Suding & L. Coal & R. Co.* (1893) 25 N. S. 384.

² *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524. It is not negligence to employ a man twenty-two years of age,

On the other hand, there are numerous cases in which the propriety of refusing to interfere with a finding of the jury based on the conception that the servant engaged for the duties in question should have had some practical experience, or been in a position in which he had an opportunity of observing others do the work, has been recognized. If the employment demands special knowledge or experience, only men of special knowledge and experience should be employed.³

physically and mentally qualified for the business, to assume the active duties of a brakeman, merely because he has not yet had experience. *Gorman v. Minneapolis & St. L. R. Co.* (1889) 78 Iowa, 509, 43 N. W. 303. Complaint by a yard switchman, charging incompetency of the fireman, who failed to understand signals, and alleging his inexperience, is sufficient as to the allegation of his incompetency. *Gulbreton H. & S. A. R. Co. v. Eckels* (1894) 7 Tex. Civ. App. 429, 26 S. W. 1117. Negligence on the master's part is not established where the only testimony on the subject of incompetency is the servant's own admission that he had never done any similar work, and where he also testifies that he knew how it ought to be done. *O'Neil v. O'Leary* (1895) 164 Mass. 387, 41 N. E. 662 (deep drilling, and blasting with electricity). In one case it was said that the inexperience of an employee can scarcely be held persuasive of incompetency as a generalization. *National Fertilizer Co. v. Travis* (1899) 162 Tenn. 16, 49 S. W. 832. But this is evidently too sweeping a statement.

³ *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524. It is negligence to intrust the handling of a dangerous material, like dynamite, to inexperienced workmen. *Stewart v. New York, O. & W. R. Co.* (1889) 54 Hun, 638, 8 N. Y. Supp. 19 (verdict for plaintiff warranted by evidence that the foreman in charge for the day was a stone mason with an imperfect knowledge of the properties of dynamite). The master may properly be found negligent where common laborers, engaged in stowing stone posts in a schooner, were charged with the duty of securing the platform, and allowed to select the gear, without instruction, and there is no evidence that they possessed the requisite skill, intelligence, or care. *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874. The management of

the gear of a windlass is a function that should be intrusted only to an experienced servant. *Fraser v. Schrieber* (1896) 163 Ill. 459, 45 N. E. 288. Confirming (1895) 60 Ill. App. 519. The uncontradicted testimony of a foreman in charge of the construction of a telegraph line that the erection of the poles required special skill, and that an employee was incompetent, is sufficient to establish the incompetency of such servant. *Postal Teleg. Cable Co. v. Cool* (1900) Tex. Civ. App. 57 S. W. 912. Incompetency of servants to operate a hand car is sufficiently shown by evidence that a certain degree of training is necessary to properly operate a hand car, and that such servants were inexperienced. *International & G. N. R. Co. v. Martinez* (1900) Tex. Civ. App. 57 S. W. 689. An employer who knows that a tall and heavy pole is merely resting on the surface of the ground, with nothing but guys to retain it in an upright position, and that his servants are engaged in removing a pile of coal from around its lower section, is bound to know that their safety requires the presence of a competent person to supervise the work of taking it down while the removal of the coal is in progress. *Trainor v. Philadelphia & R. R. Co.* (1890) 137 Pa. 148, 20 Atl. 632. A verdict for the plaintiff was upheld where the evidence tended to show that his decedent, an incompetent boy between sixteen and seventeen years of age, was knowingly placed by defendants in a dangerous mining drift, under the direction of a young, incompetent, and inexperienced foreman, whom defendants had directed to superintend the work of clearing the same from a fall of mud and water, and that decedent was killed while at work therein by a new fall and rushing in of mud and water. *Doe v. Carue* (1900) 98 Va. 247, 35 S. E. 794. In cases where incompetency of this description caused the accident, the master may be held liable as for a breach of a specific duty to instruct the

Between these two extreme predicaments lie those in which some experience is admitted to be necessary, and the question presented is whether that which the servant has had is sufficient to qualify him for his duties. The following cases cited below will indicate the views taken by the courts as to a variety of circumstances.⁴

negligent servant in his duties before putting him to work. *Sullivan v. Metropolitan St. R. Co.* (1900) 53 App. Div. 89, 65 N. Y. Supp. 842.

⁴In *Bunnell v. St. Paul, M. & M. R. Co.* (1882) 29 Minn. 305, 13 N. W. 129, there was held to be sufficient evidence to sustain a verdict for the plaintiff where the testimony showed that the man hired as a foreman of carpenters had been in the defendant's employ only about four months before the accident caused by his negligence; that for three years before that time he had been in the insurance business; that he had never learned the carpenter's trade, and had, in all, never worked more than twelve weeks as a carpenter. A car inspector, who failed to discover and note a defect, was thirty-four or thirty-five years old, and had worked for three or four months in a railroad yard in Ireland, putting brasses into freight cars, but, with this exception, had been employed as a common laborer, and was not a mechanic, and was without knowledge of machinery up to the time of entering the service of the defendant. He worked in the defendant's carpenter shop, repairing cars, putting in brasses, bolting, and putting in boxes, and assisting in the shop, from one to two years, and was then made car inspector. His evidence showed clearly that he understood the details of his business, and appeared to have been given intelligently. It was held that negligence in employing him as a car inspector was not shown. *Gibson v. Northern C. R. Co.* (1880) 22 Hun. 289. Incompetency to act as flagman for an approaching train at nighttime may be properly found, where the servant had had scarcely any experience as brakeman or flagman, had not been instructed as to the rule requiring the use of torpedoes, and had never flagged a train except once before, on which occasion he had been found fault with by defendant's conductor, and discharged for disobedience. *Mann v. Delaware & H. Canal Co.* (1883) 91 N. Y. 495. Whether a railway company is liable for an injury caused by the unskillfulness of a yard conductor in turning a switch is for the jury, where the

tracks are so complicated that, without experience in the operation of the switches, mistakes would be likely to be made, and the delinquent servant's duties as yard conductor only occasionally required him to turn the switches, and before his appointment to that position he had been engaged in coupling cars. *O'Loughlin v. New York C. & H. R. R. Co.* (1895) 87 Hun. 538, 34 N. Y. Supp. 297. The fact that a man is competent for the general duties of a locomotive engineer will not excuse a railway company for an accident caused by his lack of knowledge and experience as to the road at the place where the accident occurred. *Missouri P. R. Co. v. Patton* (1894; Tex. Civ. App.) 25 S. W. 339. Affirmed in (1894; Tex.) 26 S. W. 978, where, however, this point was not discussed. Where there is no positive evidence of incompetency, the fact that a locomotive engineer has had twenty-three years of experience is conclusive in the master's favor. *Chicago & E. I. R. Co. v. Myers* (1898) 83 Ill. App. 469. In *Wright v. New York C. R. Co.* (1858) 28 Barb. 80, the court expressed its dissatisfaction with a verdict finding that a man was not competent to act as engineer of a night train on the line between Rochester and Niagara, where the evidence was that he had served as an engineer some four years, and had been in the employ of the defendant nineteen months, but not on the section of the road in question; that he had, however, as engineer, run over the road a dozen times in the nineteen months, and had ridden on the cars at other times; and that he had run up to the bridge with a freight train, the night before; and several witnesses of the defendant engineers, also state facts tending strongly to show that such an acquaintance with a road was amply sufficient. The court of appeals held that the man was certainly competent. (1862) 25 N. Y. 562. The competency of a fireman to act as engineer on a run between stations is for the jury where the evidence is that he had been in the employment of the defendant several years, part of the time as a fireman, and at two different periods of about six

Evidence which merely goes to show that a servant has been employed in an inferior capacity will not justify the inference that the master was negligent in employing him in a higher capacity in the same line of business.⁵ Especially is it impossible to predicate negligence of such a promotion where the duties performed in the lower position were such as to enable him to acquire, by observation, a knowledge of the duties incident to the higher position.⁶

months each had served as an extra engineer in charge of freight trains, but never as a regular engineer; that he had been over the section of the road on which the accident occurred about twenty-four times in all, in his service as an engineer, the last time about a month before the accident; that he had never inspected the switches or side tracks at the point where the accident occurred, so as to learn their exact location, and knew nothing on that subject except what he had noticed when he passed over them, and had been told by others; that he had had no experience in running an engine disabled as was the one which caused the injury, and had never observed the effect of such disability upon the holding power of an engine or the ability of those in charge of it to stop it; and that he had been examined when promoted to the position of engineer, but not upon that subject. *O'Laughlin v. New York C. & H. R. R. Co.* (1887) 27 N. Y. Week. Dig. 109, 9 N. Y. S. R. 384. The negligence of the railway company is for the jury where the evidence is that the accident occurred on the first occasion when the delinquent servant had charge of a train in the nighttime; that, prior to the accident, he had had little or no experience as engineer, except such as he derived from making a few short trips by daylight; that he had also acted for a short time as fireman on day trips, and that the accident, a collision, might have been prevented if he had not neglected his duty to light the headlight. *Newell v. Ryan* (1886) 40 Hun. 286. A railroad engineer is presumably a competent person to inspect an engine to see if it is in such repair as to prevent the escape of fire. *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.* (1895) 91 Wis. 447, 65 N. W. 176. A verdict for the plaintiff has been set aside where the evidence showed that such fellow servant was an intelligent man; that the duties of a signalman and a switchman, which he was discharging when the accident oc-

curred, were so simple that, according to the testimony of one witness, they could be learned in one or two days, or, according to the testimony of another witness, in two or three weeks; and that, previous to the accident he had been employed for three weeks in the yard, and one week in the duties of switchman and signalman. *Doverill v. Grand Trunk R. Co.* (1866) 25 U. C. Q. B. 517. Where a miner whose duty it is to inspect the roof of a mine to determine its safety, and to remove loose earth or rock therefrom, testifies that he had worked in other mines, and in one other nineteen years, and another miner, charged with the same duties, testifies that he had been in the defendant company's employ fourteen months before the killing of plaintiff's husband, for which suit was brought, such evidence is sufficient to establish the competency of the miners to make such inspections, there being no substantial evidence of incompetency. *Fisher v. Central Lead Co.* (1900) 156 Mo. 479, 56 S. W. 1107. Evidence that a derrick which gave way had been erected by a servant who was a good carpenter, and had had experience in the operation of derricks and the lifting of material with them, but not with as large a derrick as the one in question, is not sufficient to show that he was incompetent. *Gunn v. Willingham* (1900) 111 Ga. 427, 36 S. E. 804. See also § 194, note 5, post.

⁵ *Edwards v. London & B. R. Co.* (1865) 4 Fost. & F. 531.

⁶ *Kellogg v. Stephens Lumber Co.* (1900) 125 Mich. 222, 84 N. W. 136 (employee in sawmill had worked his way up to the position of head sawyer); *Haskin v. New York C. & H. R. R. Co.* (1873) 65 Barb. 129 (car coupler made conductor of yard). This principle has frequently been applied in cases where the question to be determined was the competency of a fireman who was temporarily permitted to handle a locomotive. The rule applicable under such circumstances has been formulated as follows:

187. Minority.—The fact that the delinquent servant was a minor is an important, though not decisive, element in determining his competency. Its evidential weight depends upon the character of the

"Railroad companies are certainly not required to employ skilled engineers as firemen; and, if it is the prevailing custom of engineers to leave the firemen in charge of their engines when switching or similar work is to be done, then it is to be presumed that brakemen, when they engage or continue in their employment with the knowledge of the custom, assume the additional hazard which the custom involves, and can be entitled to compensation from the company for injury caused by a fireman's incompetent management of an engine only when his fitness was below what ought to be required of firemen." *Louisville & N. R. Co. v. Kelly* (1894) 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407. A requested instruction in this case, "that firemen, after a certain period of service as firemen, are promoted to engineers," was held objectionable because it assumes that such promotions of firemen to engineers were of uniform, or at least customary, occurrence "after a certain period of service as firemen," without regard to the capacity, habits, and temper of the particular individuals. The court said: "There was no proof of such custom; none such, of course, has ever prevailed." It cannot be declared, as a matter of law, that a conductor was negligent in ordering a competent fireman to operate a locomotive. *Brazil v. Western North Carolina R. Co.* (1885) 93 N. C. 313. One who has served as a fireman for a long time, and on several occasions has run an engine in a switchyard, is not to be deemed incompetent to act as engineer on a train in such yard because he is not regularly engaged as an engineer. *Ohio & M. R. Co. v. Dunn* (1894) 138 Ind. 18, 36 N. E. 702, rehearing denied in (1894) 138 Ind. 28, 37 N. E. 546. Permitting a fireman who has been employed as a brakeman for six months and as a fireman for twenty months, and who has handled an engine more or less, to operate a switch engine in coupling cars, is not negligence which will render the company liable for injuries to a switchman by starting the engine too suddenly. *Thompson v. Lake Shore & M. S. R. Co.* (1890) 84 Mich. 281, 47 N. W. 584. A railroad company was held liable where the engineer in charge allowed a

flying switch to be made by an inexperienced fireman, who had only been in service three or four weeks and never on a railroad before, and the conductor (a vice principal as to such matters in Virginia) knew he was running the engine. *Norfolk & W. R. Co. v. Thomas* (1893) 90 Va. 205, 17 S. E. 884. Unfitness for the duty of handling a switch engine is not proved where the servant had had two years' experience as fireman, and during that time had frequently been intrusted with switching. *East Tennessee, V. & G. R. Co. v. McKenney* (1886; Tenn.) 1 S. W. 509. It is not negligence to promote a fireman to the post of engineer after he has been one year in the service, where the evidence is that two years' experience as fireman, with the opportunities thus obtained for learning an engineer's duties, is generally considered sufficient to qualify the fireman for those duties; and the representative of the railway company had good reason to suppose, from the familiarity with his work shown by the fireman in question, that he had had considerable previous experience under other employers. *Texas & N. O. R. Co. v. Berry* (1887) 67 Tex. 238, 5 S. W. 817. Incompetency to act as engineer is not established where the servant had been fireman for four years, during which time he had frequently taken charge of the engine while the regular engineer was sick; and it also appears that from three to five years' service as fireman is all that is customarily required of a fireman before he is promoted. *Roblin v. Kansas City, St. J. & C. B. R. Co.* (1893) 119 Mo. 483, 24 S. W. 1011. In *Chicago & E. I. R. Co. v. Beatty* (1895) 13 Ind. App. 604, 40 N. E. 753, 42 N. E. 284, a verdict for the plaintiff was sustained where the evidence tended to prove that the delinquent servant, an engine wiper, had some experience as a brakeman, and had, in other places, as well as in the defendant's yard, acted as hostler in running engines on switches to and from roundhouses, but had never had any other experience as a fireman or as an engineer; and the appellee introduced testimony tending to prove that, in order to qualify a man to handle engines, in taking them to and from a roundhouse, he should have good judg-

work to be done, the servant's previous experience, and his actual age.¹

188. Conduct prior to the time of the accident.—*a. No act of previous negligence shown.*—Where a servant is shown to have possessed all the physical and mental qualities requisite for the proper discharge of his duties, and to have been free from any vicious habits, the only basis on which a charge of incompetency can be founded is habitual inattention to his duties. In the very nature of the case such a charge cannot be sustained where there is no proof that he was ever guilty of any carelessness before the injury was received.¹ But the mere fact that no such carelessness is proved, clearly does not excuse the master, if the servant is liable, at any moment, to be incapacitated for his duties by the recurrence of some chronic malady, and

ment, and also two years' experience as a fireman, under the direction and supervision of a competent engineer.

¹Incompetency for the duties of telegraph operator cannot be inferred from the mere fact that the servant was seventeen years old, when it is also in evidence that he has discharged his duties efficiently for a year, and that young men are generally better operators than old ones. *Sutherland v. Tron & R. R. Co.* (1891) 125 N. Y. 737, 26 N. E. 609. The fact that one employed at a mine in the responsible position of managing the brake whereby the cage in which the workmen descended was lowered was but seventeen years of age does not raise a presumption of negligence against the company as a matter of law, when such employee was experienced in the work and for over seven months had performed it satisfactorily. *Walkowski v. Penokee & G. Consol. Mines* (1898) 115 Mich. 629, 41 L. R. A. 33, 73 N. W. 895. The mere fact of employing a boy twelve years old for the purpose of running an elevator is not evidence from which a want of care in selecting a servant can be inferred. *Smillie v. St. Bernard Dollar Store* (1891) 47 Mo. App. 402. Thompson, J., dissented. The mere fact that the servant is under fourteen years of age will not justify the inference that he is incompetent, where the duties to be performed are of a simple character, such as repeating to the engineer of the hoisting machinery above a quarry the signals received from the men in the quarry. *Rickert v. Stephens* (1890) 133 Pa. 538, 19 Atl.

410 (evidence was that such work was done customarily by boys). The question of the competency of an inexperienced youth of seventeen years of age for the position of telegraph operator is for the jury where the accident was caused by his being asleep when a train passed the station. *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932. The burden is on the master to show competency, where a boy under fourteen years of age was employed to signal the engineer when buckets of coal which were being filled in the hold of a vessel were ready to be hoisted, and an accident resulted from his giving the signal prematurely. *Molasko v. Ohio Coal Co.* (1893) 86 Wis. 220, 56 N. W. 475. A statute empowering mine owners to employ boys of a certain age does not create a presumption that any boy of that age is fit for his duties, but it is still permissible for the jury to consider the boy's size, age, previous experience, strength, and intelligence, and the fact that he was kept at his post thirteen hours a day. *Carlson v. Wilkeson Coal & Coke Co.* (1898) 19 Wash. 473, 53 Pac. 725. On the ground of cohesiveness with usage it has been held that a master was justified in employing a boy over fourteen years of age, with considerable experience, as a trapper in a mine. *Kansas & T. Coal Co. v. B. R. Co.* (1895) 60 Ark. 582, 31 S. W. 163. See, however, as to this class of cases, § 45, *ante*.

¹*Bruce v. Penn. Bridge Co.* (1890) 197 Pa. 439, 47 Atl. 354.

this incapacity is apt to produce precisely those results which actually happened at the time of the accident in suit.²

b. Single act of negligence.—It has also been laid down broadly in several cases that a single prior act of negligence is incompetent as evidence to prove the unfitness of the servant.³ The receipt of information that the servant has been guilty of such an act is said merely to impose on the master the obligation of using ordinary care in investigating the cause of the accident and the competency of the servant, and acting with reference to his retention or discharge as rea-

²In *Baird v. New York C. & H. R. R. Co.* (1891) 64 App. Div. 19, 71 N.Y. Supp. 734, the court said: "When the only claim of the incompetency is that the man in question is incompetent because he is careless and reckless and inattentive, the fact that he never has been careless or reckless or inattentive is a perfect answer to such a charge. But where the charge is that he, although in his natural condition a careful and attentive man, is afflicted with a disease the effect of which may at any moment make him incompetent, it is for the jury to say whether it was negligent of the defendant to employ a man in such a condition, although up to that time there had been no failure to perform his duties." (Servant was subject to epileptic fits.)

Gallagher v. Piper (1864) 16 C. B. N. S. 669, 13 L. J. C. P. N. S. 329; *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579; *Holland v. Southern P. Co.*

(1893) 100 Cal. 240, 34 Pac. 666; *Ohio & W. R. Co. v. Dunn* (1894) 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; *Dallas City R. Co. v. Bowman* (1889) 74 Tex. 291, 11 S. W. 1102; *Houston & T. C. R. Co. v. Myers* (1881) 55 Tex. 110 (rule assumed arguendo); *McKeever v. Homestead Min. Co.* (1898) 10 S. D. 599, 74 N. W. 1053 (verdict rightly directed for defendant where the servant had made only one mistake during twelve years); *Kennedy v. Spring* (1893) 160 Mass. 203, 35 N. E. 779; *Galveston, H. & S. A. R. Co. v. Davis* (1898) 92 Tex. 372, 48 S. W. 570; first appeal (1893) 4 Tex. Civ. App. 468, 23 S. W. 305 (this case apparently makes no distinction between one and several acts); *Thomas v. Cincinnati, N. O. & T. P. R. Co.*

(1899) 97 Fed. 245. In *Bailee v. New York & H. R. Co.* (1874) 59 N. Y. 56, 17 Am. Rep. 325, where the plaintiff was held to have been rightly non-suited, the court said: "An individual

who by years of faithful service has shown himself trustworthy, vigilant, and competent is not disqualified for further employment, and proved either incompetent or careless, and not trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show what must be true of every human being,—that the individual was capable of an act of negligence, forgetfulness, or error of judgment. This must be the case as to all employees of corporations until a race of servants can be found free from the defects and infirmities of humanity. A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust, or any particular service, as when such act is intentional and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor, and his inability to perform a particular service. But a single act of casual neglect does not, *per se*, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts, and not by a single act. An engineer might, from inattention, omit to sound the whistle or ring the bell at a road crossing, but such fact would not tend to prove him a careless and negligent servant of the company. The company is only charged with the duty of employing those who have acquired a good character in respect to the qualifications called for by the particular service, and no one would say that a good character acquired by long service was destroyed or seriously impaired by a single involuntary and unintentional fault."

sonable prudence would dictate in view of the facts ascertained. If these facts prove to be such that a careful man would have considered himself justified in retaining the servant, no fault can be imputed to the master;⁴ though, undoubtedly, notice of the servant's lapse, if it is at all serious, will impose upon the master and his representatives the obligation of exercising increased vigilance in observing the servant's conduct afterward.⁵ This doctrine clearly cannot be subject to any exception in courts which take the ground that even evidence of several specific acts of negligence is not competent unless they were so frequent as to be habitual.⁶ See note 18, *infra*. But any less restrictive position must, it would seem, be compatible with the conception that even a single careless act may sometimes be of such a serious nature as to indicate that the servant is unfit for his duties, and that the master will be culpably negligent if he does not discharge him immediately after the delinquency comes to his knowledge.⁷ Especially is it legitimate to draw the inference of unfitness

⁴ *Baulee v. New York & H. R. Co.* (1872) 62 Barb. 623, Affirmed in (1874) 50 N. Y. 356, 17 Am. Rep. 325. In the opinion delivered in the lower court it was denied that "intelligent men of good habits, who are engineers or brakemen or switchmen on railroads, must inevitably be discharged . . . for the first error or act of negligence."

⁵ *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579. That a single negligent act is not proof of incompetency where the servant did not act wantonly, regardless of consequences, or maliciously, and no possible injury could be shown as the result of his action, was declared in *Chicago & E. I. R. Co. v. Myers* (1898) 83 Ill. App. 469. The incompetency of a fireman for the duties of an engineer cannot be predicated on the ground that he failed, while the train was running between stations, to notice a signal to stop, given from the rear of the train. *Core v. Ohio River R. Co.* (1893) 38 W. Va. 456, 18 S. E. 596. The mere fact that a yard master had sent an engine upon the track when a coming train was overdue does not conclusively show that the company was negligent in keeping him in its service, since he might have had information showing that the train would not arrive for some time. *Michigan C. R. Co. v. Gilbert* (1881) 40 Mich. 176, 9 N. W. 243.

⁶ To satisfy this description it is not necessary that there should have been a "constant repetition" of negligent acts. *Olsen v. North Pacific Lumber Co.*

(1901) 100 Fed. 298. There it was held that unfitness could not be inferred from the fact that five years before the accident the servant's negligence had injured one person, and that since then on three other occasions, persons working with him had been injured by acts which could not be held to impute negligence on his part, where there was no evidence to charge the master with knowledge of the latter occurrences.

⁷ See *Evansville & T. H. R. Co. v. Guyton* (1888) 115 Ind. 450, 17 N. E. 101, putting the case of carelessness so extreme as to allow two trains to meet while running in opposite directions on the same track. In another case it was said that, although a single act of a locomotive engineer in running a train 12 miles in forty minutes, while the schedule time is one hour, and a portion of such distance at 40 or 45 miles an hour, in daylight and without accident or injury to anyone, did not necessarily show him to be unfit or reckless so far as the lives of employees at work upon the track, yet this inference might perhaps have been justifiable if it had been shown that the want of accident on such run was due more to chance or good fortune than the management of the engine and the actual condition of the road, and that men working upon the track could not have been easily seen or had time to escape after being warned of the approach of the train. *Holland v. Southern P. R. Co.* (1886) 100 Cal. 210, 34 Pac. 666. In *Wabash*

where the dereliction of duty was one which the physical qualities of the servant rendered extremely probable.⁸ Nor is there any difficulty in holding that, when proof of the commission of a negligent act is accompanied by proof that the delinquent servant had a reputation for recklessness (see § 202, *post*), and this reputation was known to the master, a verdict for the plaintiff is warranted.⁹

That notice of the prior act must, in any event, be brought home to the master before it can become a factor bearing upon the question of his negligence, follows from the general principles discussed in chapter x., *ante*, and it has been so decided.¹⁰

c. Several acts of negligence.—(Compare § 184, *ante*, and § 198, *post*.)—In regard to the question whether the plaintiff is entitled to introduce evidence that the delinquent servant had been guilty of several acts of negligence prior to the time of the accident in suit, the courts are not unanimous. The doctrine which seems to the present writer to be the most logical, and which is sustained by a considerable array of authorities, is that such evidence is competent to establish the unfitness of the delinquent servant.¹¹ It is, of course, necessary

Western R. Co. v. Brown (1895) 13 C. C. A. 222, 31 U. S. App. 192, 65 Fed. 941, the court assumed that the fact of a switchman having been drunk on one previous occasion, and so caused an accident of the same kind as that in suit (cars turned onto the wrong track), was sufficient to charge the company with notice of his incompetency.

⁸The negligence of a railway company is for the jury, where it has retained in its employ as a night operator a boy eighteen years of age, who, a few months before the accident, had gone to sleep while on duty. *Baltimore & O. R. Co. v. Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952. Compare note 1, *supra*.

⁹*Marietta Nat. R. Co. v. Mussette* (1894) 86 Tex. 708, 24 L. R. A. 642, 26 S. W. 1075.

¹⁰*Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176, 9 N. W. 243. See also *Mulhern v. Lehigh Valley Coal Co.* (1894) 161 Pa. 270, 28 Atl. 1087.

¹¹*Coppins v. New York C. & H. R. R. Co.* (1890) 122 N. Y. 557, 25 N. E. 915 (servant absent from his post several times a month); *Sutton v. New York, L. E. & W. R. Co.* (1892) 50 N. Y. S. R. 514, 21 N. Y. Supp. 312; *Wood v. New York C. & H. R. R. Co.* (1898) 32 App. Div. 606, 53 N. Y. Supp. 163; *Gulf, C. & S. F. R. Co. v. Pierce* (1891) 87 Tex. 144, 27 S. W. 60 (brakeman had

frequently gone to sleep while at a switch, and had failed to throw it); *Houston & T. C. R. Co. v. Patton* (1888; Tex.) 9 S. W. 175 (habitually careless handling of engine in making coupling); *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 130, 41 Pac. 22; *Barkley v. New York C. & H. R. R. Co.* (1898) 35 App. Div. 228, 54 N. Y. Supp. 766; *Mahan v. Mt. Morris Electric Light Co.* (1899) 41 App. Div. 574, 58 N. Y. Supp. 659; *Grube v. Missouri P. R. Co.* (1889) 98 Mo. 330, 4 L. R. A. 776, 11 S. W. 736; *International & G. N. R. Co. v. Branch* (1900; Tex. Civ. App.) 56 S. W. 542; *Consolidated Coal Co. v. Snider* (1899) 179 Ill. 370, 53 N. E. 733, *Milwaukee* (1898) 79 Ill. App. 450. In *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1871) 38 Ind. 294, 10 Am. Rep. 111, the court said: "We think that it is well settled, not only by the authorities, but in reason and on principle, that, for the purpose of showing that the officers of a railroad company had not exercised due care, prudence, and caution in the employment, or in the retaining in service of careful, prudent, and skilful persons to manage and operate such road, and for the purpose of charging such corporation with notice of the incompetency of its employees, it may be shown that such employees had been guilty of specific acts of carelessness, unskilfulness, and in-

that the negligent quality of the prior acts should be beyond any reasonable dispute, before the further question whether they indicate unfitness can be considered.¹² See also § 108, *post*.

Some courts, however, have declined to adopt the above doctrine. In Pennsylvania the position has been taken that such cases are governed by the general rule of evidence that character for care must be proved by evidence of general reputation, and not of special acts.¹³ The reasoning by which this decision is supported proceeds upon an erroneous conception of the logical situation. It is evident that the general reputation which is here regarded as the only appropriate test of negligence must be regarded as a conclusion which has itself been deduced by various persons prior to the trial from a greater or less number of acts of the very same character as those which are thus declared to be unfit for the consideration of the jury. There seems to be a singular inconsistency in thus accepting a ready-made inference based upon testimony submitted in the most informal way to a nebulous tribunal of irresponsible parties outside the courtroom, and at the same time refusing to allow such testimony to be weighed inside the courtroom by a definite body of men, who have every facility afforded them for testing its reliability, and who are fully alive to the important issues which are immediately dependent upon their decision. The difficulties involved in the theory of this court are still further emphasized by the fact that it has conceded the competency of evidence going to show the servant's accustomed disobe-

competency, and that such acts were known to such officers prior to the employment of such agents, or that such employees had been retained in such service after notice of such acts."

"Thus, evidence that a locomotive fireman who had caused an accident while running a locomotive had, on another occasion, run an engine faster than, in the judgment of another engineer, was proper, and at still another time, while running a locomotive, had struck a car, in coupling to it, with force which the witness considered excessive,—is insufficient to raise a question of fact as to the competency of such fireman. *Marrinan v. New York C. & H. R. R. Co.* (1897) 13 App. Div. 439, 43 N. Y. Supp. 606.

"*Frazier v. Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467. The court referred to *Greenl. Ev.* §§ 461-469, and said: "Character grows out of special acts, but is not proved by

them. Indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established. And sometimes the very frailties that may be proved against a man may have been regarded by him in so serious a light as to have produced great improvement of character. Besides this, ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law demands only the ordinary." This case was lately cited with approval in *Galveston, H. & S. A. R. Co. v. Davis* (1898) 92 Tex. 372, 48 S. W. 570. But the earlier Texas decisions cited in note 11, *supra*, were not referred to, though they are to a contrary effect, unless which is not apparent—the court intends to rely on a supposed distinction between acts of negligence which are occasional and acts which are so frequent as to be habitual. See note 18, *infra*.

dience of orders and his habitual drunkenness, and that these facts were known to the master's representative.¹⁴ In its essence, such evidence consists of testimony as to a certain number of specific acts, and the position thus taken is therefore inconsistent with that put forward in the *Frazier Case* (1860) 38 Pa. 101, 80 Am. Dec. 467, unless—which is not apparent—it is intended to grant the competency of such evidence only in cases where it is based on general reputation.¹⁵

In Massachusetts the conception relied upon is that the character or reputation of a servant as a careful or careless man, either generally or in any department of business, cannot be shown by introducing evidence of particular acts, and by trying the question whether those acts were severally careless, or done with due care. To do this, it is said, would introduce a multiplicity of issues of which the parties ordinarily could not have previous notice, and which it would be impracticable properly to try.¹⁶ The point thus emphasized hardly seems sufficient to overcome the effect of the consideration that, according to the ordinary judgment of mankind, a servant who has been guilty of repeated acts of negligence is rather more likely than not to be unfit for his position. If a court would, perforce, have to determine the quality of each of several acts if they were put forward by the master as a justification for dismissing a servant for incompetence, there is no apparent reason why a similar investigation should be declined in an action sounding in negligence. It is not apparent that the difficulties of procedure adverted to in the cases last cited have caused any special embarrassment in the jurisdictions where evidence of this sort is deemed to be admissible. Nor is the reason assigned for this doctrine easy to reconcile with the decision in the cases cited in note 20, *infra*. The proposition that evidence of this sort must be rejected if directly offered on the issue of competency, but is proper for consideration if it happens to be before the jury for

¹⁴ *Huntingdon & B. T. Mountain R. & Coal Co. v. Decker* (1876) 82 Pa. 119.

¹⁵ For criticisms on the Pennsylvania doctrine, see *Baulee v. New York & H. R. Co.* (1874) 59 N. Y. 356, 17 Am. Rep. 325, and *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1871) 38 Ind. 294, 10 Am. Rep. 111. In *Couch v. Watson Coal Co.* (1877) 46 Iowa, 17, the court undertakes to distinguish between the Pennsylvania rule and that adopted in Indiana and New York, on the ground that the *Frazier Case* does not determine what the doctrine should be if the master or his representative had knowledge of the specific acts. But this is a

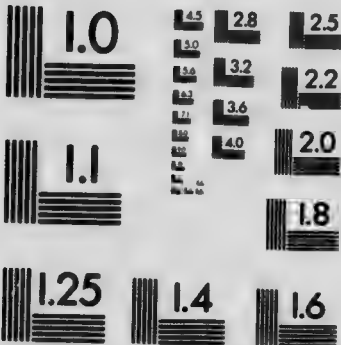
plain misapprehension of the logical position. No authority has ever gone to the extent of holding that such evidence can ultimately be a factor in the case unless the master is also shown to have had knowledge, actual or constructive, of the specific act or acts in question. Such knowledge is declared, or assumed to be, an existing element in all the cases in which this sort of evidence has been deemed admissible to establish unfitness. See, especially, notes 10 and 11, *supra*.

¹⁶ *Hutt v. Vay* (1887) 144 Mass. 186, 10 N. E. 807; *Connors v. Morton* (1894) 160 Mass. 333, 35 N. E. 860.



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other purposes, seems to present a distinction for which no satisfactory logical basis can be suggested.

In some other states, also, the judges have exhibited a more or less pronounced tendency to adopt the theory of the courts of Pennsylvania and Massachusetts. But their precise position is not very clearly defined.¹⁷

A compromise between the theory that this kind of evidence is wholly incompetent, and the theory that it is admissible, is exhibited in the cases which take the position that it does not tend to show unfitness unless the derelictions of duty have been so frequent that they may fairly be termed habitual.¹⁸ This position plainly involves the necessity for a determination by the court of the question of fact whether the acts upon which the plaintiff relies come within one or other of the categories thus contrasted. Considered as an expression of a general principle, therefore, it can scarcely be correct.

That evidence of neither one, nor several, acts of negligence committed by a servant before that which caused the injury in suit is competent to show that the latter act was negligent, is perfectly plain upon general principles, and is not disputed.¹⁹

In any jurisdiction it would probably be conceded, and by two courts it has been expressly decided, that, when conduct of a servant tending to show his qualifications, or his mental or physical fitness for

¹⁷ In *Kindel v. Hall* (1896) 8 Colo. App. 63, 44 Pac. 781, it was held that a jury should not be told that if they find the delinquent fellow servant was frequently, and for an improper length of time, absent from his post, and the practice was known, they might consider the fact as bearing on the question of his skill and competency. But, perhaps, it is not intended to deny the admissibility of such evidence altogether. Logically, it certainly bears on the question of the servant's habitual carelessness, and this is one form of unfitness. The Missouri court of appeals has laid it down that simple acts of negligence do not tend to establish general incompetency. *Cook v. St. Louis, I. M. & S. R. Co.* (1880) 8 Mo. App. 573, Appx.; but the opinion is not reported at length, and it is impossible to say what the grounds of the judgment were. A decision of the supreme court of this state to the contrary effect is cited in note 11, *supra*.

¹⁸ "Negligence such as unfits a person for service, or such as renders it negligent in a master to retain him in the employ, must be habitual, rather than

occasional, or of such a character as renders it imprudent to retain him in service." *Baltimore Elevator Co. v. Neal* (1886) 65 Md. 438, 5 Atl. 338. In *Kellogg v. Stephens Lumber Co.* (1900) 125 Mich. 222, 84 N. W. 136, the court held that a few occasional acts of negligence were not proof of unfitness. *Baltimore v. War* (1893) 77 Md. 593, 27 Atl. 85 (same point). See also *Walker v. Bolling* (1853) 22 Ala. 294, per Phelan, J., who draws the same distinction between casual and habitual acts.

¹⁹ *Hatt v. Nay* (1887) 144 Mass. 186, 10 N. E. 807; *Connors v. Morton* (1894) 160 Mass. 333, 35 N. E. 860; *Baltimore Elevator Co. v. Neal* (1886) 65 Md. 438, 5 Atl. 338. Testimony that plaintiff, who was a railroad engineer and was injured in a railroad collision, would frequently go to sleep while on duty, is inadmissible where there is no evidence that he was asleep at the time of the collision. *Missouri, K. & T. R. Co. v. Johnson* (1898) Tex. Civ. App. 49 S. W. 265, affirmed in (1898) 92 Tex. 380, 48 S. W. 568. Compare § 192, note 2, *post*.

his work, is properly before a jury upon one of the issues of the case, they may consider it on the question of his competency.²⁰

The cases in this section should be compared with those dealing with the satisfactory and unsatisfactory operation of inorganic agencies, chapter XLIII., *post*.

189. Act by which the injury was caused.—In several decisions it is laid down, quite broadly, that evidence which merely shows that the delinquent servant was negligent in respect to the particular act which caused the injury will not warrant a finding that he was incompetent.¹ So far as this doctrine depends on considerations analogous to those relied on in the cases which deny the justifiability of inferring incompetence from one act of negligence committed before the accident in suit, it must seemingly be subject to the same qualification as the general rule laid down in those cases, *viz.*: that the delinquency which caused the accident may be of such a flagrant character as to warrant the conclusion that only an unfit servant could have committed it.² It has been objected that, "if a single act of negligence is to be regarded as tending by itself to show incompetency, and furnish any ground for conjecture that such incompetency is known to the company or its agents, then it must follow that all cases of damage by negligence of a fellow servant may be allowed to be traced to the negligent appointment of incompetent subordinates."³ But, plainly, this would not necessarily be the consequence of admitting in appropriate cases the competency of the evidence con-

²⁰ *Olsen v. Andrews* (1897) 168 Mass. 261, 47 N. E. 90; *Couch v. Watson Coal Co.* (1877) 46 Iowa, 17.

¹ *Curran v. Merchants' Mfg. Co.* (1881) 130 Mass. 374, 39 Am. Rep. 457; *Salem Stone & Lime Co. v. Chastain* (1894) 9 Ind. App. 453, 36 N. E. 910; *Lindvall v. Woods* (1891) 44 Fed. 855; *Texas & N. O. R. Co. v. Berry* (1887) 67 Tex. 238, 5 S. W. 817; *Baltimore v. War* (1893) 77 Md. 593, 27 Atl. 85; *Peaslee v. Fitchburg R. Co.* (1890) 152 Mass. 155, 25 N. E. 71; *Spring Valley Coal Co. v. Patting* (1894) 30 C. C. A. 168, 58 U. S. App. 575, 86 Fed. 433; *Hathaway v. Illinois C. R. Co.* (1894) 92 Iowa, 337, 60 N. W. 651; *Buckley v. Gould & C. Silver Min. Co.* (1882) 8 Sawy. 394, 14 Fed. 533.

² In *Sullivan v. New York, N. H. & H. Co.* (1892) 62 Conn. 209, 25 Atl. 711, the court, taking the ground that negligence, as regards the retention of the servant, was not "necessarily

shown," refused to set aside a verdict for the plaintiff for nominal damages, based on evidence that the delinquent servant was negligent in respect to the particular incident which led to the injury. In *Atlanta Cotton Factory Co. v. Speer* (1882) 69 Ga. 137, 47 Am. Rep. 750, the opinion of the majority of the court proceeded partly upon the hypothesis that the fact of a foreman's having wilfully violated a rule promulgated for the security of the children employed in the establishment was proof of his incompetency. In *Pleasants v. Raleigh & A. Air Line R. Co.* (1897) 121 N. C. 492, 28 S. E. 267, the fact that when a switch was open, and cars were standing on the side track to which it led, a conductor signaled to his engineer that the train might safely proceed, was assumed to be sufficient evidence of incompetency.

³ *Lee v. Detroit Bridge & Iron Works* (1876) 62 Mo. 565.

demned. The questions whether a negligent act was merely a temporary lapse by a capable servant, or indicated an essential unfitness, are entirely distinct, and it seems impossible, from a purely logical standpoint, to maintain that such evidence, so far as it bears upon the latter question, should be rejected simply because the other one is also suggested by it. It may be readily conceded that the practical result of leaving juries untrammelled as regards the construction of this kind of testimony would inevitably be a serious inroad upon the doctrine of common employment. But this is hardly an adequate reason for excluding it altogether. The power of the court to direct the deliberations of the jury by differentiating clearly the two issues to which the evidence is applicable, and to make peremptory rulings upon its effect in extreme cases, is a sufficient guaranty against its being used to sap the foundations of the doctrine in question. It has also been said that to allow a jury to infer negligence or unskillfulness on the delinquent servant's part from the simple fact of the happening of the accident in suit would conflict with the principle that it is incumbent on the plaintiff to establish by affirmative proof that his injury was caused by the negligent and unskillful act of the fellow servant.⁴ Clearly, however, no logical reason can be suggested why the principle of *res ipsa loquitur* should not be as applicable under appropriate circumstances to cases where the injury arises from the negligence of a servant, as it is to cases where the injury is due to the defective quality of some inanimate agency of the master's business. The rule as to the burden of proof, therefore, is not necessarily infringed by admitting the competency of the evidence objected to. Whether it is sufficient, unsupported, to establish incompetency, depends upon the character of the servant's act.

190. Derelictions of duty subsequent to the injury in suit.—Subsequent derelictions of the servant have been held not to be competent evidence of fault on the master's part in having had the delinquent servant in his employment.¹ That this is true, without qualification, of acts which do not tend to show unfitness of the kind complained of, is, of course, indisputable.² But if it indicates a want of fitness at the time when the act was committed, it is difficult to see why it

⁴ *Baltimore Elevator Co. v. Neal* 46 Iowa, 17; *Craig v. Chicago & A. R.* (1886) 65 Md. 438, 5 Atl. 338. "The occurrence itself," said the same court to evidence sustained where there was in another case, "raises no presumption of negligence, and justifies no inference of incompetency." *Baltimore v. War* (1893) 77 Md. 593, 27 Atl. 85.

² *Ransier v. Minneapolis & St. L. R. Co.* (1884) 32 Minn. 331, 20 N. W. 332.

¹ *Couch v. Watson Coal Co.* (1877)

should not at least be competent when the act was sufficiently close in point of time to the accident in suit to render it not unreasonable to infer that the servant's capacity for his duties was the same at the later as at the earlier date.

191. Disclaimer of fitness by delinquent servant himself.—Under ordinary circumstances, it would seem, the self-depreciatory statements of the delinquent servant himself are to be wholly disregarded where his previous experience and conduct are such as to justify the master in supposing that he is competent to do the work assigned to him.¹

192. Reputation.—(Compare § 202, *post.*)—In some cases it has been argued that the servant's reputation for incompetency is evidence that he was actually incompetent, and not simply a circumstance which put the master upon inquiry as to whether he was or was not competent. But this contention has always been rejected.¹ Still less is reputation competent evidence to establish that that particular form of incapacity which it ascribes to him existed at the time of the injury, and contributed to produce it.²

¹ Where boys of the same age and size are commonly considered competent to do the work in which the servant whose act caused the injury in suit was engaged, and who for six months had done the work to the satisfaction of all his collaborators, the mere fact that, on the occasion in question, he had told the master's vice principal that he did not feel strong enough to do the work will not render the master liable for the act of the vice principal in setting him to work notwithstanding this statement. *Jungnitsch v. Michigan Malleable Iron Co.* (1895) 105 Mich. 270, 63 N. W. 296. In *Wright v. New York C. R. Co.* (1858) 28 Barb. 80, the supreme court remarked that the statement of an engineer to his superior officer, that he did not feel competent to take a train over a particular piece of road at night, was "very slight evidence" to prove incompetency for that duty; but did not express any definite opinion as to the precise evidential weight of the fact. The court of appeals ([1862] 25 N. Y. 562) held that an engineer was certainly competent, a ruling which necessarily implies that the evidence in question was inadequate to justify the inference of negligence on the master's part.

² *Casgrave v. Pitman* (1894) 103 Cal. 268, 37 Pac. 232 (negligence was held to be negated by proof that the servant was not really intemperate, though

he had that reputation); *Lee v. Michigan C. R. Co.* (1891) 87 Mich. 574, 49 N. W. 909 (reputation of incompetency as yard master not sufficient when based only on the fact that he had had no experience as switchman). So, also, in *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 129, 41 Pac. 22, the court said that it is the character of the employee which is the object of ultimate determination, not his reputation, and that, as evidence of reputation becomes necessary only where there is an inability to furnish direct proof of the employer's knowledge, so it is proper only after the establishment of the fact that the employee is in truth an unfit person; and proceeded thus: "Reputation is not proof of that fact. A man's reputation may be at variance with his character or in accord with it. He may be reputed reckless, and in fact be careful. An employer is not bound to discharge an employee merely because of his ill repute; but he is culpable if he retains in his employ a servant with a bad reputation well founded." To the same effect, see *Galveston, H. & S. A. R. Co. v. Davis* (1893) 4 Tex. Civ. App. 468, 23 S. W. 301; *Baltimore & O. R. Co. v. Henthorne* (1896) 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634 (intemperance).

³ *Baltimore & O. R. Co. v. Colvin* (1888) 118 Pa. 230, 12 Atl. 337 (repu-

193. Certificates and licenses, evidential significance of.—Certificates of competency and licenses to pursue certain avocations merely limit the master's range of choice to the class of specialists to whom these documents are granted, and do not compel him to employ or retain any individual member of the class. They are, accordingly, no more than *prima facie* evidence of such individual's competency, and do not justify keeping him in the service after his actual unfitness has become known to the master.¹

On the other hand, the mere fact that an employee has never been licensed by any official body to do the work in question is not of itself sufficient to show that he is incompetent or unskilful.² The requisite special knowledge may be obtained by practical experience.³

C. MASTER'S KNOWLEDGE, ACTUAL OR CONSTRUCTIVE, OF THE INCOMPETENCY, MUST BE SHOWN.

193a. General.—As was indicated in the general statement of principle in § 177, *ante*, the liability of the master for injuries caused by the unfitness of a servant is limited by a doctrine analogous to that which prevails with respect to other agencies,—the doctrine, namely, that actionable negligence is predicated only in cases in which the master either hired the delinquent servant with a knowledge of his

tation for carelessness not evidence of inefficient performance of duty at the time of the accident); *Baltimore & O. R. Co. v. Henthorne* (1896) 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634 (reputation for drunkenness not evidence that servant was drunk when the accident occurred); *Erb v. Popritz* (1898) 59 Kan. 264, 52 Pac. 871. Compare § 188, note 19, *ante*. In *Fonda v. St. Paul City R. Co.* (1898) 71 Minn. 438, 74 N. W. 166, this rule was applied in an action by a third person. Nicknames are not so generally expressive of the characteristics of the persons to whom they are applied as to be competent evidence for the purpose of proving that the bearer of the name possessed the characteristics denoted by the nickname. *Marrinan v. New York C. & H. R. I. Co.* (1897) 13 App. Div. 439, 43 N. Y. Supp. 606 (fact that a servant is called by his fellow employees "Crazy Nolan" not, in the absence of other proof, competent evidence to show that he is actually crazy). In a subsequent case this ruling was cited with approval, and a new trial ordered, on the ground that the jury had not been left uninfluenced

by the evidence of a nickname ("crazy") which had been applied to the culpable servant. *Baird v. New York C. & H. R. R. Co.* (1897) 16 App. Div. 490, 44 N. Y. Supp. 926. See also, to the same effect, *St. Louis, A. & T. H. R. Co. v. Corgan* (1891) 49 Ill. App. 229.

¹*Consolidated Coal Co. v. Seniger* (1899) 179 Ill. 370, 53 N. E. 733. Affirming (1898) 79 Ill. App. 456; *Walker v. Bolling* (1853) 22 Ala. 294.

²*Illinoi. Steel Co. v. Richter* (1898) 82 Ill. App. 45 (engineer in charge of a mill not licensed in accordance with the provisions of a municipal ordinance). In *McMahon v. Davidson* (1867) 12 Minn. 357, Gil. 232, the defendant was held liable for injuries caused by the incompetence of an unlicensed engineer. The incompetence there was not, however, deduced from the mere fact that he had no license.

³A yard master who has never passed the examination for engineer may be a competent person to operate a switch engine, if he has occasionally handled engines, and done so with safety. *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (1899) 97 Fed. 245.

unfitness, or retained him in the service after notice of such unfitness. The language used by the Supreme Court of the United States is that the plaintiff must show, not only the incompetency, but that the defendant failed to exercise proper care and diligence to ascertain his qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of some agent or officer of defendant having the power to remove the servant.¹ On the one hand, therefore, a verdict for the plaintiff will always be upheld where there is adequate proof that the master knew of the delinquent servant's incompetency before the time when the accident happened, and still retained him in the employment.² On

- ¹ *Wabash R. Co. v. McDaniels* (1882) 53 N. Y. 579; *Frazier v. Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467; *Alabama & F. R. Co. v. Waller* (1872) 48 Ala. 459; *Lake Shore & M. S. R. Co. v. Stupak* (1889) 123 Ind. 210, 22 N. E. 246; *Ohio & M. R. Co. v. Col-larn* (1881) 73 Ind. 261, 38 Am. Rep. 134; *Indiana Mfg. Co. v. Millican* (1882) 87 Ind. 87; *Pennsylvania Co. v. Roney* (1883) 89 Ind. 452, 46 Am. Rep. 173; *Texas & P. R. Co. v. Johnson* (1896) 89 Tex. 519, 35 S. W. 1042; *Kean v. Detroit Copper & Brass Rolling Mills* (1887) 66 Mich. 277, 33 N. W. 395; *Chicago & A. R. Co. v. Sullivan* (1872) 63 Ill. 293; *Mexican Nat. R. Co. v. Musette* (1894) 7 Tex. Civ. App. 169, 24 S. W. 520, affirmed in (1894) 86 Tex. 708, 24 L. R. A. 642, 26 S. W. 1075; *Cruselle v. Pugh* (1881) 67 Ga. 430, 44 Am. Rep. 724; *Gulf, C. & S. F. R. Co. v. Pierce* (1894) 87 Tex. 144, 27 S. W. 60, Affirming (1894) 7 Tex. Civ. App. 597, 25 S. W. 1052; *Bonner v. Whitcomb* (1891) 80 Tex. 178, 15 S. W. 899. See also the cases with reference to incompetency arising from intemperate and other bad habits, in the preceding section, and those reviewed in the following sections, which all assume the existence of the rule stated in the text. Since evidence that the master knew of the servant's unfitness is always competent, error cannot be predicated of the fact that the court admitted it at a certain stage of the trial, simply because it proves to be irrelevant as to the issue finally taken. *Atlee v. South Carolina R. Co.* (1884) 21 S. C. 550. The same rule holds under Cal. Civil Code, § 1971, providing that an employer must in all cases indemnify an employee for losses caused by the former's want of ordinary care, although under § 1970 he is not liable unless he neglected to use ordinary care
- ² *Walker v. Bolling* (1853) 22 Ala. 294; *Senior v. Ward* (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261; *Columbus, C. & I. C. R. Co. v. Troesch* (1873) 68 Ill. 545, 18 Am. Rep. 578; *Laning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417; *Michigan C. R. Co. v. Dolan* (1875) 32 Mich. 510; *Evansville & T. H. R. Co. v. Guyton* (1888) 115 Ind. 450, 17 N. E. 101; *Illinois C. R. Co. v. Jewell* (1867) 46 Ill. 99, 92 Am. Dec. 240; *Chicago & G. E. R. Co. v. Harney* (1867) 28 Ind. 28, 92 Am. Dec. 282; *Nordyke & M. Co. v. Van Sant* (1884) 99 Ind. 188; *Cincinnati, H. & I. R. Co. v. Madden* (1892) 134 Ind. 462, 34 N. E. 227; *Kansas P. R. Co. v. Salmon* (1875) 14 Kan. 512; *Union P. R. Co. v. Young* (1878) 19 Kan. 498; *Poirier v. Carroll* (1883) 35 La. Ann. 699 (under Louisiana Code, art. 2520, providing that a master is liable for damages by servants which he might have prevented); *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994; *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176, 9 N. W. 243; *New Orleans, J. & G. N. R. Co. v. Hughes* (1873) 49 Miss. 258; *Huffman v. Chicago, R. I. & P. R. Co.* (1883) 78 Mo. 50; *Houston & T. C. R. Co. v. Myers* (1881) 55 Tex. 110; *Kerrin v. Chicago, P. & St. L. R. Co.* (1892) 50 Fed. 185; *Ross v. Chicago, M. & St. P. R. Co.* (1881) 2 McCrary, 235, 8 Fed. 144; *Galveston, H. & S. A. R. Co. v. Puris* (1893) 4 Tex. Civ. App. 468, 23 S. W. 301; *Ledridge v. Hathaway* (1898) 170 Mass. 348, 49 N. E. 656; *Cherokee & P. Coal & Min. Co. v. Dickson* (1900) 10 Kan. App. 391, 61 Pac. 450; *Chapman v. Erie R. Co.* (1874)

the other hand, in the absence of evidence that he possessed such knowledge, the master is, as a matter of law, deemed to be free from culpability.³

in the "selection" of the negligent employee. *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 129, 41 Pac. 22. A decision which is opposed to those authorities is *Texas & N. O. R. Co. v. Tutman* (1895) 10 Tex. Civ. App. 434, 31 S. W. 333, where it was held, for reasons which are not explained in the opinion, that the mere fact that a railroad company knows that its servants are negligent and careless will not render it liable to one for injuries inflicted on another by such negligence. This ruling is certainly wrong, unless the court intended to make a distinction between habitual and isolated acts of negligence. See §§ 184, 188, *ante*.

³ *Reiser v. Pennsylvania Co.* (1892) 152 Pa. 38, 25 Atl. 175; *Keystone Bridge Co. v. Newberry* (1880) 96 Pa. 246; *Muthern v. Lehigh Valley Coal Co.* (1894) 161 Pa. 270, 28 Atl. 1087 (a case under the mining law of Pennsylvania); *Louisville & N. R. Co. v. Kelly* (1894) 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407; *Union P. R. Co. v. Milliken* (1871) 8 Kan. 647; *Galveston, H. & S. A. R. Co. v. Faber* (1885) 63 Tex. 344 (1889) 77 Tex. 153, 8 S. W. 64; *Conrad v. Gray* (1895) 109 Ala. 130, 19 So. 98; *St. Louis Press Brick Co. v. Kenyon* (1893) 57 Ill. App. 640; *Huffman v. Chicago, R. I. & P. R. Co.* (1883) 78 Mo. 50; *Wall v. Delaware, L. & W. R. Co.* (1889) 54 Hun. 454, 7 N. Y. Supp. 709; *Dysart v. Kansas City, Ft. S. & M. R. Co.* (1898) 145 Mo. 83, 46 S. W. 751; *Stevens v. San Francisco & N. P. R. Co.* (1893) 100 Cal. 554, 35 Pac. 165; *Lee v. Detroit Bridge & Iron Works* (1876) 62 Mo. 565; *Matthews v. Bull* (1897; Cal.) 47 Pac. 773; *Murphy v. Hughes* (1898) 1 Penn. (Del.) 250, 40 Atl. 187; *O'Boyle v. Lehigh Valley Coal Co.* (1894) 161 Pa. 275, 28 Atl. 1088; *Kindel v. Hall* (1896) 8 Colo. App. 63, 44 Pac. 781; *Crew v. St. Louis, K. & N. W. R. Co.* (1884) 20 Fed. 87; *Bogard v. Louisville, E. & St. L. R. Co.* (1885) 100 Ind. 491; *Lake Shore & M. S. R. Co. v. Stupak* (1886) 108 Ind. 1, 8 N. E. 630; *Cincinnati, H. & L. R. Co. v. Madden* (1893) 134 Ind. 462, 34 N. E. 227; *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92; *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447, 67 N. W. 358;

Murphy v. Hannibal & St. J. R. Co. (1884) 85 Mo. 95; *St. Louis, A. & T. H. R. Co. v. Corgan* (1891) 49 Ill. App. 229; *Dow v. Kansas P. R. Co.* (1871) 8 Kan. 642; *Lawler v. Androscoggin R. Co.* (1873) 62 Me. 467, 16 Am. Rep. 492; *Blake v. Maine C. R. Co.* (1879) 70 Me. 60, 35 Am. Rep. 297; *Reiser v. Pennsylvania Co.* (1892) 152 Pa. 38, 25 Atl. 175; *East Tennessee, V. & G. R. Co. v. Gurley* (1883) 12 Lea, 46. A complaint is demurrable which merely alleges that it was the master's duty to employ careful and skilful servants, and that he failed to select those that were competent. A want of care and diligence in the selection should also be charged. *Moss v. Pacific R. Co.* (1872) 49 Mo. 167, 8 Am. Rep. 126. A special verdict which does not find, as facts, that the delinquent servant was incompetent, and that the master knew of his incompetency, will not support a judgment for the plaintiff. *Evansville & T. H. R. Co. v. Tohill* (1895) 143 Ind. 49, 41 N. E. 709, 42 N. E. 352. An instruction is erroneous by which the master's liability for the negligence of a co-servant is made to hinge upon his competency alone. The essential question is whether the master used ordinary care to procure a competent person. *Tarrant v. Webb* (1856) 18 C. B. 797, 25 L. J. C. P. N. S. 261. A clause in a charge, that the law imposes the duty "to employ reasonably skilful and competent employees," is a misdirection, unless it is qualified in another part by the instruction that the incompetency of a servant is not a ground of liability unless it is known, actually or constructively, to the master. *Lewis v. Emery* (1896) 108 Mich. 641, 66 N. W. 569. In laying down the law of a case with a view to a new trial, it is improper to proceed upon the hypothesis that the plaintiff was employed as an inexperienced man, unless there is some evidence that the employer knew the servant to be inexperienced. *Mayes v. Chicago, R. I. & P. R. Co.* (1884) 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680 (correcting, in this regard, the opinion in the first hearing of the case. The plaintiff was a minor, but only a little under twenty-one years of age).

In this instance, as in the case of the other instrumentalities of an employer's business, the knowledge or ignorance contemplated by the law connotes the situation in which he could or could not, by the exercise of due care, have ascertained the servant's unfitness.⁴ See chapter x., *ante*. The question whether the master knew or ought to have known of the servant's incompetency is primarily one for the jury.⁵ It is obvious that the responsibilities which arise out of the employment of a rational living creature as an industrial agency must in some respects be essentially different from those which attend the use of an inorganic instrumentality, or of an animal which, for juridical purposes, is regarded as a mere chattel, devoid of reasoning capacity. This difference is reflected in the nature of the master's obligations with regard to ascertaining the qualifications of his servants, both at the time they are hired and while they are at work.

194. Duty to inquire into the fitness of a servant at the time he is hired.—(See also § 180, *ante*.)—Although an employer is, to a great extent, entitled to act upon the assumption that instrumentalities purchased from persons whose business it is to manufacture them are in a sound condition when they are first put in use (see § 153, *ante*), he clearly would not be justified in acting upon the assumption that a servant who seeks a position is qualified for it. It is therefore well established that, where the service in which the servant is to be employed is such as to endanger the lives and persons of coemployees,

⁴*Chicago, R. I. & P. R. Co. v. Doyle* (1877) 18 Kan. 58; *Cameron v. New York C. & H. R. R. Co.* (1894) 77 Hun, 519, 28 N. Y. Supp. 898; *East Tennessee, V. & G. P. Co. v. Gurley* (1883) 12 Lea, 46; *L. v. C. R. Co.* (1879) 70 Am. Rep. 297; *Hall v. Beck* (1901) 156 Ind. 460, 6 N. E. 2d 101. An allegation that the master of the delinquent servant's incompetency is sustained by proof that it ought to have been known. *Chicago, R. I. & P. R. Co. v. Doyle* (1877) 18 Kan. 58. It is not error to submit a case to the jury on the theory that the plaintiff is entitled to recover if the negligent servant was incompetent and the defendant ought to have known of his incompetence. *Hills v. Chicago & G. T. R. Co.* (1885) 55 Mich. 437, 21 N. W. 878. It is error to direct a verdict for the defendant upon a finding by the jury that the fellow servant whose negligence caused the injury was incompetent, but that this incompetency was not known to the defendant. Such a finding leaves open the question

whether due care was used in the selection of that servant. *Skerritt v. Scal-lan* (1877) 11 C. L. 389.

⁵*Pagels v. Meyer* (1900) 88 Ill. App. 169; *Calumet Electric Street R. Co. v. Peters* (1900) 88 Ill. App. 112; *Scott v. Utah Consol. Min. & Mill. Co.* (1899) 18 Utah, 486, 56 Pac. 305; *Huntsinger v. Trezler* (1897) 181 Pa. 497, 37 Atl. 574; and the other cases cited in this section.

Where a rule of a railroad company makes it the duty of all employees to report omissions of duty, and the negligent acts of the culpable servant took place on the train on which the plaintiff was working, it is more reasonable to suppose they were done in his presence, or under his observation, than to imply knowledge on the part of the company; and if he knew of and failed to report the acts of negligence, the natural inference is that he intended to assume the additional risk. *Cameron v. New York C. & H. R. R. Co.* (1895) 145 N. Y. 400, 40 N. E. 1.

the master, before engaging such servant, is required to make reasonable investigation into his character, skill, and habits of life.¹ An exception to this rule is admitted where the work is of a simple kind, which anyone of fair intelligence and requisite physical ability is competent to perform.² This investigation need not necessarily assume the form of questioning an applicant for work as to his competency. An omission to do this is negligence only when there is no better source of information at hand, and cannot be imputed as culpable where information is sought from the applicant's former employer.³ On the other hand, the employer's duty is fully discharged if he makes careful inquiry into the habits and competency of the men employed, and upon such inquiry believes, and has good reason to believe, them sober and competent and careful.⁴

An employer is also bound to institute affirmative inquiries in order to ascertain the qualifications of a servant whom he transfers to a more responsible position, for which special qualifications are

¹ *Western Stone Co. v. Whalen* (1894) 151 Ill. 472, 38 N. E. 241; *S. P. Mann v. Delaware & H. Canal Co.* (1883) 91 N. Y. 495; *Norfolk & W. R. Co. v. Vuckols* (1895) 91 Va. 193, 21 S. E. 342; *Chicago & G. E. R. Co. v. Harney* (1867) 28 Ind. 28, 92 Am. Dec. 282; *Alabama & F. R. Co. v. Waller* (1872) 48 Ala. 459; *The Ancees* (1899) 34 C. C. A. 558, 93 Fed. *40, Reversing (1898) 87 Fed. 565; *Nutzmann v. Germania L. Ins. Co.* (1900) 78 Minn. 504, 81 N. W. 518; *Fraser v. Schroeder* (1896) 163 Ill. 459, 45 N. E. 288. The erection of telegraph poles is deemed to be work which requires special skill, and therefore falls within the scope of this principle. *Postal Teleg. Cable Co. v. Coote* (1900; Tex. Civ. App.) 57 S. W. 912.

² *Timm v. Michigan C. R. Co.* (1893) 98 Mich. 226, 57 N. W. 116 (loading ties on a hand car).

Whether the master at the time of engaging the servant, or afterwards, ought to have inquired whether he was competent or not, or should have taken notice, under all the facts, of the probability that he was not, nothing being said on the subject by either party, is a question for the jury. *May v. Smith* (1893) 92 Ga. 95, 18 S. E. 330; *Irvine v. Brooklyn Heights R. Co.* (1901) 59 App. Div. 95, 69 N. Y. Supp. 80 (servant had made no statement to defendant's officers as to his defective eyesight, and the evidence generally went to show his competency).

³ *Gier v. Los Angeles Consol. Elect. R. Co.* (1895) 108 Cal. 129, 41 Pac. 22. It is competent to show what the servant's previous record with other employers has been, as it is for the jury to say whether such facts might not have been known to the master, if he had made proper inquiry. *Baltimore & O. R. Co. v. Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952.

⁴ *Moss v. Pacific R. Co.* (1872) 49 Mo. 167, 8 Am. Rep. 126. See *Indiana Mfg. Co. v. Millican* (1882) 87 Ind. 87; *Baltimore & O. R. Co. v. Hawthorne* (1896) 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634; *Fines v. Silburn* (1893) 73 Hun. 549, 26 N. Y. Supp. 181. A master exercised due care in the employment of a brakeman at a mine where the machinery used was simple and easily managed, where, before hiring, he made inquiries of one competent to judge of the applicant's experience and ability, and, further, had him instructed and watched by the engineer for a time after he commenced work. *Walkowski v. Penokee & G. Consol. Mines* (1898) 115 Mich. 629, 41 L. R. A. 33, 73 N. W. 895. It is not the duty of the master to ascertain the qualifications of a servant "as a fact," for the imposition of such an obligation would be tantamount to a requirement that his qualifications should be warranted. *Illinois C. R. Co. v. Morrissey* (1891) 45 Ill. App. 127.

demanded, unless the servant has given proof of his capacity in some similar position.⁵

193. Duty of the master to keep himself informed as to the fitness of a servant already in his employment.—The consequences of the essential difference between the situations in which the master is utilizing the work of human beings and of other appliances are still more conspicuous when we come to consider his duties with regard to keeping himself informed as to the fitness of servants after their employment. That he is bound to do this, so far as it can be accomplished by proper supervision and superintendence, is well settled.¹ But the rule of conduct based upon the physical law that inorganic appliances are constantly tending to deteriorate with use finds no analogy in cases where it is a question whether the master should have known of a servant's unfitness. On the contrary, when suitable and competent persons have been employed, good character and proper qualifications may be presumed to continue, and the master may rely on that presumption until notice of a change.²

¹*Evanville & T. H. R. Co. v. Guyton* (1888) 115 Ind. 450, 17 N. E. 101. There the court, in commenting upon the evidence, which was held to justify the jury in finding the defendant liable for the negligence of a conductor whom it had promoted without the usual examination, said: "It should be remembered that Stice [the conductor] had served the company as brakeman until quite recently before the unfortunate accident, and while his service as brakeman is not to be disregarded in determining his competency to act in the more responsible position of conductor, it does not follow, without more, that because he was an efficient and competent brakeman, and fit for promotion, he was also competent to take charge of and run a wild train." Cases cited in § 186, note 4, *ante*.

²*Baltimore & O. R. Co. v. Benthorpe* (1896) 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634; *Norfolk & W. R. Co. v. Vuckols* (1895) 91 Va. 193, 21 S. E. 342; *Ohio & M. R. Co. v. Collarn* (1881) 73 Ind. 261, 38 Am. Rep. 134; *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524; and the cases cited under the following sections. A plea that the company had exercised ordinary care and diligence to secure a skillful engineer who was reputed to be careful and skilful, and supposed to be such

at the time of the collision, is not good, as "supposed" means no more than "believed." *Alabama & F. R. Co. v. Walker* (1872) 48 Ala. 459.

³*Blake v. Maine C. R. Co.* (1879) 70 Me. 60, 35 Am. Rep. 297; *Michigan C. R. Co. v. Dolan* (1875) 32 Mich. 510; *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176, 9 N. W. 243; *Lake Shore & M. S. R. Co. v. Stupak* (1880) 123 Ind. 210, 23 N. E. 246. In *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579, the defendant complained of the following charge: "But if, after a competent and proper person is employed for such a duty, his habits become such that it is unsafe to trust him any longer in that capacity, the company are bound to use, through their proper officers, such reasonable care and diligence in ascertaining what the man is, after he is employed, as they would be in his original employment." The court of appeals upheld the objection, saying: "Good character and proper qualifications, once possessed, may be presumed to continue, and I see no reason why a principal may not rely upon that presumption as to these personal qualities until he has notice of a change, or knowledge of such facts as would be deemed equivalent to notice, or at least such as would put a reasonable man upon inquiry. The charge permitted the jury, without restriction or limit, to determine what particular supervision or watchfulness was necessary to

Where the master receives specific information with regard to practices or habits which indicate that the servant ought no longer to be retained in the employment, there is ordinarily no obligation to discharge him without an investigation into the charges, unless the notification is accompanied by such evidence as leaves no doubt of the truth of such charge. A rule that would require the master to discharge a servant, careful and competent when employed, without investigation, upon a charge of carelessness, is very properly declared to be a harsh one, which would often result in great injustice to employees.³

D. CIRCUMSTANCES BEARING UPON THE QUESTION OF THE MASTER'S KNOWLEDGE OF THE SERVANT'S INCOMPETENCE.

196. Incompetence of servant.—The principle explained in the pre-

exonerate the defendant from the charge of negligence. They might require periodical investigations, or an efficient detective system. They were at liberty to adopt any rule, and might adopt one which would practically make the defendant a guarantor of the correctness of every act of its employees. We have been referred to no authority for such a doctrine, and it would be manifestly unjust to adopt it." The court held that reasons for inspection of machinery or implements are not applicable to the case of an employee, and said: "If competent when employed, additional experience would naturally render him more so, and while his habits might change for the worse, there is no such depravity in human nature as in law requires special vigilance on the part of the employer to prevent it."

³Where the material charge against the defendant was that, with notice of the negligence and carelessness of an engineer, it carelessly and negligently retained him in its service, the court said: "The jury found that the appellant had knowledge of the careless habits of Pool before the day on which the injury occurred, but this does not authorize us to say, as a matter of law, that it negligently retained him in its service after such knowledge." *Lake Shore & M. S. R. Co. v. Stupak* (1889) 123 Ind. 210, 23 N. E. 216. All that the master is required to do when his attention is directed to circumstances indicating a diminution in the servant's efficiency is to make careful and frequent investigation as to the fact, if he

retains him in his service. Whether he performs this duty is a question for the jury to pass upon. *Michigan C. R. Co. v. Gilbart* (1881) 46 Mich. 176, 9 N. W. 243. If a railroad brakeman has actually been guilty of repeated acts of negligence, the fact that he is not negligent in specific instances called to the attention of the officers of the railroad does not necessarily relieve the company from liability for an injury to a fellow servant resulting from the servant's negligence. *Baird v. New York C. & H. R. R. Co.* (1901) 64 App. Div. 14, 71 N. Y. Supp. 734, holding that it was the duty of the company's officers, upon being notified, not merely to inquire into the truth of the complaint made, but also as to whether the delinquent was accustomed to perform his duties in the way he should. In another case it was laid down in a charge to the jury that, if the master continues the employee in his service after receiving notice of the unfitness, he does so at his own risk, notwithstanding the fact that he may have made inquiry and decided that such servant was not negligent or incompetent. He is bound by the fact, whatever it may be. *Ross v. Chicago, M. & St. P. R. Co.* (1881) 2 McCrary, 235, 8 Fed. 544. But this statement is too broad. Plainly, there can be no liability under such circumstances if the inquiry was carefully conducted, and a prudent man would have been justified in drawing the conclusion that the charges against the servant were not well founded.

ceding subtitle involves the corollary that, as a general rule, the master's knowledge must be proved by independent evidence, and cannot be inferred from the mere fact of the servant's unfitness, supposing that to be proved or admitted.¹ This rule, however, is subject to two qualifications. One is analogous to that which, in the case of injuries caused by inanimate agencies, is created by the doctrine of *res ipsa loquitur*.² See chapter XIII. B, *post*. The other is that the testimony by which the incompetency of a servant is established may be such as to warrant the additional conclusion that the master had notice of his incompetency, or that he omitted to make such inquiries as common prudence would have dictated.³

¹ *Roblin v. Kansas City, St. J. & O. R. Co.* (1893) 119 Mo. 476, 24 S. W. 1011 (incompetency said to be not even prima facie proof of negligence in employing the servant); *Thomas v. Herrell* (1890) 18 Or. 546, 23 Pac. 407. It is error to instruct a jury that, when the incompetency of a servant is proved, a presumption arises that the master knew of it. *Hicks v. Southern R. Co.* (1901; S. C.) 38 S. F. 725. It is error to charge a jury that if a servant did not possess some indispensable qualification for his duties, this of itself showed the master to have been negligent, for it may be that all reasonable precautions were taken to ascertain his competency for the place, and that the master was nevertheless deceived. *Taylor v. Western P. R. Co.* (1873) 45 Cal. 323.

There is, however, some authority for the doctrine that proof of the servant's unfitness renders it necessary to submit to the jury the question whether the master was negligent. *Skerritt v. Sealton* (1877) 11 C. L. 389, where the jury had specially found, in a case where a scaffold had been unskillfully constructed, that the delinquent co-servant was incompetent, but that the defendant was not aware of it, and the trial judge directed a verdict for the defendant. A new trial was awarded on the ground that the question whether the master had used due care in the selection of the servant had not been submitted to the jury. Dowse, B., did not express a decided opinion as to whether the onus of proving negligence still lay on the servant after the incompetency of the delinquent servant was shown. Pilles, C. B., held that the onus of disproving negligence was transferred by such evi-

dence to the master, adopting the theory of Deasy, B., in *Murphy v. Pollock* (1863) 15 Ir. C. L. Rep. 224, that, as the mode and circumstances of the employment were matters peculiarly within the knowledge of the master, evidence showing that the delinquent fellow-servant had started an engine after the plaintiff's decedent, who was killed by its exploding, had suggested that there was something wrong with it, was sufficient to be submitted to the jury on the question of his incompetency. Barons Fitzgerald and Hughes intimated an opinion to the contrary, but held that, at all events, it was not evidence of negligence in selecting the servant. In Minnesota also it has been held that proof that the servant was incompetent at the time of his employment casts upon the master the burden of disproving negligence. *Crandall Hellrath* (1877) 24 Minn. 127. It is difficult to see how these decisions be reconciled with the general rule of evidence which casts upon the party alleging negligence the onus of proving all the elements necessary for the establishment of the charge.

² An instruction which declares, without qualification, that negligence in hiring a servant cannot be inferred merely from the fact of his incompetency, is erroneous, as there may be a degree of incompetency which, of itself, might justly be regarded by the jury as imparting notice. *East Tennessee, V. & G. R. Co. v. Gurley* (1883) 12 Lea, 46. Compare § 198, *infra*, as to acts prior to accident.

³ *Murphy v. St. Louis, I. M. & S. R. Co.* (1879) 71 Mo. 202. In one case it was said that, in the absence of evidence as to the exercise of any care in his selection, proof that a servant who had

197. Bodily and mental qualities of the servant.—As the ultimate and essential question in cases of this type is whether the servant, viewed as a combination of natural and acquired qualities, had the capacity to perform his work properly, discussions of the effect of natural qualities alone, in imparting notice of the unfitness of a person of full age, are not likely to be frequent.¹ The common sense of the matter, however, seems to warrant the proposition that, when such a person, having no obvious mental defect or bodily weakness, offers himself for employment, the master may proceed upon the assumption that he is what he appears to be in these respects, and that any inquiries which may be necessary, in view of the duties contemplated (§ 194, *ante*), may, without culpability, be restricted to ascertaining whether his character, disposition, education, skill, and experience, are such as to render him competent for the position sought. Compare the principle applicable to the situation dealt with in § 180, *ante*.

Minority, it is manifest, introduces into the problem a differentiating element which narrows the scope of the allowable presumptions to an extent which varies according to the age of the employee and the difficulty or danger of the duties to be performed. Or perhaps it would be more correct to say that, when a person who is plainly not of full age is being hired, the master is not entitled to the benefit of any presumptions whatever, and that the capacity of

been in the service but two or three weeks was incompetent when employed need not be supplemented by proof of the company's knowledge of his incompetency, the presumption that the employer had done his duty being overcome by proof that the servant was incompetent; and the general rule was laid down as follows: Where one competent at the time of his employment becomes incompetent, or indulges in a habit which renders him incompetent during its indulgence, notice of the incompetency or of the habit must be brought home to the company, or the incompetency or habit must be so notorious as to charge the company with knowledge; but when the incompetency does not arise after the employment, but existed at the time, proof of notice is not necessary. *Lee v. Michigan C. R. Co.* (1891) 87 Mich. 574, 49 N. W. 909.

¹ It has been held that notice of a servant's want of competency for the duties of a brakeman cannot be inferred from the fact that he is a negro. *Missouri P. R. Co. v. Christman* (1886) 65

Tex. 369. "Proof of facts which show the nonexistence of such intelligence, ability, or disposition must be made by the party who asserts its nonexistence. The law does not presume it because the person whose qualities may be the subject of investigation may be of one or another race or color; nor is a jury at liberty to infer it from such fact. If, however, this were not true, and the rule were that a jury might infer that a person was an unsuitable person for brakeman from the fact that he was a negro, then such inference would have to be based on the fact that all negroes are wanting in intelligence, ability, or disposition to perform faithfully and safely the duties of brakemen. If this were true, the appellee would stand charged with knowledge of their unfitness, and, knowing that the brakemen on his train were negroes, would be held to have voluntarily assumed such risks as resulted from such incompetency. The invocation of such a rule would be suicidal to the appellee's case."

that person, so far as it depends on his natural qualities, is to be determined in each particular instance as an open question, with reference to the nature of the work to be done, and the cardinal fact that immature years are usually accompanied by bodily and mental powers lower than the average. Some such principle as this seems to be implied in all the cases cited in § 187, *ante*, in which the actual question decided was that the minor was or was not incompetent; but the writer has not found any direct authority on the point.

198. Conduct of the servant prior to the accident.— The question whether a single act of negligence can ever be regarded as being of itself sufficient evidence of constructive notice does not seem to have been directly considered.¹ But, on principle, there does not seem to be any adequate reason for denying that, in extreme cases, such an act might bear this significance. Compare § 137, *ante* (near the end).

According to most of the authorities, evidence of the commission of several acts of negligence prior to that which caused the injury in suit is admissible to establish the master's negligence whenever those acts were so frequent that he would have learned of their commission if he had exercised proper vigilance in supervising the conduct of his servants.² For the same reason, a jury is warranted in inferring constructive notice on the master's part when, several times before the accident occurred, the servant had been in a condition which showed that he was addicted to a habit which rendered him unfit for his duties.³ This principle is applied subject to the qualification that a

¹ In *Galveston, H. & S. A. R. Co. v. Davis* (1898) 92 Tex. 372, 48 S. W. 570, the court expressed an opinion, *arguendo*, that, if there had been competent evidence *aliunde* that the delinquent servant was a careless man, testimony of a certain specific act would have been admissible to show that the master was chargeable with knowledge of his character in this respect.

² *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 476, 9 N. W. 243; *International & G. N. R. Co. v. Branch* (1900; Tex. Civ. App.) 56 S. W. 542. A verdict for plaintiff was held proper in *Whittaker v. Delaware & H. Canal Co.* (1891) 126 N. Y. 544, 27 N. E. 1042, affirming (1890) 34 N. Y. S. R. 822, 11 N. Y. Supp. 914 (habitual violation of rules); *Wall v. Delaware, L. & W. R. Co.* (1889) 54 Hun. 454, 7 N. Y. Supp. 709 (engine negligently handled in yard on numerous occasions); *Daly v. Sang* (1895) 91 Wis. 336, 64 N. W. 997 (acts of negligence, extending over two weeks). A master is not entitled to a nonsuit where there are previous acts of negligence stated in the complaint, and evidence to support them. *Hicks v. Southern R. Co.* (1901; S. C.) 38 S. E. 725. In a Texas case it has been laid down that, while the competency or incompetency of an employee cannot be proved by specific acts of carelessness (see § 188 *b* and *c*, *ante*), yet, if such acts have, as a matter of fact, come to the knowledge of the master, they may be put in evidence for the purpose of establishing that knowledge. *Galveston, H. & S. A. R. Co. v. Davis* (1893) 4 Tex. Civ. App. 468, 23 S. W. 303. But it is not apparent what can be the purpose of thus proving knowledge of acts which are, *ex hypothesi*, of no evidential significance as regards the incompetency of the servant.

³ A verdict finding negligence of the employer in failing to learn of an en-

master who has exercised due care in the employment of a servant may rely upon the presumption of competency until he has notice or knowledge to the contrary, and although the employee may frequently use appliances in a negligent manner, yet, if such use leaves no trace behind it, which it is the duty of the master on inspection to see, no presumption of knowledge on his part arises.⁴ Nor does the law go so far as to hold a railroad corporation to such an extreme of circumspection as to compel it to note, at its peril, every lapse of its employees, where no notice thereof is directly communicated, and where the circumstances are not such as to afford a reasonable presumption that the derelict conduct of the employee had become known to the employer.⁵

In some jurisdictions it is held that the master's knowledge must always be established by independent testimony.⁶ But this qualification of the rule is admitted,—that, if there is evidence *aliunde* that the servant was a careless person, even a single act of negligence is proper to consider in relation to the question whether the company had notice of his character.⁷ Compare § 188, note, 20, *ante*.

199. Act which caused the accident.—It has been laid down that the act of negligence which is the subject-matter of the action is not evidence from which a jury is warranted in finding that the master re-

gineer's habit of intoxication was sustained in *Hills v. Chicago & G. T. R. Co.* (1885) 55 Mich. 437, 21 N. W. 878, where there was a special finding that he had been intoxicated, or under the influence of liquor, three times when running his engine. In *Tonnensen v. Ross* (1890) 58 Hun, 415, 12 N. Y. Supp. 150, evidence that a servant was intoxicated as often as two or three times a week for a period of nearly two years before the accident, during which time he had been working for the defendant, and that the latter's superintendent was at the place of work every other day, was held to make a question for the jury as to the master's knowledge, or means of knowledge, of the servant's habits. In *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579, evidence that a negligent servant had been in the habit of drinking daily many times, and had become somewhat dissipated, and that he was intoxicated on the night of the accident, was held sufficient, in connection with testimony that the master's representatives had been accustomed to daily intercourse with him and had seen him in drinking places, and on some occasions when he drank, and that one of them had reprimanded him for drinking, to justify a verdict against the

master, though the evidence was somewhat conflicting.

⁴ *Walkowski v. Penokee & G. Consol. Mines* (1898) 115 Mich. 629, 41 L. R. A. 33, 73 N. W. 895.

⁵ *Huffman v. Chicago, R. I. & P. R. Co.* (1883) 78 Mo. 50 (where an engineer had, several times, run his engine at excessive speed, but in remote rural districts).

⁶ *Olsen v. Andrews* (1897) 168 Mass. 261, 47 N. E. 90; *Keith v. New Haven & N. Co.* (1885) 140 Mass. 175, 3 N. E. 28. A verdict for the plaintiff will not be set aside where one of the plaintiff's coservants gave evidence that the delinquent servant had been intoxicated in the master's presence, while engaged in his duties, and another that such servant had been so drunk on one occasion as to be compelled to leave his work and go home, and the superintendent testified that he had seen the servant drunk several times, and did not state that these were not times when the servant was at his work. *McPhce v. South* (1895) 163 Mass. 216, 39 N. E. 1007.

⁷ *Galveston, H. & S. A. R. Co. v. Davis* (1898) 92 Tex. 372, 48 S. W. 570, first appeal (1893) 4 Tex. Civ. App. 168, 23 S. W. 305.

tained him with knowledge of his incompetence.¹ The reason which has been supposed to furnish an adequate basis for this doctrine has already been mentioned in discussing the effect of such evidence, considered as tending to establish the servant's incompetency. The criticisms made upon that reason in the section referred to (189, *ante*), are also pertinent in this place. It seems impossible to deny that the delinquency which caused the injury may be of such a flagrant character that a jury might fairly infer that the master could not have failed to discover the servant's unfitness if proper inquiries had been instituted when he was hired, or his work had been properly supervised. Indeed, this aspect of the situation has been duly taken account of in one decision.²

200. Length of the period during which the unfitness has continued.— Both on principle and authority it is clear that, if the servant's incompetency had continued for such a length of time before the accident that a careful and diligent supervision of the master's business ought to have brought it to light, he is chargeable with notice of its existence.¹ Whether the period in evidence is sufficient for this purpose is in each instance a question of fact.²

¹ *Conrad v. Gray* (1895) 109 Ala. 130, 19 So. 398.

² *Pleasant v. Raleigh & A. Air Line R. Co.* (1897) 121 N. C. 492, 28 S. E. 267, the facts of which are noted in § 189, *ante*. The evidence was held sufficient to take the case to the jury on the question of the defendant's imputed knowledge.

¹ *Whittaker v. Delaware & H. Canal Co.* (1891) 126 N. Y. 544, 27 N. E. 1042. Evidence that an elevator boy had been continually incompetent for six months is relevant, as bearing on the master's knowledge of his incompetency. *Meyer's Sons v. Falk* (1901) 99 Va. 385, 38 S. E. 178.

² In *Cameron v. New York C. & H. R. R. Co.* (1895) 145 N. Y. 400, 40 N. E. 1, a verdict by which a railroad company was declared to be negligent in retaining a brakeman who had habitually violated a rule was set aside. The following extracts from the opinion sufficiently explain the grounds upon which the conclusion was based: "There is no arbitrary rule of law that charges the master with constructive notice of the negligent omissions of duty on the part of a coservant, after the lapse of a certain time, under all circumstances. The doctrine of constructive notice is founded upon reasonable and just con-

siderations, and the mere lapse of time is not always the test of negligence on the part of the master. If a defect exists in the appliances furnished the servant for doing his work, of such a character and for such a length of time as to enable the master to discover and remedy it by reasonable vigilance, inspection, or examination, then the law will imply notice, since he ought to know what can thus be ascertained. The same rule will apply where the place furnished to the servant to do his work becomes defective, dangerous, or unsafe by use or otherwise. So, when the negligence of a coservant in performing his work is of such a character as to leave traces or evidence of it in the work itself, which can be seen or discovered by reasonable examination, the master might be chargeable after it had continued for such a length of time as to render it reasonable to assume that he either must have known of the omission of duty, or could have known of it by the exercise of reasonable care; or where the incompetency of the servant is frequently displayed under the eye and observation of some officer or foreman who represents the corporation, or had the power to discharge him. But how was the master in this case to know that Norton habitually violated the

201. Promise by the master to discharge the delinquent servant.—Such a promise is deemed to be tantamount to an admission that the servant was incompetent, and that the master was aware of his incompetency.¹

202. Reputation.—(Compare § 192, *ante*.)—The doctrine which declares the notoriety of a certain fact in the community where the parties live to be competent evidence of a defendant's knowledge of the fact operates both to the advantage and disadvantage of a master in the type of case now under review.

On the one hand, testimony that the delinquent servant had a general reputation for competency at the time and place of employment is admissible as tending to disprove that the master was negligent in employing him.¹

On the other hand, according to the doctrine adopted by most of the authorities, the fact that a servant was generally reputed to be unfit for the work for which he was hired is, in itself, an independ-

rules for his own protection and that of his coservants? His work was performed on freight trains running over a long line of railroad, with little, if any, opportunity for any officer or representative of the company to watch or observe him at any one point. He had sufficient ability and intelligence to do his work, and his omissions of duty were purely wilful or thoughtless. It would be manifestly unreasonable and unjust, under such circumstances, to impute negligence to this defendant for the sole reason that during four months it failed to detect his delinquencies. The defendant had given him, by its rules, plain and simple instructions to govern his conduct with respect to the switches, and there was no reason to suspect that they would be disregarded, since it was quite as convenient for him to obey as to violate them. Moreover, it had, in these same rules, invited and requested all of his coservants to make prompt report to the company of any neglect or disobedience of the rules on his part, and no complaint had been made. It was reasonable to assume that his co-employees, whose lives might be endangered by his neglect, would observe and report his omissions of duty, if any; and if they failed to observe any, how can it be said that the defendant itself was in fault in not discovering what his coservants themselves had not discovered? The negligent acts of Norton took place while he was working on the same train and in a like capacity with the deceased.

It is more reasonable to suppose that they were done in his presence, or under his observation, than to imply knowledge on the part of the defendant; and if it can be said that the deceased knew of these omissions of duty on the part of his fellow brakeman, and failed to report them, he might be regarded as voluntarily assuming the risks and dangers incident to his association in a common work with a careless or incompetent coservant. There is a manifest inconsistency in assuming that the officers or representatives of the defendant knew, or could have known, of Norton's violation of the rules, and at the same time that the deceased did not." *Western Stone Co. v. Whalen* (1894) 151 Ill. 472, 38 N. E. 241, held that negligence in failing to learn of the servant's bad habits was properly inferred where he had been constantly drinking to excess for a period of nine months.

¹ *Poirier v. Carroll* (1883) 35 La. Ann. 699.

² *Baltimore & O. R. Co. v. Camp* (1897) 26 C. C. A. 626, 54 U. S. App. 110, 81 Fed. 807; *Illinois C. R. Co. v. Morrissey* (1891) 45 Ill. App. 127. It should be noted, however, that, as a master is absolutely liable for the negligence of a vice principal, evidence on the defendant's behalf that he had the reputation of being a careful worker is incompetent, where the ground of the action is the delinquency of such agent. *Malcolm v. Fuller* (1890) 152 Mass. 160, 25 N. E. 83.

ent evidential element, which may be considered by a jury as tending to show that the master, if he had exercised ordinary care, would have discovered that unfitness.²

This view is not approved by the New York court of appeals, which has taken the ground that the safer and better rule is to require that the incompetency of the servant should, in the first place, be proved by evidence of specific acts of negligence. After this founda-

² In *Monahan v. Worcester* (1890) 150 Mass. 439, 23 N. E. 228, the court said: "The master is bound to use reasonable care in selecting his servants, and if a person is incompetent for the work he is employed to do, the fact that he is generally reputed in the community to want those qualities which are necessary for the proper performance of the work certainly has some tendency to show that the master would have found out that the servant was incompetent, if proper means had been taken to ascertain the qualifications of the servant." In *Davis v. Detroit & M. R. Co.* (1870) 20 Mich. 105, 4 Am. Rep. 364, the court said: "If the defendants continue a man in their employ who is so notoriously unfit as to have established a general reputation to that effect, it is unreasonable, the plaintiff argues, to suppose the officers of the defendants ignorant of that fact, unless we excuse their want of information on the ground of neglect of duty on their part to their employees and the public, so gross as to make it proper and just to hold them responsible to the same extent as if they were fully informed of all the facts. And if they fail to inquire into the cause of accidents, where manifestly this is an important part of their duty, and a high obligation rests upon them to accomplish it thoroughly and faithfully, they cannot afterwards justly plead their ignorance, to excuse their principal from responsibility for other accidents resulting from the same cause." For other cases on this point, see also *Hatt v. Nay* (1887) 144 Mass. 186, 10 N. E. 807; *Gilman v. Eastern R. Corp.* (1865) 10 Allen, 233, 87 Am. Dec. 635 (1866) 13 Allen, 433, 90 Am. Dec. 210; *Western Stone Co. v. Whalen* (1894) 151 Ill. 472, 38 N. E. 241 (approving the statement of principles in *Shearm. & Redf. Neg. § 223*); *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994; *Chicago & A. R. Co. v. Sullivan* (1872) 63 Ill. 293; *St. Louis, I. M. & S. R. Co. v. Hackett* (1894) 58 Ark. 381, 24 S. W. 881; *Lake Shore & M. S. R. Co. v. Stupak* (1889) 123 Ind. 210, 23 N. E. 246; *Grube v. Missouri P. R. Co.* (1889) 93 Mo. 330, 4 L. R. A. 776, 11 S. W. 736; *Mexican Nat. R. Co. v. Mussette* (1894) 86 Tex. 708, 24 L. R. A. 642, 26 S. W. 1075; *Snodgrass v. Carnegie Steel Co.* (1896) 173 Pa. 228, 33 A. 1. 1104; *Texas & P. R. Co. v. Johnson* (1896) 89 Tex. 519, 35 S. W. 1042; *Erb v. Popritz* (1898) 59 Kan. 264, 52 Pac. 871; *Chicago, L. S. & E. R. Co. v. Hartmann* (1897) 71 Ill. App. 427; *Stoll v. Daly Min. Co.* (1889) 19 Utah, 271, 57 Pac. 295. In an action for injuries caused by the negligence of a fellow servant, a special finding that no agent of the employer knew of the latter's unfitness and recklessness will not defeat a general verdict in favor of the plaintiff, inasmuch as such a finding does not rebut the presumption that notice will be presumed, where the employee is so grossly and notoriously unfit that not to know of his unfitness is negligence. *Chicago R. I. & P. R. Co. v. Doyle* (1877) 18 Kan. 58. In *Sterens v. San Francisco & N. P. R. Co.* (1893) 100 Cal. 554, 35 Pac. 165, the court approved of the refusal of the trial judge to permit the plaintiff to prove the general reputation of the delinquent servant for intemperance among his coemployees, but the reason assigned was merely that the offer was general, and that, if offered for the purpose of affecting the master with notice, it should have been so specified. In *Cook v. Parham* (1853) 24 Ala. 21, the court held that the answer of a witness, that the delinquent servant "had no reputation, for the reason that he had no experience, and he regarded him as wholly incompetent" for his duties, was properly admitted. The statement in the first clause was plainly competent, and, no specific objection having been made to the second clause, the court was not bound to separate it from the other.

tion is laid, the second prerequisite to recovery, *viz.*, notice to the master, may be established by showing that the incompetency was generally known in the community.³ In other words, evidence of reputation, not connected with any specific acts of negligence, is deemed not to be admissible to show that the master ought to have known of the servant's incompetency.⁴ The virtual effect of this doctrine is that the admissible evidence under this head is limited to the testimony showing that certain specific acts of carelessness were so generally known in the community or among the delinquent's fellow servants that they ought to have been known to the master.⁵

Under either of these doctrines, evidence of reputation is only admitted when the injury in suit was due to that particular kind of unfitness for which the servant was notorious,⁶ and when the unfitness is of such a kind that it may become the subject of a general reputation.⁷

It is important to remember, that the servant's general reputation

³ *Park v. New York C. & H. R. R. Co.* (1898) 155 N. Y. 215, 49 N. E. 674.

⁴ *Lambrecht v. Pfizer* (1900) 49 App. Div. 82, 63 N. Y. Supp. 591. "Reputation, general in the community, . . . based upon acts or reputed acts of ignorance or carelessness, is one thing. The mere gossip or speech of people, that may have no foundation upon acts even alleged, is another." *McCarty v. Ritch* (1901) 59 App. Div. 145, 69 N. Y. Supp. 129. In a much earlier case, not cited in either of these, it was observed: "Reputation is not competent evidence to charge a master with negligence in the employment of a servant, because, first, it may be false, and, secondly, he may never have heard it." *Haskin v. New York C. & H. R. R. Co.* (1873) 65 Barb. 129. But this theory is more sweeping than that of the recent decisions.

⁵ *Youngs v. New York, O. & W. R. Co.* (1897) 154 N. Y. 764, 49 N. E. 1106. Summarized in *Park v. New York C. & H. R. R. Co.* (1898) 155 N. Y. 215, 49 N. E. 674.

⁶ *Hawk v. Pennsylvania R. Co.* (1887; Pa.) 9 Cent. Rep. 786, 11 Atl. 459 (recklessness); *Norfolk & W. R. Co. v. Hooper* (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994 (intemperance). In this case an instruction was held erroneous which told the jury that unless the culpable servant was drunk at the time of the accident, and his negligence by reason of such drunkenness produced

or contributed to the accident, evidence of general reputation as to his incompetency was not relevant, and could not be considered, "unless such reputation was brought home to the knowledge of the defendant before the accident." The court said that the condition thus appended was inaccurate, because, on the one hand, if the culpable servant did not cause the accident, the master's knowledge of his reputation had nothing to do with the case; while, on the other hand, if the culpable servant did, by his intemperance, cause the accident, it was immaterial whether the master had actual knowledge of his bad reputation, inasmuch as he was negligent in not knowing it. In *Walkowski v. Penokee & G. Consol. Mines* (1898) 115 Mich. 629, 41 L. R. A. 33, 73 N. W. 895, it was held that the incompetency of a brakeman, through whose negligence a cage fell to the bottom of a mining shaft, to the injury of an occupant, could not be shown by talk among the men that the employee lowered the cage too fast, when the accident was not due to the rate of speed, but to the fact that the screw of the brake was turned in the wrong direction.

⁷ In *Monahan v. Worcester* (1890-1891) 150 Mass. 439, 23 N. E. 228, the court refused to say that it might not be a matter of common repute in a community that a man is physically weak, and is partially blind and deaf.

is, of course, only one among many kinds of probative facts, and not the only kind from which the master's notice of the servant's incompetency may be inferred. The servant's general character may have been not only good, but very good, while the defendant had actual knowledge that he was, in point of fact, careless, negligent, reckless, unskilful, and incompetent; or his general reputation may have been that of a sober man, when, in point of fact, the defendant knew that he was in the habit of getting drunk, and that, when drunk, he was desperate and reckless.⁸

It has been held that negligence cannot be imputed to the master for not knowing the reputation acquired by a servant ten or fifteen years before the accident in suit, at a time when he was still attending school, and had not yet entered the master's employment.⁹ But the doctrine formulated above, in § 194, *ante*, as to the duty of the master to inquire into the qualifications of the servant when he is hired, indicates that this immunity must terminate at some point of time anterior to the hiring. Upon what principle that point should be fixed is a question which has apparently not been discussed. Of course, the reputation of the delinquent servant for unfitness at any time during his employment, prior to the accident in suit, is admissible in evidence.¹⁰ Whether it will be allowed any probative force depends upon whether, taking into consideration the ordinary method of conducting the business, it can reasonably be supposed to have reached the master.¹¹

What constitutes a general reputation, for the purpose of affecting a master with notice of a servant's defect, is not very clearly settled by the cases. There is no doubt that this description is answered by a reputation which pervades any considerable territorial section of the community in which he lives.¹² Several cases also proceed upon the

⁸ *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1871) 38 Ind. 294, 10 Am. Rep. 111. In *Zinnwall v. Chicago & A. R. Co.* (1889) 35 Mo. App. 661, it was said that notoriously as to the bad habits of a servant was the only evidence which could supply the place of evidence of actual knowledge on the part of the master's representatives. But this is clearly an inaccurate way of stating the rule, as there are other sources of constructive knowledge.

⁹ *Baird v. New York C. & H. R. R. Co.* (1897) 16 App. Div. 490, 44 N. Y. Supp. 926.

¹⁰ *Mexican Nat. R. Co. v. Musette* (1883) 7 Tex. Civ. App. 169, 24 S. W. 520 (testimony as to such reputation Vol. 1. M. & S.—28).

not objectionable for the reason that it is not distinctly confined to a period just preceding the accident).

¹¹ There can be no inference of negligence in regard to the employment of a servant where there is no evidence that he had not a good reputation at the time of his hiring, or at any other time than during two days during which he had been engaged in making a single trip on a certain train. *Van Dusen v. Lake Shore & M. S. R. Co.* (1887) 12 N. Y. S. R. 351.

¹² *Gilman v. Eastern R. Corp.* (1865) 10 Allen, 233, 87 Am. Dec. 635 (intemperance); *Monahan v. Worcester* (1890) 150 Mass. 439, 23 N. E. 228 (physical weakness); *Park v. New York*

theory that a general reputation among the coemployees of the delinquent servant is within the scope of the doctrine.¹² It has even been laid down that, where a man is engaged in an occupation which brings him into contact with only one class of a community, the material point is his reputation among that class, and inquiries as to it must be confined to that class.¹⁴ But, apparently, under no conception of what is general reputation could it be held that the remarks of a small section of the coemployees are evidence tending to charge a master with knowledge of the unfitness which is imputed by those remarks.¹⁵

The fact that a servant bore, among his fellow servants, some nickname derogatory of his mental or physical qualities, or his character,

C. & H. R. R. Co. (1898) 155 N. Y. 215, 49 N. E. 674. In *St. Louis, I. M. & S. R. Co. v. Hackett* (1894) 58 Ark. 381, 24 S. W. 881, the fact that the servant's reputation was a matter of common knowledge in the county was held sufficient.

¹²*Texas & P. R. Co. v. Johnson* (1896) 89 Tex. 519, 35 S. W. 1042; *Lambrecht v. Pfizer* (1900) 49 App. Div. 82, 63 N. Y. Supp. 591; *Galveston, H. & S. A. R. Co. v. Henning* (1897; Tex. Civ. App.) 39 S. W. 302, Affirmed in 90 Tex. 656, 40 S. W. 392, but this point was not discussed; *International & G. N. R. Co. v. Jackson* (1901; Tex. Civ. App.) 62 S. W. 91; *Warrington v. Atchison, T. & S. F. R. Co.* (1891) 46 Mo. App. 159 (incompetence of negligent servant a matter of common talk among his fellow servants). In one case, the master's knowledge of intemperate habits was held to have been properly inferred, where they had been "notorious among his fellow employees, and long continued." *Chicago & A. R. Co. v. Sullivan* (1872) 63 Ill. 293. And in two others, where several coemployees testified that he was a very reckless man. *Illinois C. R. Co. v. Jewell* (1867) 46 Ill. 99, 92 Am. Dec. 240; *Calumet Electric Street R. Co. v. Peters* (1899) 88 Ill. App. 112.

¹⁴*Galveston, H. & S. A. R. Co. v. Davis* (1893) 4 Tex. Civ. App. 468, 23 S. W. 301, holding that a question worded: "Do you know what Thomas Henry's general reputation was, and how he was generally regarded as to care and competency, while running his engine?"—was too general, where the delinquent servant was a railway engineer.

¹⁵"The reputation of a foreman amongst a few workmen employed un-

der him is not a general reputation. It is merely the opinion of a small number of men, of which there is no sufficient reason to suppose the master may be cognizant, or which he may be bound to heed." *Driscoll v. Fall River* (1895) 163 Mass. 105, 39 N. E. 1003. In *Davis v. Detroit & M. R. Co.* (1870) 20 Mich. 105, 4 Am. Rep. 364, the court, in discussing the evidence, said: "It is plain however, that Harris is not shown to have a general reputation for carelessness or unfitness of any description. No one ventures to express an opinion to that effect. The evidence only tends to show that, when an accident occurred, remarks were made that he was careless, or that he went too fast. They were such remarks, we suppose, as were almost certain to be made, in any case, when an unfortunate accident occurs, while the consequences are exciting the bystanders, and before inquiry and calm consideration have determined whether there is any basis for them in justice or not. Such remarks are of very trifling importance, and if they would tend to convict a man of negligence, few engineers of much experience, we apprehend, would escape condemnation. And of how little importance they were in the present case, and how little likely to express settled opinions, may be inferred from the fact that no one of the persons supposed to have made these remarks is placed upon the stand to testify to facts which would justify them. We think, therefore, that the evidence of reputation should be dismissed from further consideration." This case was followed in *Walkowski v. Penokee & G. Consol. Mines* (1898) 115 Mich. 629, 41 L. R. A. 33, 73 N. W. 895. See note 6, *supra*.

would seem to be fairly admissible as an element indicative of his general reputation.¹⁰ At all events, it seems proper to say that where such epithets are shown to have been bestowed on a man by any large proportion of his fellow servants, and to have come to the master's ears, prudence demands that inquiries should be made with a view to ascertaining what were the man's real character and capacity.

203. Specific statements as to unfitness made by individual coemployees of the delinquent servant.— A few decisions dealing with the evidential weight of remarks made by the injured servant himself or by coemployees other than the one whose negligence caused the injury, are to be found reported in the books. The conclusion, in each instance, was adverse to the plaintiff, as will be seen from the subjoined note.¹ But it seems to be fairly open to question whether such statements as those mentioned ought not to be regarded as at least sufficient to put a master on inquiry, where it is shown that they were made in the presence of himself or his representative, or were communicated to them. There is, at all events, no room for doubting that

¹⁰ In *Park v. New York C. & H. R. R. Co.* (1895) 85 Hun, 184, 32 N. Y. Supp. 482, evidence that the culpable servant's general reputation prior to the accident was that he was "a little off," and that among railroad men he was usually called "Crazy Brown," was held admissible to prove the master's knowledge of his unfitness. This decision was reversed by the court of appeals, as being inconsistent with the doctrine announced in the cases cited in notes 3, 4, and 5, *supra*. But it seems to be a reasonable deduction from the less restricted doctrine held in the other states, as explained above. In view of the fact that Illinois is one of the states in which the court of last resort has applied the latter doctrine (see note 2, *supra*), it is difficult to admit the correctness of a ruling of the Court of Appeals, that evidence that the delinquent servant was known by the nicknames of "Crazy Pete" and the "Wild Irishman," is inadmissible either for the purpose of showing that the engineer was incompetent or negligent, or for the purpose of showing that the employer knew of his incompetence or negligence. *St. Louis, A. & T. H. R. Co. v. Corgan* (1891) 49 Ill. App. 229.

¹ Recovery cannot be had where the only evidence going to show the master's knowledge is the testimony of the plaintiff that he told the master's representative that the delinquent servant

was incompetent, but there is no evidence that he was actually incompetent, and the master's representative denies that such statements were made. *Snodgrass v. Carnegie Steel Co.* (1896) 173 Pa. 228, 33 Atl. 1104. The mere fact that the plaintiff testifies that he thought the servants by whose negligence he was injured were not "fair hands," and told the employer that he had better get rid of them, will not constitute evidence sufficient to carry the case to the jury. *Sanders v. Ettrick Phosphate Co.* (1883) 19 S. C. 510. Evidence that the yard master of one railroad company, who was short a man, employed a switchman on the statement of a yard master of another company that he "had one that he was done with that he could have," about an hour before an accident to a fellow servant, is insufficient to show negligence on the part of the company in hiring him. *Ohio & M. R. Co. v. Dunn* (1894) 138 Ind. 18, 36 N. E. 702, Rehearing denied in (1894) 138 Ind. 28, 37 N. E. 516. A strong expression of opinion as to the unfitness of the delinquent servant, uttered by a mere fellow servant on the day following the accident, is not competent evidence on that point, as an admission binding the defendant. *Catlin v. Michigan C. R. Co.* (1887) 66 Mich. 358, 33 N. W. 515.

Compare the cases cited in the preceding section, note 15.

it is always a question for the jury whether the retention of the servant was negligent, when his superior has reported that he no longer regards him as competent.²

E. DUTY TO EMPLOY AN ADEQUATE NUMBER OF SERVANTS.

204. Generally.—A duty of the master which, as a matter of logical arrangement, it seems equally appropriate to associate either with that discussed in the foregoing sections, or with that of conducting the business upon a safe system (see chapter xv., *post*), is the duty of employing a staff of servants sufficiently large to perform the work with reasonable safety to themselves.¹ The fact that some slight inconvenience or expense will be caused by engaging the services of an other employee will not excuse the master if the work could not safely be done without him.²

This duty being, like all others, continuous in its quality (see chapter ix., *ante*), the master is bound to see that the number of servants engaged upon the work in hand remains sufficient to insure the reasonable safety of each of them. This principle affects him with liability, not only where he allows the force of employees, considered as a whole, to fall below the proper aggregate, but also where he fails to assign an adequate number of men to each particular piece of work which may be undertaken from time to time.³ His obligation, in this point of view, is deemed to be violated if he conducts his business

¹ *Morroe v. St. Paul City R. Co.* (1898) 71 Minn. 326, 73 N. W. 973.

² *Elike v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545; *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312; *Burke v. Syracuse, B. & N. Y. R. Co.* (1893) 69 Hun, 21, 23 N. Y. Supp. 458; *McMullen v. Missouri, K. & T. R. Co.* (1895) 60 Mo. App. 231; *Albertz v. Bachs* (1890) 32 N. Y. S. R. 1014, 10 N. Y. Supp. 639; *Jones v. Old Dominion Cotton Mills* (1886) 82 Va. 140; *Johnson v. Ashland Water Co.* (1888) 71 Wis. 553, 37 N. W. 823; *Texas & P. R. Co. v. Rogers* (1893) 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378; *Craig v. Chicago & A. R. Co.* (1891) 54 Mo. App. 523. A complaint alleging that the jury was caused by the inadequacy of the number of men employed is demurrable. *Supple v. Agnew* (1904) 191 Ill. 439, 61 N. E. 392, Reversing 80 Ill. App. 437. A ship is "seaworthy," as regards the sufficiency of her crew, if the required number can

be made up by counting in the fireman. *Re Meyer* (1896) 74 Fed. 841.

³ *Trainor v. Philadelphia & R. R. Co.* (1890) 137 Pa. 148, 20 Atl. 632 (master held liable where the plan adopted for taking down a pole required the superintendence of a competent person, but the laborers were left to manage for themselves).

⁴ In an action resulting from a collision, due to the fact that one of the trains was sent out with two instead of three brakemen, it is not error to refuse to charge that, if the jury believed that the third brakeman would not have been at his post, the plaintiff could not recover. It cannot be assumed that, if the third brakeman had been sent, he would not have done his duty. *Booth v. Boston & A. R. Co.* (1878) 73 N. Y. 38, 20 Am. Rep. 97. See also *Braun v. Conrad Seipp Brewing Co.* (1897) 72 Ill. App. 232 (servant withdrawn by order of the master, while the work was in progress).

on a system which ignores the physical needs of his employees to such an extent that they cannot obtain the food necessary for the support of their bodily strength without absenting themselves from their posts.⁴ In its application to cases of this type, the doctrine invades, to some extent, a domain of facts in which it is apt to conflict with that which declares the master to be free from liability for injuries caused by conditions arising out of the mere details of the work. See chapter xxxii., *post*. So far as the movements of servants may depend upon their own volition, and are not in any way affected by the control of a superior, it is clear that there can be no recovery on the theory that the number of servants was temporarily inadequate at the time and place where the injury was received, unless it is shown that such inadequacy was known, actually or constructively, to the master or his representative.⁵

In a purely logical point of view, it is possible to refer to the conception of an inadequacy of the force employed in the cases in which the negligence alleged is the failure to detail a servant to give warning of the approach of danger. But, for the purposes of classification, it seems preferable to treat these cases as exemplifying a breach of the duty to conduct the business on a safe system. They are therefore collected under §§ 209, 210, *post*.

A situation which, in its practical results upon the servant's safety, is identical with that produced by hiring an insufficient number of employees, arises when an employee is given an excessive amount of work to perform. To enable him to recover on this ground, it must be shown that some part of the other work which he had to perform interfered with or prevented his doing something which he might and ought to have done to prevent the accident in suit.⁶

205. Master's performance of duty primarily a question for the jury.—Whether the master has, in any particular instance, fulfilled his obligation to employ a sufficient number of servants is primarily

⁴ *Pennsylvania Co. v. McCaffrey* (1894) 139 Fed. 430, 29 L. R. A. 104, 38 N. E. 67 (railway time table arranged so as to produce this result).

⁵ *Parker v. New York & N. E. R. Co.* (1895) 18 R. I. 773, 30 Atl. 849 (mere fact that a substitute did not remain at a switch continuously during the temporary absence of the regular switchman cannot properly be construed by the jury as an implied notice to the company that said switch was unattended).

⁶ *White v. Sydney & L. Coal & R. Co.* (1893) 25 N. S. 384. Whether a railway company is negligent in employing no more than one watchman to look after the live engines in a yard, and prevent them from being tampered with, is a question for the jury, where the watchman has also to perform the duties of a wiper. *Southern P. Co. v. Lafferty* (1893) 6 C. C. A. 474, 15 U. S. App. 193, 57 Fed. Rep. 537 (two engines got out on main track in some unexplained manner).

a question of fact, to be determined by the jury.¹ But a finding of negligence in this regard is not warrantable where there is nothing to show that the accident was one which should have been anticipated.²

The fact that the number of servants was smaller than usual on the occasion when the accident occurred is one which tells with especial force against the master.³ But evidence to that effect will not establish negligence, where it appears that the safety of the other servants is sufficiently secured by the methods actually adopted in the performance of the work.⁴

It has been held that an action cannot be maintained where there is no evidence of a general usage to engage a servant to perform the

¹ *Ruppel v. Agnew* (1901) 191 Ill. 439, 61 N. E. 392, Reversing (1898) 80 Ill. App. 437. A railroad company is not, as a matter of law, free from negligence in having only one brakeman to control ten loaded cars in descending a grade to a place where they are to be coupled to a stationary car. *Georgia P. R. Co. v. Propst* (1889) 90 Ala. 1, 7 So. 635. An instruction is too broad which declares that a railroad company is negligent, as a matter of law, towards the employees operating a freight train, in failing to furnish a conductor, where a passenger coach is attached. *Means v. Carolina C. R. Co.* (1898) 122 N. C. 990, 29 S. E. 939. On the second and third appeals of this case recovery was allowed on the ground that the train in question was actually a regular passenger train, and not merely a freight train which picked up passengers now and then. (1899) 124 N. C. 574, 45 L. R. A. 164, 32 N. E. 960, and (1900) 126 N. C. 424, 35 S. E. 813.

Verdicts have been upheld which were based on the theory that a railway company is bound to see that a derrick provided for the use of shippers, the arm of which is liable, when not fastened, to swing out over the track, and so endanger trainmen, is placed under the charge of a competent servant, so that it may be kept properly fastened when not in use. (*Gates v. Chicago, M. & St. P. R. Co.* [1892] 2 S. D. 422, 50 N. W. 907); and that a railway company must keep enough trackmen, not only to supervise the line under ordinary circumstances, but also for extraordinary occasions, as after a rainstorm, when it needs a more minute inspection. (*Hardy v. Carolina C. R. Co.* [1877] 76 N. C. 5).

² No obligation on the part of a railway company to keep an agent at a flag station where there is an unblocked siding can be predicated, in the absence of evidence that the track is in such a condition that there is danger that cars may escape onto the main line. *Hebert v. Flint & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 659. The owner of a steamer, tied up for the winter, is not bound to keep a night watchman on board, to lessen the risk of injury from fire to which members of the crew, who are sleeping on board, are exposed. *Lang v. H. W. Williams Transp. Co.* (1898) 119 Mich. 80, 77 N. W. 633.

³ *South West Improv. Co. v. Smith* (1888) 85 Va. 306, 7 S. E. 365 (verdict for plaintiff proper, where loaded coal cars in a mine got beyond control, owing to there being only one brakeman on duty, instead of two, as was usual); *Thorpe v. Missouri P. R. Co.* (1886) 80 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3 (verdict for plaintiff proper, where the switching crew, of which he was one, was smaller than usual, and he was injured while coupling cars, owing to the fact that his signals to the engineer were not transmitted); *Stoddard v. St. Louis, K. C. & N. R. Co.* (1877) 65 Mo. 515 (not error to refuse to direct a verdict for the defendant, where the master's representative had been notified that one of the regular hands was too sick to attend to his duties, and no substitute was provided).

⁴ *Gulf, C. & S. F. R. Co. v. Compton* (1890) 75 Tex. 667, 13 S. W. 467 (company broke custom of sending out water trains equipped with a conductor).

functions in question;⁵ and that the master cannot be held liable on the ground that, although the customary number of servants was engaged on the work to be done, use might have been made of an additional servant on the occasion when the accident occurred, with the possible result of preventing it.⁶ But the controlling significance thus ascribed to usage is not conceded in all jurisdictions. See § 50, *ante*.

⁵The absence of such evidence was one of the grounds of the decision in *Lang v. Williams Transp. Line* (1894) 110 Mich. 80, 77 N. W. 633, cited in note 2, *supra*.
⁶*Relyea v. Kansas City, Ft. S. & G. R. Co.* (1892) 112 Mo. 80, 18 L. R. A. 817, 20 S. W. 480 (rear collision of two freight trains equipped with the customary number of brakemen).

CHAPTER XIV.

DUTY OF THE MASTER WITH REGARD TO ANIMALS.

As to animals, considered as a part of the master's "plant," as that word is used in the employer's liability acts, see chapter xxxvii. *post*.

206. Nature or duty explained.—It is well settled that a servant may recover for injuries caused by an animal which the master uses as a part of his industrial appliances, or keeps on the premises for other purposes, if it is vicious, or in some other way dangerous to persons doing work by its agency, or in its neighborhood, and the master was, or ought to have been, aware of its bad qualities.¹

Wherever the animal is used as an industrial appliance, the necessity of proving the master's knowledge may be regarded as being simply an application of the general principle discussed in chapter x. But in other instances the requirement may be viewed either from this standpoint, or with reference to the old rule of the common law that the *scienter* of the owner of a vicious or mischievous animal is the gist of an action against him for any injuries which it may inflict upon persons or property.²

A specific and independent cause of action may be predicated of the

¹ This rule was applied in the case of a vicious dog (*Farley v. Picard* [1894] 78 Hun, 560, 29 N. Y. Supp. 802); a vicious horse (*Knickerbocker Ice Co. v. Finn* [1897] 25 C. C. A. 579, 51 U. S. App. 256, 80 Fed. 483; *Bessemer Land & Improv. Co. v. Dubose* [1899] 125 Ala. 442, 28 So. 380; *Leigh v. Omaha Street R. Co.* [1893] 36 Neb. 131, 54 N. W. 134; *George H. Hammond Co. v. Johnson* [1893] 38 Neb. 244, 56 N. W. 967; *Green & C. Street Pass. R. Co. v. Bresmer* [1881] 97 Pa. 103; *Gray v. Germania Gas Coal Co.* [1894] 164 Pa. 508, 30 Atl. 397; *Cooper v. Portner Brewing Co.* [1901] 112 Ga. 894, 38 S. E. 91; *Martin v. Wrought Iron Range Co.* [1893] 4 Tex. Civ. App. 185, 23 S. W. 387; *Wilson v. Sioux Consol. Min. Co.* [1898] 16 Utah, 392, 52 Pac. 626; *Fraser v. Hood* [1887] 15 Sc. Sess. Cas. 4th series, 1780; bolting horses (*Moffatt v. Bateman* [1869] L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore P. C. C. N. S. 369); untrained horses (*Wilson v. Boyle* [1889] 17 Sc. Sess. Cas. 4th series, 62). An averment that the master continued to use a horse which he knew to be unfit for the work is sufficient to take the case to the jury. *Crichton v. Keir* (1863) 1 Sc. Sess. Cas. 4th series, 407.

² See 1 Beven, Neg. p. 633; *Shearm. & Redf. Neg.* § 628. This rule, and not the general principle mentioned in the text, was the basis of the decision in *Clark v. Armstrong* (1862) 24 Sc. Sess. Cas. 2d series, 1315 (farmer not bound to keep a bull confined and shut up, on the chance that it may injure one of the farm servants).

failure of the master to warn the servant of the unsafe character of an animal.³ See chapter xvi., *post*.

As in the case of other appliances, the servant's knowledge of the danger to which he is exposed by an animal is, in most jurisdictions, deemed to be conclusive proof that he assumed the resulting risk.⁴ See chapter xvii., *post*.

As to the duty to adopt a safe system, in so far as it relates to the duty of inspection, see chapter xi., *ante*.

As to the employment of a sufficient number of servants, see chapter xiii., *ante*.

As to the evidential significance of the master's violation of or compliance with one of his own rules, see § 16, *ante*.

As to the non-delegable quality of the duty of making an enforcing rules, see chapter xxxi., *post*.

³ *Bowman v. Texas Brewing Co.* deer and elk are kept in the inclosure in (1897) 17 Tex. Civ. App. 446, 43 S. W. which he is to do his work. *Bormann v. Milwaukee* (1896) 93 Wis. 522, 33 808.

⁴ As, where an employee knows that L. R. A. 652, 67 N. W. 924.

CHAPTER XV.

DUTY OF THE MASTER TO CONDUCT THE BUSINESS UPON A SAFE SYSTEM.

A. DUTY CONSIDERED WITHOUT REFERENCE TO FORMAL RULES.

- 207. Master bound to see that the instrumentalities are properly used.
- 208. Application of this doctrine in specific cases.
- 209. Duty to warn a servant in regard to transitory and sporadic dangers.
- 209a. Limits of this duty.

B. DUTY TO FORMULATE RULES DEFINING THE MANNER IN WHICH THE WORK IS TO BE DONE.

- 210. Generally.
- 211. Limits of the duty to promulgate rules.
- 212. Relation of this duty to that of instruction.
- 213. Common usage as a test of the performance of the duty.
- 213a. Habitual practice; how far a legal substitute for a rule.
- 213b. Duty to bring the rules to the notice of the servant.
- 214. Duty to enforce the rules promulgated.
- 215. Construction and meaning of rules.
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C. PERFORMANCE OF THE DUTY IN SPECIFIC CASES.

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- a. Generally.
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218. — of employees engaged in track work.

219. — of car repairers.

220. — of employees working in yards.

221. Automatic and unauthorized movements of cars.

222. Track repairing as it affects the safe operation of trains.

223. Loading of cars.

224. Work in concerns other than railways.

D. WHEN A RULE IS BINDING UPON A SERVANT.

225. Introductory statement.

226. No rule deemed to be binding unless it is brought to the knowledge of the servant.

227. When a servant is deemed to have knowledge of a rule.

228. Reasonableness.

229. Rules making servants the insurers of their own safety.

230. Rules requiring the servant to examine the appliances used by him.

- 231. Conflict between the obligation of a rule and other duties.
- 232. Waiver of rules, when inferable from the master's acquiescence in their violation.
- 233. Rationale of the doctrine of waiver.
- 234. Waiver considered with reference to an express agreement to obey the rules.

As to the duty to adopt a safe system, in so far as it relates to the duty of inspection, see chapter XI., *ante*.

As to the employment of a sufficient number of servants, see chapter XIII., *ante*.

As to the evidential significance of the master's violation of or compliance with one of his own rules, see § 16, *ante*.

As to the non-delegable quality of the duty of making and enforcing rules, see chapter XXXI., *post*.

As to the necessity of proving that the omission to promulgate rules was the proximate cause of the injury in suit, see chapter XLII., *post*.

A. DUTY CONSIDERED WITHOUT REFERENCE TO FORMAL RULES.

207. Master bound to see that the instrumentalities are properly used.

—It has been recognized from a very early period in the evolution of the law relating to the employer's liability for injuries to his servants that he is, to use the language of an eminent English judge in a noted case, "no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery, than for injuries caused by a defect in the machinery itself," or, in other words, that "a master is responsible, in point of law, not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used."¹

A servant's complaint is not demurrable where the unsafety of the system is alleged as the cause of the injury.² Nor should a verdict be

¹ Lord Watson, in *Smith v. Baker* case the injured servant was not in the employ of the defendant. An employer is bound "so to carry on his operations as not to subject those employed by him to unnecessary risk." *Smith v. Baker* [1891] A. C. 325, 362, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660, referring to the opinions of Lord Chelmsford in *Bartonshill Coal Co. v. McGuire* (1858) 3 Macq. H. L. Cas. 310, 4 Jur. N. S. 773, and of Lord Wensleydale in *Weems v. Matheson* (1861) 4 Macq. H. L. Cas. 226. About the same time that these last-cited cases were decided, the court of exchequer applied a like principle in *Lose v. Lancashire & Y. R. Co.* (1858) 2 Hurl. & N. 728, 27 L. J. Exch. N. S. 249, 4 Jur. N. S. 364. But in this

² *Reagan v. St. Louis, K. & N. W. R. Co.* (1887) 93 Mo. 348, 6 S. W. 371; *Snyder v. Cleveland, C. C. & St. L. R. Co.* (1899) 60 Ohio St. 487, 54 N. E.

directed for the defendant on the ground that the injury was caused by a fellow servant's negligence, where such unsafety is one of the grounds of recovery relied upon, and the charge is supported by evidence.³

As already observed in § 9, *ante*, the scope of the duty now under review is very considerably restricted by the operation of the doctrine of common employment, a result which follows naturally and unavoidably from the fact that the persons who use the instrumentalities, or direct them to be used in certain ways, are themselves almost invariably employees. In fact, it may be laid down broadly that, except in those instances where the master himself supervises the work (see § 10, *ante*), or the method under discussion was put into operation with his direct sanction, the first stage in the investigation of a servant's right to recover on the ground of the imperfection of the system of work must always be the establishment of either of two conclusions, *viz.*: (1) That the performance of a non-delegable duty was involved; or (2) that the employee who made the arrangements alleged to be negligent was a vice principal by virtue of his official position.

If there is any evidence which tends to show that the system of work adopted by the defendant was an improper one, it is error to dismiss the action.⁴

Negligence cannot be imputed of the mere fact that a master has permitted his servant to put an appliance, more or less fre-

475; *Macdonald v. Edson Coal Co.* (1896) 23 Sc. Sess. Cas. 4th series, 504. In *Reed v. Northeastern R. Co.* (1891) 37 S. C. 42, 16 S. E. 289, a complaint was held not to be demurrable which alleged that the plaintiff's decedent was killed owing to the fact that the defendant had left open the switches leading to a "Y" line and spur, and that a train was consequently derailed. The basis of the decision apparently is that the averments did not necessarily imply that the condition of the switches was due to the negligence of a fellow servant.

³ *McKillop v. North British R. Co.* (1896) 23 Sc. Sess. Cas. 4th series, 768; *Gibson v. Nimmo* (1895) 22 Sc. Sess. Cas. 4th series, 491. A nonsuit is improper where, so far as appears, the act of the fellow servant which caused the injury may have been authorized by the rules of the defendant. *Dick v. Indianapolis, C. & L. R. Co.* (1882) 38 Ohio St. 389 (section hand struck by

train running with unusual rapidity while racing with another).

⁴ *Fairweather v. Owen Sound Stone Quarry Co.* (1895) 26 Ont. Rep. 604. There it was held that there could be no recovery in so far as the plaintiff's claim rested on the fact that he had suffered injury through the negligence of the company's manager; but it was deemed necessary to send back the case for a new trial, for the reason that the jury had not been asked to consider certain testimony which was to the effect that the manner of working was to take the tamps out of the charged holes which failed to explode; that a dangerous tool, or one not sufficiently guarded, was in use for this purpose; and that the plot was furnished by the directors of the company. The court considered that the manner of working the quarry ought to be known to the defendant corporation, and that they should be answerable if the system is dangerous or negligently conducted.

quently, to a use for which it was not intended.⁵ Such a situation is, however, viewed somewhat differently if the conduct of the servants amounted to an infraction of an express rule. See § 232, *post*.

208. Application of this doctrine in specific cases.— Negligence in respect to the system upon which the master's business is conducted is imputable where a servant is given more work than he can perform efficiently;¹ where the space in which a servant is required to perform a duty is not sufficiently large for the work to be done;² where an instrumentality is put to uses to which it is not adapted;³ where the methods adopted for getting heavy objects on to or off of railway cars and other vehicles are dangerous;⁴ where the methods of handling the cargoes of vessels expose the servants to undue perils;⁵ where no proper precautions are taken to protect car repairers;⁶ or where railway rolling stock is moved in such a way as to expose employees to unnecessary risk.⁷

¹After laying down the rule that it was no part of the defendant's obligation to furnish an appliance which should be safe for any illegitimate use, the court remarked: "We know of no principle which imputes negligence to an employer under such circumstances, merely because he permits his workmen to relax his regulations or disregard his general instructions or advice, when they choose to do so for their own convenience, and with knowledge of the risk." *The Persian Monarch* (1893) 5 C. C. A. 117, 14 U. S. App. 158, 55 Fed. 333.

²See § 204, note 5, *ante*.

³*Cole Bros. v. Wood* (1894) 11 Ind. App. 37, 36 N. E. 1074.

⁴As, where a traveling crane is used to tear up the rails of an old line of railway. *Welsh v. Moir* (1885) 12 Se. Sess. Cas. 4th series, 590. See also §§ 26 28, *ante*.

⁵A foreman of a section gang engaged in loading ties upon cars is under the duty to adopt some extra precaution to guard against accident to a subordinate placed in a car in such a position that at times he cannot see what is being done by those throwing the ties over the side of the car. *Clough v. Kansas Ctn. Ft. S. & M. R. Co.* (1894) 56 Mo. App. 630. In *South-eastern Kansas R. Co. v. Moore* (1892) 49 Kan. 616, 31 Pac. 138, a servant was allowed to recover on the theory that some special appliances ought to be furnished, for the purpose of facilitating the work of loading rails on flat cars.

On the other hand, it has been held that negligence cannot be inferred where the method adopted for loading rails on flat cars was for the men to lift a rail, walk with it to a car, and, when they reached the car, to line up, and at the word of command throw it, by a combined effort, on the car. *Conne v. Union P. R. Co.* (1889) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382.

⁶A steamboat which attempts to deliver freight without mooring, when certain danger to the crew is necessarily involved, is liable for the drowning of an employee by falling from the stage plank on its withdrawal from the shore, made necessary to save her smokestacks, while such employee is actually crossing the plank. *Cheatham v. Red River Line* (1893) 56 Fed. 248. See also § 209, notes 3 and 4, *post*.

⁷In *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266, the court, alluding to the fact that one of the precautions taken by some of the railroad companies is to place locks upon the switches, said that, if the defendant had adopted that precaution, no question could presumably have been raised as to its sufficiency. See also §§ 209, 219, *post*.

⁸A railway company which permits its tracks to become unsafe should be held to an increased responsibility for the manner in which its trains are run over such tracks. *Wilson v. Louisiana & N. W. R. Co.* (1899) 51 La. Ann. 1133, 25 So. 961. Negligence is infer-

Culpability is also inferable where there are no proper arrangements for guarding stationary locomotives, so as to prevent them from

able where, by the arrangements of a railway company, train hands were required to run cars along a trestle until they came very close to a place where it ceased to be safe, there being nothing to indicate the point at which the defective part began. *Paulmier v. Erie R. Co.* (1870) 34 N. J. L. 151. An elevated street railroad company is not liable for injuries resulting in the death of a workman employed on the track, merely because it allowed trains to closely follow one another. *Bruen v. Uhlmann* (1899) 40 App. Div. 620, 60 N. Y. Supp. 222, denying rehearing (1898) 30 App. Div. 453, 51 N. Y. Supp. 958. Where men are at work in foggy weather on a trestle over which trains are run at intervals the company is bound to take such precautions as are proper in view of the atmospheric conditions. *Inter-State Consol. Rapid Transit R. Co. v. Fox* (1889) 41 Kan. 715, 21 Pac. 797. Whether the custom of pushing flat cars ahead of the engine is negligent is a question for the jury. *Fordyce v. Lowman* (1893) 57 Ark. 160, 20 S. W. 1090. A railroad company cannot be found guilty of negligence toward an employee killed on its track, for the reason that, in a yard where trains are moving almost constantly, it starts a train while a dense smoke has settled down on the track from the locomotive of another train. *Moore v. Great Northern R. Co.* (1897) 67 Minn. 394, 69 N. W. 1103. It is not negligence, as a matter of law, for a railway company to permit its cars to run unattended in its yard, though it would probably be otherwise if moving cars were left without some one to control them, in places where the public were allowed to be on the tracks. *Kelley v. Chicago, M. & St. P. R. Co.* (1881) 53 Wis. 74, 9 N. W. 816. It is not negligence, as a matter of law, to shunt cars by kicking them backward by an engine, unattended by a brakeman or lookout, in a yard where trains are being made up. *Schnible v. Lake Shore & M. S. R. Co.* (1893) 97 Mich. 318, 21 L. R. A. 660, 56 N. W. 565. The ground of the decision was that the trial judge had, in his charge, improperly ignored the element of the servant's knowledge of the risk caused by this system of shunting. The authorities followed were *Murphy v. New York C. & H. R. R. Co.*

(1882) 11 Daly, 122 and *Campbell v. Pennsylvania R. Co.* (1887; Pa.) 2 Atl. 489, where employees were denied recovery on the ground that they were aware of the manner in which the company was accustomed to do the shunting of its cars in its yards. Whether a railroad company was guilty of negligence toward an employee killed by being run over by a train is for the jury, where he was crossing one of six parallel tracks in the course of his employment at the time of the accident, and by reason of frequent passing of trains and the large number of men employed the work was extremely hazardous, and the foreman undertook to direct the time of crossing the tracks, and there is evidence that the train approached noiselessly, and, owing to a storm and the darkness, was observable only a few car lengths, and even at that distance it could not be ascertained whether it was moving or not. *Illinois C. R. Co. v. Gilbert* (1895) 157 Ill. 354, 41 N. E. 724. It is a high degree of negligence toward an employee required to traverse the track in the nighttime, to run a train without a headlight on a dark night. *Baltimore & O. S. W. R. Co. v. Isop* (1898) 176 Ill. 471, 52 N. E. 237, 732. Affirming (1897) 71 Ill. App. 74. Where an employee who was engaged in coupling cars, after they had been weighed, while in motion, as they were kicked one by one, while loaded, on scales, was injured in consequence of failing to get out of the way of one, which he alleges was coming faster than usual, the mere fact that it was moving at more than the usual rate of speed, with no other proof of negligence, except his assertion that the cars could have been sent over the scales at a lower rate of speed, is not sufficient to show negligence on the part of the company, where he testifies that twice before they had come as fast as this one, and he had refused to make the coupling. *Woods v. St. Paul & D. R. Co.* (1888) 39 Minn. 435, 40 N. W. 520. On the ground of compliance with common usage it has been held that it is not negligent to make flying switches. *Hunt v. Hurd* (1900) 39 C. C. A. 220, 98 Fed. 683; *Gorman v. Minneapolis & St. L. R. Co.* (1889) 78 Iowa, 300, 41 N. W. 303. For the same reason there is no negligence in starting a train

being put into motion by the careless or wilful act of strangers;⁸ where a siding is constructed on an inclined plane, without special precautions to prevent the escape of rolling stock on to the main line;⁹ where a switch which it is the company's duty to keep closed is left open;¹⁰ where workmen are not properly protected from dangers to be anticipated from the ordinary movements of vehicles in the public streets;¹¹ where no proper measures are taken to prevent a dangerous current of electricity from being sent over a wire at a time of the day when lamps are customarily trimmed;¹² where workmen are not protected from heavy fragments of metal which are apt to be caught up by a large cogwheel and thrown about the room in which they are engaged;¹³ where the arrangement of the plant is such that servants handling explosives are exposed to unnecessary dangers;¹⁴ where proper supervision is not exercised, with a view to

without a snow plough and two engines to force a passage through a snow drift. *Bryant v. Burlington, C. R. & N. R. Co.* (1885) 66 Iowa, 305, 55 Am. Rep. 275, 23 N. W. 678. It is not negligence to subject the couplings of cars to the additional strain caused by the use of two engines to draw the train. *Hauk v. Pennsylvania R. Co.* (Pa. 1887) 9 Cent. Rep. 786, 11 Atl. 459 (plaintiff's contention was that one of the engines should have been used as a "pusher"). Backing a gravel train when a road is under construction is not negligence. *Carr v. North River Constr. Co.* (1888) 48 Hun, 266. Compare § 29, *ante*. Whether or not a company is negligent in failing to designate, by a clearing post or otherwise, the distance at which cars on the repair track should be placed from the lead track, and so liable to a car repairer injured by reason of the tender of a passing engine on the lead track striking a car on the repair track, is for the jury, where there is evidence that a point of safety could have been designated. *Cumpton v. Texas & P. R. Co.* (1895) Tex. (Civ. App.) 33 S. W. 151, former appeal (1893) 4 Tex. Civ. App. 25, 23 S. W. 47. In *McDonald v. Chicago, St. P. M. & O. R. Co.* (1889) 41 Minn. 439, 43 N. W. 380, it was held to be negligence as regards an experienced servant to adopt the method of turning an engine upon a turntable by means of another engine, the force being applied by a stick extending between them. Other cases involving situations similar to those presented in the above note will be found in §§ 209, 217-220, *post*.

⁸ *Southern P. Co. v. Lafferty* (1893) 6 C. C. A. 474, 15 U. S. App. 193, 57 Fed. 536. Compare § 221, *post*.

⁹ In *Galveston, H. & S. A. R. Co. v. Crockett* (1894) 6 Tex. Civ. App. 160, 25 S. W. 486, the precaution suggested was the use of a stub switch, so constructed that it would cause loose cars to run off a side track before reaching the main track. Compare § 221, *post*.

¹⁰ *International & G. N. R. Co. v. Johnson* (1900) 23 Tex. Civ. App. 160, 55 S. W. 772.

¹¹ Where a wagon of a third person runs against a guy rope stretching from a structure upon which work is being done at night, and thereby causes a servant engaged in that work to fall to the ground, his master may be found liable for the reason that he failed to protect his employees by setting danger signals or stationing a watchman near the guy rope, and he cannot excuse himself on the ground that, when the work was begun, he furnished an adequate supply of lamps which they might have used. *Grace & H. Co. v. Kennedy* (1900) 40 C. C. A. 69, 99 Fed. 679.

¹² *Harroun v. Brush Electric Light Co.* (1896) 12 App. Div. 126, 42 N. Y. Supp. 716, Appeal dismissed in (1897) 152 N. Y. 212, 38 L. R. A. 615, 46 N. E. 291.

¹³ *Richlands Iron Co. v. Elkins* (1893) 90 Va. 249, 17 S. E. 890. Compare note 5, *supra*.

¹⁴ The system of work at a quarry is negligent where a steam crane is placed in such a position that the live cinders thrown out by the boiler furnace frequently fall at a place where workmen

protecting the servants against falling bodies;¹⁵ where the arrangements made for giving signals for the movement of machinery are not such as are calculated to secure the safety of the servants whom that movement may endanger.¹⁶

If the servants employed are not competent for the work to be done unless they are under proper supervision, the master fails to perform his duty to have competent servants, where he has not arranged to have such supervision exercised at the time it is required.¹⁷

Whether the system of work is to be deemed negligent will sometimes depend upon the skill and experience of the servant who is seeking recovery.¹⁸ See, generally, chapter VII., *ante*.

For other cases which might, as a mere matter of logical classification, be placed under the head of the master's duty to provide a safe system, see §§ 86, 98, 102, 103, 105, 107, *ante*.

As to common usage as a test of the quality of the methods of work, see § 46, *ante*.

209. Duty to warn a servant in regard to transitory and sporadic dangers.—One very common aspect of the duty to provide a safe system is presented in those cases in which the gravamen of the complaint is a breach of the obligation to warn a servant against perils arising from the manner in which the instrumentalities are affected by isolated events which occur at more or less frequent intervals during the performance of the servant's work, but which produce no permanent effect upon the intrinsic condition of the instrumentalities themselves. The distinctive feature which is common to actions to recover for injuries caused by such perils is that the environment of

are putting in blasts, and no arrangements are made for intercepting those cinders. *Grant v. Drysdale* (1883) 10 Sc. Sess. Cas. 4th series. 1159.

¹⁵ *Di Vito v. Crage* (1898) 35 App. Div. 155, 55 N. Y. Supp. 64 (rock which had been thrown by a previous blast on to top of the bank underneath which a servant was put to work fell on him).

¹⁶ As regards coal miners engaged in placing loaded hutches on the hoisting cages, it is negligence not to provide a bell for signaling the engineer of the hoisting apparatus, and to appoint an employee to superintend the placing of the hutches and to regulate the ascent and descent of the cages. *Murdock v. Mackinnon* (1886) 12 Sc. Sess. Cas. 4th series. 810.

¹⁷ *McElligott v. Randolph* (1891) 61 Conn. 157, 22 Atl. 1094; *Trainor v. Philadelphia & R. R. Co.* (1890) 137

Pa. 148, 20 Atl. 632; *McCarthy v. Thomas Davidson Mfg. Co.* (1899) Rap. Jud. Quebec, 18 C. S. 272. See also cases cited under §§ 204, 205, *ante*.

¹⁸ An employer is not, as a matter of law, free from negligence in directing an inexperienced employee to hold one end of a plank the other end of which rests on a wagon for the purpose of unloading a heavy barrel by means thereof. *Beard v. American Car Co.* (1895) 63 Mo. App. 382 (the barrel struck the inner end of the plank off of the wagon on to the ground, and, falling upon it, caused such a shock as to break the servant's wrist. The point was that this method of unloading would not have been dangerous to an experienced workman who understood how far the plank should have extended inside the wagon to prevent its being pushed off).

the servant undergoes some temporary change. A warning appropriate to such circumstances may be given in the shape of a general instruction. It must, then, be such as to put the servant upon his guard, either by notifying him of the time and place where he may expect the change to occur, or, at all events, by notifying him that, within certain limits, the change may occur, at any time, and any place. (See below.) Or the warning may take the form of some signal informing the servant that the change is imminent. In either case, the danger to be provided for will often be such that the servant's safety can be effectively secured only by directions in the nature of rules promulgated beforehand for the guidance of all the servants, both those who are to be protected against sporadic dangers and those whose acts may produce such dangers. The logical relation thus indicated is deemed to be a sufficient warrant for considering this obligation as one which arises out of the duty to conduct the business on a safe system. In a merely logical point of view, however, it might, with perfect propriety, be discussed in connection with the general obligation of keeping the servant informed as to dangers which he has no means of ascertaining himself. See next chapter.

One phase of the obligation is indicated by the principle that the master is bound to see that no order with respect to change of position of the subject of the work shall be executed without due warning to the employee.¹ This principle is exemplified in a class of cases involving injuries of a type very common in the great industrial establishments of modern times,—injuries, that is to say, produced by the fact that some heavy object not under the control of some particular servant passes at intervals along certain lines through the space in which a servant is required to work. The special danger to be anticipated from such an event arises from the fact that the servant's coemployees, whose duty it is to regulate the movement of the heavy object, be they ever so vigilant, will often find it impossible to save him from injury by a warning given immediately before the entrance of the object into the space, where there is a danger of its impinging either upon his own person, or upon some object which will thereby be set in motion to his injury, and that the servant himself will often be unable, consistently with giving adequate attention to his duties, to keep a proper watch for the approach of the object. The situation, therefore, is one in which the highest degree of care on the part of the servants themselves cannot always avert a catastrophe, and in

¹ *Stewart v. Philadelphia, W. & B. R. Co.* (1889) 8 Honst. (Del.) 450, 19 Atl. 639 (charge to jury).
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which the adoption of suitable precautions by the master is calculated to diminish very greatly the risk of such a catastrophe. Under such circumstances it is reasonable to infer the existence of an absolute duty on the master's part to make arrangements for imparting a timely warning to any servant who may be imperiled by such a cause.

The most numerous illustrations of the duty to give warning are furnished by those cases in which the danger was produced by the movements of railway rolling stock, or other similar appliances.²

¹Negligence may be inferred where no system of signals has been provided for warning track laborers in a tunnel as to the movements of trains. *Felice v. New York C. & H. R. R. Co.* (1897) 14 App. Div. 345, 43 N. Y. Supp. 922. Though there is no rule requiring the train dispatcher to notify an engineer of the whereabouts of a train with which he is liable to collide, it is his duty, when knowing that a train, which has orders to and is making 25 miles an hour, is only ten minutes behind a train allowed to make but 16 miles an hour, and which is three hours late, to telegraph warning to them. *Houston & T. C. R. Co. v. Higgins* (1900) 22 Tex. Civ. App. 430, 55 S. W. 744. It is negligence to omit to notify the employees who are dispatching an extra freight train by night, that the track is obstructed at a yard which the train will reach within an hour after starting, and also negligence to omit to notify those in charge of the yard that the train is coming. *Mettrac v. Texas & P. R. Co.* (1898) 50 La. Ann. 466, 23 So. 461 (fireman injured by a collision). It is the duty of those operating a freight train which is being backed onto a switch, to station a man on the rear car to warn employees rightfully on the track as to its approach, and it is no excuse for the failure to perform this duty that the rear car was a box-car, which did not conveniently admit of this precaution being taken. *Illinois C. R. Co. v. Mahan* (1896) 17 Ky. L. Rep. 1200, 34 S. W. 16. To drive one car, without warning, against another which is being repaired is negligence. *Stucke v. Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342. A railroad is liable for the death of an employee while loading with heavy lumber cars standing on a spur or side track, through the fall of the lumber on him, caused by a jolt while coupling the car in which he was at work, without notice to him. *Rayland v. St. Louis, I.*

W. & S. R. Co. (1897) 40 La. Ann. 1166, 22 So. 366. A complaint relying on the theory that a railroad company owes a station agent who was engaged in unloading a car, requiring his presence on the main track, the duty of giving warning of the approach of a freight train on the main track, is not demurrable, as it may have been that strict attention to the work in which he was engaged was inconsistent with constant watchfulness for approaching trains. *Snyder v. Cleveland, C. C. & St. L. R. Co.* (1899) 60 Ohio St. 487, 54 N. E. 475. In the following case the doctrine is laid down that, independently of the rules prescribed by the company, it owed a duty to its yard switchmen to give a signal of the movement of an engine, where such has been the custom. *Sobieski v. St. Paul & D. R. Co.* (1889) 41 Minn. 169, 42 N. W. 803. Irrespective of a statute, the starting or running of a switch engine in a switch yard filled with a network of tracks, upon which cars and engines are constantly moving, and in which yardmen are constantly at work, without the ringing of a bell or the blowing of a whistle, is evidence of negligence. *Union P. R. Co. v. Elliott* (1898) 54 Neb. 299, 74 N. W. 627. The failure of employees in charge of a work train running backward, to station a lookout on the leading car to give notice to the engineer of the approach of another train, is negligence. *Rinard v. Omaha, K. C. & E. R. Co.* (1901) 164 Mo. 270, 64 S. W. 124. A railroad engineer who knows that a brakeman is standing on the pilot to make a coupling is negligent in suddenly and without warning increasing the speed of the train when about 6 feet from the car to which the engine is to be coupled. *St. J. & L. C. R. Co.* (1895) 94 Iowa 380, 62 N. W. 799. A conductor is negligent, if, knowing that a car is being and unexpectedly starting of a train without notice to a brakeman on a

The omission to warn has also been declared to be a ground for holding the master liable, where the servant was exposed to the risk of injury from the operation of hoisting appliances,² or from heavy bodies which are thrown from a higher level as a detail of the work,³ or from heavy substances which are likely to fall at irregular intervals

in coupling a car will probably endanger his safety, he orders it to be moved without giving warning to him. *Purcell v. Southern R. Co.* (1896) 119 N. C. 728, 20 S. E. 161. A laborer ordered to unload a car has a right to assume that the other cars will not be backed down on the car while he is at work, without notice to him. *North Chicago Rolling Mill Co. v. Johnson* (1885) 114 Ill. 57, 20 N. E. 186. The risk that an engine which is believed to be on its way to the repair shops will, in a few minutes, back towards the place at which a yard clerk has just alighted from it, not only without signals, but without any lookout, is not one which is assumed by such clerk. *St. Louis & T. H. R. Co. v. Eggmann* (1895) 60 Ill. App. 291. Where an employee of a railway construction company is at work on top of a tower wagon on the tracks of a street railway company, over which its cars were running, necessitating the frequent removal of the wagon from the tracks, by reason of which plaintiff was injured, it is the duty of the construction company to use ordinary care to prevent injury to its employee, while at work on the tower wagon, by so protecting the wagon that it would not have been necessary to remove it while he was at work, without notice or warning. *North American R. Constr. Co. v. Putry* (1900) 10 Kan. App. 55, 61 Pac. 871. Where a servant is engaged in repairing a cable which has been lowered so far that there is danger of its being struck by an engine which is moving up and down a railway track over which it hangs, the master is guilty of negligence if he omits to furnish a watchman, and see that he is stationed so as to stop the engine. *Burns v. Merchants' & Planters' Oil Co.* (1901) Tex. Civ. App. 63 S. W. 1061. The owner of steel works, who uses a locomotive to shift the materials, is bound to give an inexperienced servant special instruction as to the danger to which he is exposed by the passage of such locomotive at a place where he cannot see it approaching until it has almost reached him. *Weiss v. Bethlehem Iron Co.*

(1898) 31 C. C. A. 363, 59 U. S. App. 627, 88 Fed. 23. A servant who, while his attention is absorbed by his work, is injured by a cable which is moved along the ways on which it travels without any warning signal, may recover damages. *Michael v. Rounoke Mach. Works* (1894) 90 Va. 492, 19 S. E. 261. See also the cases cited in note 6, *infra*. Additional cases in which the facts were of an essentially similar nature, but which are classified under other headings, for the reason that the decisions were founded upon a somewhat different logical conception, are cited in the preceding section and in subtitle C of this chapter.

² Negligence is inferable from the absence of a man to superintend the placing of the coal hatches in the hoisting cage of a mine, and the want of a bell to communicate with the employee who operated the hoisting apparatus. *Murdock v. Mackinnon* (1885) 12 Se. Sess. Chas. 4th series, 816. The danger of striking a person coming up from the hold of a vessel, in swiveling barrels into the hatchway, requires, so long as shipwrights are at work in that part of the hold, and their work makes it necessary for them to come on deck through the hatch into which the loading is going on, that means should be taken by those in charge of the loading to ascertain when someone is coming up the ladder, or that someone should be stationed at such a place near the hatch that those coming up may be properly and seasonably warned. *The Pioneer* (1897) 78 Fed. 600.

³ Where it is essential to the safety of laborers, whose duties in the loading of a ship require them to be in the hold, that a "hatch-tender" should be stationed at the hatchway to warn them when bales of cotton are about to be thrown into the hold, it is the duty of the company to supply a person to be stationed at the hatchway for that purpose. *Cherney v. Ocean S. S. Co.* (1893) 92 Ga. 726, 19 S. E. 33. An employer is not, as matter of law, free from negligence in causing the bank of earth at the side of a ditch in which an employee is working to fall by prod-

through the action of gravitation alone,⁵ or from flying fragments of materials⁶ found in the master's establishment,⁶ or from a sudden rush of steam into a boiler where the servant was set to work,⁷ or from the dangerously high pressure of steam in a wooden vessel, into which it has been admitted at a time when a vent which should have been open is plugged up,⁸ or from explosive substances.⁹ Negligence is predicable where no proper precautions are taken, after several blasts have been set off, to ascertain whether they have been all properly exploded, so that the servants might be warned before returning to their work,¹⁰ or from the presence of a current of electricity in places where the servant has no reason to expect it.¹¹

Where the employer has adopted a system for the purpose of notifying servants of the approach of a certain kind of transitory or sporadic

danger it from above, without giving the employee any adequate warning, merely telling him to "look out" at the instant the earth falls. *Raynor v. Trolan* (1897) 22 App. Div. 107, 47 N. Y. Supp. 897.

⁵An inexperienced employee set at work with a pick to undermine a high embankment of earth does not, as matter of law, by continuing the work, assume the risk attendant upon the temporary absence of his superintendent, although he knows of his absence and that he is no longer watching the bank, since he has the right to assume that the superintendent will return in time to warn him of the danger of the bank's falling. *Lynch v. Allen* (1893) 160 Mass. 249, 35 N. E. 556. An employer is bound to station a man at the top of a bank which is being excavated, where there is danger of its falling, so as to give the workmen a timely warning. *Burlington & M. River R. Co. v. Crackett* (1886) 19 Neb. 138, 26 N. W. 921. A complaint is not demurrable which alleges that, while plaintiff was employed in defendant's quarry, defendant's superintendent negligently directed another laborer to work at a point on the face of the quarry almost directly above the spot where plaintiff was at work, without warning plaintiff of the danger, and that such laborer, being ignorant of plaintiff's position, loosened a large rock, which rolled down and struck plaintiff. *August v. Owens* (1900) 111 Ga. 464, 36 S. E. 839.

⁶The owner of a foundry fails to perform his duty to provide a safe system for the protection of his employees where he makes a practice of breaking

up old iron by dropping on it a heavy ball of iron, the fall of which frequently scatters to a considerable distance large pieces of the metal, and the man in charge of the weight merely gives a warning shout, without taking any precautions to see that the space over which the metal might fly is clear. *McGuire v. Cairns* (1890) 5 Sc. Scs. Cas. 4th series, 540.

The owner of a mill is liable for an injury to an employee from a piece of flying steel cut by steam power, although the machine was a perfect one, where the cutting of steel was more dangerous than of iron, and no one was employed to give warning when steel was being cut, although the foreman had usually given warning. *McCarty v. Ontario Rolling Mill Co.* (1900) 27 Ont. App. Rep. 155. See also *ante*.

⁷*Keurance Boiler Co. v. Fitch* (1899) 181 Ill. 549, 54 N. E. 1044. Affirmed (1898) 78 Ill. App. 35.

⁸*Crouell v. Thomas* (1895) 99 Ill. 193, 35 N. Y. Supp. 936.

⁹*Grimaldi v. Lane* (1901) 177 Mass. 565, 59 N. E. 451, where a superintendent did not warn plaintiff to go away to a safe distance, when an unexploded charge of dynamite was being unloaded by another employee with an iron spoon.

¹⁰*Kelley v. Cable Co.* (1887) 7 Mont. 70, 14 Pac. 633.

¹¹It is negligence to turn on a current of electricity at an unusually early hour, without notifying a servant who is engaged in making repairs. *Colorado Electric Co. v. Lubbers* (1888) 1 Colo. 505, 19 Pac. 479.

radio danger, it is plain that the fact of the servant's having relied on the receipt of the customary warning, and being thus induced not to keep as careful a watch as he would otherwise have kept, constitutes a specific and additional reason for holding the master liable for injuries which may result from the omission to give the warning on some particular occasion.²

"Where employees are working in such a position that the sudden tightening of a cable is likely to injure them if they are not on their guard, the failure of the master's vice principal to warn them in accordance with a custom established by himself, that the cable is about to be tightened, is negligence for the consequence of which the master must answer. *Richmond Granite Co. v. Bailey* (1896) 92 Va. 554, 24 S. E. 232. Where the work of one employed in a saw mill to remove and pile in the yard lumber as fast as it is sawed is such as to bring him upon a part of a platform frequently made dangerous by the descent of heavy timbers from the saws above, with great velocity and at irregular intervals, it is negligence for the mill owner, who had adopted a custom of warning the men of the coming of these timbers by means of a signal, to omit the customary and cautionary signal. *Anderson v. Northern Mill Co.* (1890) 42 Minn. 424, 44 N. W. 315. Where the usual signal to men employed in a train yard that a train is coming is a shout by one of the men that "the cars are coming," and this is shown by the evidence to have been adopted as a safer signal than the blowing of a whistle or the ringing of a bell, a laborer who has been employed at the yard for several weeks and knows what signal was agreed upon cannot, if struck by a train, recover for his injuries on the theory that the failure to sound a bell or whistle was negligence. *Speed v. Atlantic & P. R. Co.* (1879) 71 Mo. 303. In *Anderson v. Ogden Union R. & Depot Co.* (1892) 8 Utah, 128, 30 Pac. 305, the following charge was held correct: "If you find it was the custom and practice of the defendant, within and for a period previous thereto, to give timely warnings to the employees at such times only as earth was pushed down the bank, or when there was danger, and not at other times, and the plaintiff knew of this custom, and relied upon it, then the plaintiff would have a right to have expected such warning when danger was imminent from such cause, and he would not be expected to keep so constant a watch to detect danger, or so high a degree of care to avoid it as he otherwise would be required to do at this time." In *Cincinnati, N. O. & T. P. R. Co. v. Barber* (1895) 17 Ky. L. Rep. 424, 31 S. W. 482, the court, in commenting on the evidence, which was held to justify the conclusion that the plaintiff's intestate, not being warned of a train's approach, and being near the track, if not upon it, attempted, in order to prevent a wreck, to remove certain obstructions, and in this way was killed, owing to the fact that the men on the train failed to see him until it was too late to check up, said: "Warning signals had been given by this very train, prior to that time, of its approach to the place where the work was being done. This train passed there every day, and knew the necessity of giving notice of its approach, for the safety of the train and those on board, if not for the safety of the laborer. The trainmen evidently believed this to be their duty, and the deceased had the right to believe it would be performed, and, when hearing the alarm signal, in the attempt to prevent what might have resulted in a wreck of the train, as well as loss of life, lost his own life; and we think the evidence authorized a recovery, based on the alleged wilful neglect." It is a breach of duty on the part of an engineer not to look out before starting his engine, and give the usual signals, for the purpose of warning any employee who may be working on the track. *Britton v. Northern P. R. Co.* (1891) 47 Minn. 340, 50 N. W. 231 (decision rendered in regard to an accident in Wisconsin where, under Wis. Anno. Stat. 1889, § 816a, a railroad company was liable for the negligence of an engineer). The same rule is applicable where the servant injured was in the employ of a person other than the defendant. Thus, the employees of a contractor engaged, to the knowledge of a railroad company, in the grading

An employer does not discharge his full duty of keeping a place reasonably safe, by giving warnings of threatened or impending danger, when the employee charged with the duty of giving the warnings is so engrossed and busy with his other duties that he cannot properly and efficiently give the necessary warnings.¹³

Where means for warning the servant have been provided, or a warning was actually given by some employee for whose acts and omissions the master was responsible, the servant is entitled to recover if the warning thus conveyed was inadequate to secure his safety.¹⁴

of a new track alongside the main track, in such close proximity as to be liable to be struck by passing trains, are not bound to keep a constant lookout for approaching trains, where it is the uniform practice of those operating the trains to give warning of their approach. *Erickson v. St. Paul & D. R. Co.* (1889) 41 Minn. 500, 5 L. R. A. 786, 43 N. W. 332. The court said: "Although in the employment of a contractor, and not of defendant, the plaintiff was lawfully at work along defendant's railroad, with its knowledge and by its authority. The character of his work was such that, under the facts, it owed him the duty of active vigilance to the extent of giving him signals, by way of warning of approaching trains, and he had a right to rely on its doing this, instead of keeping a constant lookout for himself, at least in view of the fact that the company had adopted and practised the custom of giving such warnings, and which he had every reason to suppose would be continued. Had plaintiff been employed by the defendant itself to work on its track, there probably would have been no question raised that defendant would have owed him this duty of active vigilance, and that he would have had the right to become engrossed in his work to such an extent as not to notice the approach of trains, and to rely upon the performance by the defendant of its duty to give him signals to warn him of the fact. But it can make no difference in principle whether a person be at work immediately upon the track or so near it as to be struck by passing trains. Neither does this duty depend, as appellant seems to claim, upon the fact that the person is a servant of the company, and the employees running the trains his fellow servants. It is a duty growing out of the fact that he is lawfully working there under the authority and with the knowledge of the com-

pany, and depends upon the general principles of law requiring the exercise of ordinary care not to injure another."

¹³*The Pioneer* (1897) 78 Fed. 600.

¹⁴A railroad company in whose yards it is the rule to give warning of the approach of an engine by ringing its bell does not perform its duty toward employees, where the bell is cracked or otherwise defective so that it does not sound loudly enough to warn persons of the approach of the engine under ordinary circumstances. *Northern P. R. Co. v. Krohn* (1898) 29 C. C. A. 674, 56 U. S. App. 593, 86 Fed. 230. An employer who undertakes to give his employee warning of the approach of an engine and cars into a shed where the latter is at work is bound to give such warning as may be heard by a person of ordinary hearing, considering the distance between the person giving the warning and the employee. *Mississippi Cotton Oil Co. v. Ellis* (1894) 72 Miss. 191, 17 So. 214. A railway company which knows that a large number of its employees are engaged in work requiring them to cross its tracks, and that there is a blinding snow storm at the point where they are working, and that trains pass such point at frequent intervals, is required to give such warning something more than the usual warning given by an approaching engine. *Illinois C. R. Co. v. Gilbert* (1894) 51 Ill. App. 404. The blowing of a whistle by the engineer of a railroad train 50 yards or more before reaching the place where the track is obscured by dense smoke for 250 or 300 yards is not, as matter of law, a sufficient exercise of care toward other employees who may be coming on the track from the opposite direction. *Woodward Iron Co. v. Herndon* (1896) 114 Ala. 191, 21 So. 430. The owner of an iron mill who places to place in the mill and around the yard, cannot be said to have done

But a master is not in fault because he fails to communicate a fact which is immaterial to the servant's safety, and which, if he had known it, would not have affected his action.¹⁵

209a. Limits of this duty.—Both upon principle and authority it is clear that a master cannot be deemed culpable on the ground of an omission to give warning, where the servant already possesses sufficient knowledge of the conditions to enable him to take appropriate precautions for safeguarding himself. Accordingly, a master "is

his whole duty to employees in sounding a whistle when the locomotive emerges from the building, if the locomotive cannot be seen from the outside and other whistles are constantly sounded within the building. *Weiss v. Bethlehem Iron Co.* (1898) 31 C. C. A. 363, 59 U. S. App. 627, 88 Fed. 23.

¹⁵ A verdict for the servant, based on the theory that the defendant's superintendent was negligent in not informing him that an unexploded charge which he was ordered to drill out had a wet fuse, cannot be sustained where there is no evidence going to show either that it was more dangerous to extract a charge which had failed to ignite on account of the wetness of the fuse than one which had failed to ignite owing to one of the several causes from which such an occurrence may result, or that the method of extracting the charge would have been at all different if the nonexplosion had been due to some other cause than the wetness of the fuse. *Henderson v. Williams* (1890) 66 N. H. 405, 23 Atl. 365.

¹ In *Greenwald v. Marquette, H. & O. R. Co.* (1882) 49 Mich. 197, 13 N. W. 513, the liability of the defendant was denied on grounds thus stated: "The defendants can fully prove that decedent knew that the locomotive was moving or about moving back, and it also shows that there was room enough for him to perform his duties without being hurt. But this is not all. The order to back up was a proper one beyond question; and as decedent was participating in the operations connected with the backing up of the locomotive and knew what was going on and what to expect, he does not seem to have stood in need of warning by bell or whistle."

As track repairing or track cleaning after a snow storm in the vicinity of moving trains is intrinsically a dangerous occupation, the fair presumption is, not only that men who engage in it take the risks of the employment, but that

they are competent to keep themselves out of manifest and unnecessary danger. Hence, representatives of a railroad company have the right to assume that one of a gang of men employed to release a snow-bound train on one track will not place himself in danger of being struck by a train on another track 7 feet from the former. *Nye v. Pennsylvania R. Co.* (1896) 178 Pa. 134, 35 Atl. 627. The court in this case also relied on the consideration that it would, under the circumstances, have been impracticable for the division superintendent to have communicated any warning in regard to the movements of the passing train, as the men to be notified "might have moved 100 feet or a mile in ten minutes." A rule of a railroad company requiring signals to be given by the foreman of workmen upon its track when any work is to be done which will render its track unsafe, or impassable, or unsafe for trains at their usual rate of speed, does not require signals to be given where the work being done does not render the track impassable or dangerous, so as to render the company liable for injuries to a workman who fails to clear the track for a passing train, and who is acquainted with the usage not to signal approaching trains or slacken their speed, but that the workmen should clear the track. *Aurandt v. Chicago, M. & St. P. R. Co.* (1894) 90 Iowa, 617, 57 N. W. 442. The person in charge of a switch engine in a railroad yard, used for the purpose of moving cars, has a right to act on the belief that the various employees in the yard, familiar with the continuously recurring movement of the cars, will take reasonable precaution against their approach; particularly where the cars are moving so slowly that ordinary attention on their part would enable them to avoid them. *Verkefetz v. Humphreys* (1892) 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835. A railroad

not required to keep special watch over his employee and warn him of common dangers to which he may be subjected in the performance

company is not guilty of negligence towards section hands who have occasion to travel by a hand car when it runs a train around a curve at the rate of from 25 to 32 miles an hour. *International & G. N. R. Co. v. Arias* (1895) 10 Tex. Civ. App. 190, 30 S. W. 446. No action can be maintained where the usual signal has been given by which the approach of a train is indicated, and the servant is familiar with that signal. *Henion v. New York, N. H. & H. R. Co.* (1897) 25 C. C. A. 223, 51 U. S. App. 157, 79 Fed. 903 (station master injured by train). Railroad companies do not owe any duty to trainmen to place signals at snow banks along their tracks, or to give them notice by whistle or bell of the approach of their train to such banks. They assume the risks arising from the existence of such banks just as they assume the risk of the existence of permanent structures which they know to be near the track. *Brown v. Chicago, R. I. & P. R. Co.* (1886) 69 Iowa, 161, 28 N. W. 487. The failure to blow the whistle of the engine attached to a construction train so that the hands thereon could prepare to protect themselves against the sudden jerk of the train in stopping is not imputable as wilful negligence, where they had been informed by the boss that the train would stop at that place, and knew where the train was before and at the time it stopped. *Simmons v. Louisville & N. R. Co.* (1892) 13 Ky. L. Rep. 941, 18 S. W. 1024. A company was declared not guilty of any breach of duty in regard to notifying an employee of the approach of a train, when it was in evidence that the engine which was pushing the train in question up an incline in a yard had a very loud exhaust which could be heard at a great distance, and which, by reason of its singularity, was a better signal than a bell, the ringing of which was almost incessant, owing to the constant movements of the engine about the yard throughout the day, and would therefore signify very little at any particular moment. *Chesapeake & O. R. Co. v. Lee* (1888) 84 Va. 642, 5 S. E. 579. The starting of a freight train unexpectedly to a brakeman on the top of a car at the rear end of a train, but not suddenly, violently, or negligently, gives

him no cause of action for injuries caused by his being thrown from the train thereby. *Johanson v. Canadian P. R. Co.* (1892) 50 Fed. 886 (decided on demurrer). In *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 675, 22 S. E. 83, the court implies in its argument (p. 689) that a railroad company has discharged its whole duty in regard to the protection of a section foreman traveling on a hand car, when it has expressly instructed him to be on the lookout for special trains, and, as a matter of precaution, to flag around curves and through cuts. In *Perry v. Old Colony R. Co.* (1895) 161 Mass. 296, 41 N. E. 289, where the plaintiff was injured by the "blowing down" of a locomotive underneath which he was working, it was contended that, when the foreman sent the plaintiff to do the job, he should have given notice to the engineer or fireman that he had been sent. But the court said: "Both the engineer and fireman knew that someone would be sent by the foreman to do the repair; and it hardly would seem necessary for the foreman to notify them that he had done what, in the ordinary course of things, they had every reason to expect he would do. There was nothing to show that there was anything unusual about the job, or manner or place of doing it. The place was dangerous, but the plaintiff knew that. He also knew that the engine would have to be blown down if a check was ground in, and that that was done over the ashpit as commonly as anywhere. There was no negligence on the part of the foreman in failing to notify the plaintiff of what he well understood himself. There was nothing to show that it was customary, when men were sent to grind in checks, to notify the engineer or fireman, or anybody else, of the fact, and that they must be careful about blowing down, or that it had ever been done before, or that anything was omitted in this case on which the men habitually relied or had a right to rely. There was testimony that the workmen looked out for themselves, as they needs must in many things. Some details a foreman may safely ignore, or leave to the men over whom he has charge. We discover no evidence of negligence on the part of Noyes [the foreman]." In *Leonard v.*

of his ordinary duties."² The reluctance of the courts to allow a servant to recover for an injury due to such a danger is especially strong

Collins (1877) 70 N. Y. 90, it was held that where a servant injured by the fall of a bank of earth sought to recover on the theory that the master failed to keep his promise to warn him when certain work rendering the subsidence of the bank probable was about to be commenced, it was error to refuse a request to the effect that the failure of the defendant to keep his promise would not be a ground of recovery if the servant actually looked up and saw the work in progress. In *McMahon v. Ida Min. Co.* (1898) 101 Wis. 102, 76 N. W. 1098, first appeal (1897) 95 Wis. 308, 70 N. W. 478, it was held that the failure of a shift boss of a mine to inform a miner ordered to go to blasting in a place where there are unexploded blasts, as to the exact number of such blasts, was not negligence, where he had good reason to believe that all the unexploded blasts had wires protruding therefrom, which would be a sufficient warning to the miner. Compare also *Houston & T. C. R. Co. v. Struchinski* (1894) 6 Tex. Civ. App. 555, 26 S. W. 23, 642 (for facts see § 220, *post*).

²An engineer on a locomotive is not guilty of negligence in failing to stop the train, or warn of danger a section hand who stands in a safe position, several feet from the track, until after the engine passes; and the foreman of a gang of section hands under no duty to warn each of the other of danger from each passing train, as they are so familiar with the track as to be presumably capable of looking out for themselves, and there is no unusual danger, and no rule exists imposing upon him such duty. *Ring v. Missouri P. R. Co.* (1892) 112 Mo. 220, 20 S. W. 436. A railroad company is not negligent in failing to place danger signals to warn members of a bridge gang running hand cars to look out for section men at work on the track. *Brennell v. Southern P. Co.* (1899) 34 Or. 256, 56 Pac. 129. In a case holding that the mere fact that in a railroad company's private yard, where cars are loaded and unloaded and trains made up, such cars are permitted to move along the tracks unattended by a brakeman, cannot be held negligence, as matter of law, as against the company's servants employed in such yard, the court said: "A court would probably

be justified in declaring, as a matter of law, that it was negligence in a railroad company to permit its cars, or even a single car, to move along its track in a public place, such as a street crossing, or, perhaps, at its passenger depots, where the public are permitted to be upon and travel across its tracks, without having someone on the same to control its movements; but the question presented by this case is an entirely different question. The cars which were permitted to go along its tracks unattended were in the private yards of the defendant, where no persons were expected to be present except its servants and agents, many of whom were present solely for the purpose of moving the cars on the tracks, without being upon the same as brakemen. If it was negligence to permit the cars to run unattended in the defendant's yard, where cars are loaded and unloaded and moved about for the purpose of making up trains, such negligence is not so apparent that a court may pronounce upon it as a matter of law. At most, it might be a fact to go to the jury upon the question of negligence." *Kelly v. Chicago, M. & St. P. R. Co.* (1881) 53 Wis. 74, 9 N. W. 816. A railway company does not owe yard employees the duty of notifying them when an opening, such as is usual and necessary from time to time in shifting cars in the yard, will be closed up, inasmuch as these openings are not left for the purpose of enabling the employees to cross the track. *Pladett v. Central R. Co.* (1898) 105 Ga. 203, 30 S. E. 728. Whether a foreman was negligent in not notifying a switchman that a switch had already been turned, and that it was, therefore, unnecessary for him to cross the track to tend it, depends upon what the foreman should have foreseen the switchman would undertake to do if he was not informed that the switch had been changed to the required position. *Grant v. Union P. R. Co.* (1891) 45 Fed. 673. The failure to have a servant on the rear of a backing train to give warning of its approach to a street crossing was not negligence as to a flagman at the crossing, who could have seen the train if he had been performing his duty to keep a watch for approaching trains. *Coleman v. Pittsburg, C. C. & St. L. R. Co.* (1901) 23 Ky. L. Rep. 401.

in cases where the isolated event which caused the injury occurred during the work of constructing or repairing a part of the master's plant.³

It is sufficiently manifest that some of the applications of the doctrine exemplified in the cases just cited, when considered with relation to the facts involved, go very far towards reducing the obligations of warning to a mere nullity. The process of nullification may be said to be complete in those decisions which proceed upon the broad ground that employers cannot be required to warn their men as to every transitory risk, where the only thing the men do not know is the

63 S. W. 39. There is no necessity of a signal being given to an off-bearer in a sawmill of the starting of the saw carriage, where it is uniformly started as soon as the hooks are removed from the cants, and the carriage has been so operated hundreds of times during the few days he has worked at it. *Olsen v. North Pacific Lumber Co.* (1901) 106 Fed. 298. A master is not bound to notify a servant working near a trap-door on every occasion on which it is opened for purposes connected with the ordinary routine of the business. *Kupp v. Rummel* (1901) 199 Pa. 90, 48 Atl. 679. Compare *Young v. Miller* (1897) 167 Mass. 224, 45 N. E. 628, holding that a master owes no duty to give a servant who knows of the existence of a trap door, and that it is liable to be open at any time, notice or warning that it is open at any particular time. *North Chicago Rolling Mill Co. v. Johnson* (1885) 114 Ill. 57, 29 N. E. 186, the servant's nonanticipation of the event which injured him is adverted to as one of the elements indicating the existence of a duty to give warning.

³ In *Porter v. Silver Creek & M. Coal Co.* (1893) 84 Wis. 418, 54 N. W. 1019, the majority of the court thus stated their reasons for refusing to allow the servant to recover for injuries caused by the sudden tautening of a cable in a chute, the jury having found that there was no negligence on the part of the employee in control of the machinery: "The only ground upon which such negligence can be claimed is that the defendant furnished the plaintiff an unsafe place to work, and did not warn him of the fact that the cable was in the chute and would be lifted. Had the machinery of the dock been in regular operation handling coal, and had this lifting of the cable from the chute

been one of the incidents of such operation, regularly or occasionally recurring, the argument would be strong that negligence could be predicated upon the failure to warn a new and inexperienced employee of such fact. Such, however, was not the situation. The docks, structures, and machinery were not in use. They were undergoing repairs and rebuilding made necessary by a recent storm. The situation was substantially the same as if they were in process of erection. Now, in the original erection of buildings or structures, the rule that the master must furnish a safe place to work can have manifestly very limited application. In the handling of building materials, the adjusting of machinery, and the many operations that are continually going on in the process of building or rebuilding, dangers constantly must arise against which no foresight can provide or warning be given. A place which is perfectly safe at one moment may become full of danger the next moment. Were the employer held to the duty of providing at all times a safe place for the builder to work, or of warning him of a possible future danger, we apprehend few would undertake to build or repair any structure. Such a rule of diligence would be too grievous to be borne." *Cassoday and Orton, J.J.*, dissented on the ground that the plaintiff was directed to work in a place of imminent, but unforeseen, danger, of which he had no knowledge or warning, and that the defendant, as master, was bound to show that the engineer was liable to start the machinery at any time without warning, and thus imperil the safety and life of the plaintiff. The conclusion of the majority that the defendant was, as a matter of law, not bound to anticipate such an accident as that which occurred seems to the pres-

precise time when the danger will supervene;⁴ nor where the actual danger which caused the injury was due to a transitory occurrence, of such a nature that the plaintiff must have known that it would probably happen from time to time.⁵ The conclusion thus based upon the transitory and obvious character of the risk is regarded as especially appropriate where that risk is essentially incident to the very work which the servant has undertaken to do.⁶

The somewhat inconsistent position which is the result of a theory which attributes this effect to the servant's knowledge of the conditions is avoided by denying, as some courts have done, that the mas-

ter writer an unjustifiable invasion of the province of the jury. The standard of duty is doubtless not so high when repairs are going on (see § 29, *ante*), but surely it is going too far to say that a jury could not warrantably find a master negligent in having failed to make suitable arrangements for obviating such an accident as the one which occurred.

⁴In *McCann v. Kennedy* (1896) 167 Mass. 23, 44 N. E. 1055, the plaintiff was at work upon a house in which the defendant was making some changes. He went up a ladder, stepped through a window, and then, in order to avoid a man who was working behind it, stepped to the left upon a joist which had been sawed nearly through for a well-hole, and fell. The plaintiff knew that the customary way to make well-holes was to lay the joists and then cut them out, and, so far as appears, knew where this well-hole would be. It would be seen from the plaintiff's testimony that the joist had been cut very recently. Another witness stated, without contradiction, that he had cut it a moment before the accident, and had gone to get an ax to knock the joist out. It was held that the employer was not liable.

⁵*Flynn v. Campbell* (1893) 160 Mass. 128, 35 N. E. 453, where the plaintiff, after four and a half years of experience in the work of wheeling coal from a coal-shed to a fire room, was struck in the foot by a load of coal which had been dumped through a hatchway in the roof, after being discharged from a lighter, the position of which could easily have been ascertained, and whether it was ready to unload or not.

⁶Hence, an employer is not required in formal language to notify an employee sent into a room in which a fly-

wheel has exploded to clear away rubbish, that no one has as yet examined the room to see that nothing is likely to fall upon him. Under such circumstances the servant has no right to assume that he is not the first to be sent into the room. *Kanz v. Page* (1897) 168 Mass. 217, 46 N. E. 620. In *Burns v. Matthews* (1895) 146 N. Y. 386, 40 N. E. 731, the court, in denying the right of a laborer to recover for injuries caused by the collapse of the walls of a trench, said: "Had the foreman known that the walls of the trench were likely to give way, it doubtless would have been his duty to have warned Burns; but masters are not insurers against accidents, and they ought not to have extraordinary and unexpected burdens imposed upon them. They are required to be careful and prudent, and to exercise the care and caution over the men in their employ that careful and prudent men ordinarily exercise. A foreman, having fifty men under him, cannot be expected to keep his eye constantly upon every man and see that he does not step into a place of danger, nor can he, having the care of so many, be expected momentarily to think of every danger that may befall them. Each man is expected to have some judgment and care with reference to the preservation of himself from danger, and of necessity much has to be left to his care in this regard. Burns was not set at work upon a dangerous machine about which he had no knowledge, but instead he was directed to dig a trench for a sewer. He had done such work before, and so far as appears was a man of reasonable intelligence, and must have known something of the dangers of working in deep trenches without curbing. He was at liberty to select his own place to work in the trench, and he might have commenced where it

ter's duty is fulfilled, where the only warning received was a general notification to the servant to be on his guard,⁷ especially where the plaintiff had gone to work after the notification was issued;⁸ or where there has been a change in the methods, of which he was ignorant, and which entailed the approach of danger from an unexpected quarter.⁹ Another way of reaching a similar conclusion is also indicated by a decision in which it was held that a usage which is itself an evidence of a want of due care cannot be utilized as a defense.¹⁰

It has already been shown that, as a general rule, a master is under no obligation to take steps to preserve his employees from the consequences of casualties which are not due to his negligence. See § 13, *ante*. One exception to this rule is that a court would probably decline to interfere with a verdict based on the theory that it is culpable to omit to warn an employee when some sudden catastrophe has created an extra-hazardous situation, and it is apparent that a timely notification would have enabled him to escape. But it is obviously a condition precedent to recovery under such circumstances, that the master should be proved to have been aware, actually or constructively, that the servant was in such a position as to be exposed to danger by the catastrophe in question (see chapter x., *ante*), and that it would have been possible to convey the warning to him with sufficient rapidity to enable him to protect himself.¹¹

was but a foot deep. He knew that curbing had been put in up to the man-hole, and that it must have been the intention of the foreman to curb north therefrom." Other decisions bearing upon this limitation of the servant's right of action will be found in § 218, note 2, *post*.

⁷ *The Pioneer* (1897) 78 Fed. 600. See § 109, note 3, *ante*. A railroad employee who cannot reasonably protect himself by watching out for the return of a switch engine with cars attached to be coupled to a car at which he is employed, while standing on a ladder resting upon it, is entitled to some warning other than a mere general instruction that he must look out for himself when the cars are switched against it. *Houston & T. C. R. Co. v. Strycharski* (1896; Tex. Civ. App.) 35 S. W. 851. When a minor thirteen years of age, employed to pick out the slate from coal cars after they have been run down an incline from the place of loading, has been told to be on his guard when cars are being run down, and also to be on his guard against the jerking of the cars when the train was being

started, and is subsequently injured by being thrown off a car by the sudden impact of another car which has thus been run down against the one on which he is working, it is for the jury to say whether the master's duty of instruction has been sufficiently discharged. *Fisher v. Delaware & H. Canal Co.* (1893) 153 Pa. 379, 26 Atl. 18.

⁸ *The Pioneer* (1897) 78 Fed. 600.

⁹ *Houston & T. C. R. Co. v. Strycharski* (1896; Tex. Civ. App.) 35 S. W. 851.

¹⁰ Thus, a custom of moving an engine immediately upon the covers being placed over the man-hole after taking water, leaving the fireman to get down over the coal without signal to him, will not relieve the railroad company from liability to a fireman for personal injuries while getting down, occasioned by such movement, where the character, quantity, or location of the coal was such as to make his position unusually perilous, or where the engine moved more suddenly than usual. *Knott v. Dubuque & S. C. R. Co.* (1892) 84 Iowa, 462, 51 N. W. 57.

¹¹ The case cannot be submitted to the

B. DUTY TO FORMULATE RULES DEFINING THE MANNER IN WHICH THE WORK IS TO BE DONE.

210. Generally.—It has been judicially recognized that rules for the conduct of a business are prescribed both for the purpose of increasing the economic efficiency of the various instrumentalities which are brought into use, and for the purpose of lessening the risks which the servants will have to incur.¹ The law, however, takes no account of the financial aspects of an employer's arrangements. From a juridical standpoint those arrangements are material only in so far as they may affect the safety of others, and the persons who are most directly and vitally interested in the manner in which an industrial concern is carried on by its proprietor are necessarily those who assist him in his enterprise. The rationale of the obligations which arise out of this situation is not far to seek.

However experienced and careful servants may be, a master is clearly not justified in conducting a complicated business on a system which assumes them to be capable of selecting, upon each and every occasion, that particular course of action which is the safest both for themselves and for their fellow employees. In the very nature of the case, many of the elements of the problems involved in the process of making a choice between alternative methods of work at any given time and place must be unknown to persons whose range of view is necessarily limited to their own immediate environment. Some of the perils produced by unavoidable ignorance may doubtless be obviated by properly instructing the servants. But even after the very fullest information of which the circumstances admit has been imparted to them, there will, in many lines of business, remain a residuum of situations which can be rendered safe for them only by the issuance of peremptory directions which leave nothing to their own discretion, and require them to do certain work in a specified manner. Wherever, therefore, the master should, as a reasonably prudent man, see that there is a probability of injury to some individual servant or to some class of servants, if they and their fellow employees are left

jury on the issue that the servant was not warned of a discovered peril, where the evidence is that he was injured in jumping, when a fire broke out, from a window on the third floor of a building in which he had, at the request of a superior employee, remained during the dinner hour, at which time he and other employees were usually absent: that a fire suddenly broke out and spread with such rapidity that the em-

ployees on the first floor had only just time to escape: that the immediate superior of the injured servant was the only person who was aware that he was in the building, but that he could have been notified of the fire if his presence had been known. *Hernischel v. Texas Drug Co.* (1901; Tex. Civ. App.) 61 S. W. 419.

¹ *Sutherland v. Troy & B. R. Co.* (1891) 125 N. Y. 737, 26 N. E. 609.

to regulate their actions according to their own ideas of what is proper, he is charged with the obligation of protecting them, as far as possible, both by prescribing the lines upon which the ordinary routine of their work shall be conducted, and by declaring what precautions shall be taken by them to minimize the danger arising from special emergencies.² The duty upon which the responsibility of the master in this regard is predicated is, therefore, one particular branch of the general duty of the master not to expose his servants to extraordinary

²The language used by the courts in referring to the obligation to promulgate rules is sufficiently illustrated by the following extracts. Other passages of a similar tenor will be found in the quotations from cases dealing with special points to be hereafter discussed.

"It is settled doctrine that a railroad company is bound to guard its employees against negligence of coemployees, so far as it can, by the enactment and promulgation of reasonable rules in the management of its business." *Abel v. Delaware & H. Canal Co.* (1891) 128 N. Y. 662, 28 N. E. 663. It is the master's duty "to make and promulgate sufficient rules and regulations for the conduct of the business in its ordinary run, and for any extraordinary occasions that may be reasonably anticipated." *Slater v. Jewett* (1881) 85 N. Y. 73, 39 Am. Rep. 627. "When a railroad company's employees are known to be doing their work in a reckless and dangerous manner, it is the duty of the company [master] to change the manner of operation by some regulation or rule." *Boing v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579, 45 N. E. 1028. "The intestate, upon entering the defendant's employ, assumed and assented to the ordinary risks incident to the service. But employers cannot avail themselves of this assent unless they take reasonable precautions to insure the servant's safety while in the performance of his duties, and there can be no exemption from liability for injuries sustained by a servant when such injuries are traced to the employer's failure to take such precautions. Within the operation of this principle a corporation is bound to carry on its business under a proper system and under reasonable rules and regulations, and if, through a failure to establish such, a servant is injured, the corporation is liable." *Ford v. Lake Shore & M. S. R. Co.* (1891) 124 N. Y. 493, 12 L. R. A. 454, 26 N. E. 1101. In *Reagan*

v. St. Louis, K. & N. W. R. Co. (1887) 93 Mo. 348, 6 S. W. 371, the court cited with approval the following passage from the treatise of Shearman & Redfield on Negligence, § 93: "One who employs servants in complex and dangerous business ought to prescribe rules sufficient for its orderly and safe management. His failure to do so is a personal negligence, for the consequences of which he is liable to his servants." The same statement is also adopted as correct in *Richlands Iron Co. v. Elkins* (1893) 90 Va. 249, 17 S. E. 890. The subjoined statement of the general rule by another textwriter has been adopted in *Texas & N. O. R. Co. v. Echols* (1894) 87 Tex. 339, 27 S. W. 60, 28 S. W. 517: "If a master is engaged in a complex business that requires definite regulations for the safety and protection of his employees, a failure to adopt proper rules, as well as laxity in their enforcement, is negligence *per se*, and the establishment of defective or improper rules is such negligence as renders the master responsible for all injuries resulting therefrom." *Wood, Mast. & S.* § 403; 3 *Wood, Railway Law*, § 382. A master is bound to "make and promulgate proper rules for the government of his servants and business, whenever it is so large or complicated as to make his personal supervision impracticable." *Murphy v. Hughes* (1898) 1 Penn. (Del.) 250, 40 Atl. 187. "Without such regulations their employees would be at the mercy of others [coemployees] whom they had no election in employing, or over whose actions they have no control." *Pattonburg, Ft. W. & C. R. Co. v. Patton* (1874) 74 Ill. 341. "The rule is well settled that it is the duty of all persons and corporations having men employed in their employ in the same business to make and promulgate rules which, if observed, will afford protection to the employees. This is the more necessary where the manner of doing business is

dangers.³ See chapter 1, subtitle B. The adoption and maintenance of defective or imperfect rules are manifestly as much negligence as the entire failure to establish any rules.⁴ Where an employer knows, or ought to know, that a certain rule is inefficient, either because it is not calculated to furnish proper protection, or because it is habitually disregarded by employees, it becomes his duty to adopt such other additional regulations as will secure the safety of the servant concerned.⁵ Negligence is predicable of his failure to see that a rule which was adequate for the protection of the servants was properly carried out.⁶ (See § 214, *post*.) The test of the sufficiency of a rule is that it shall be reasonably well calculated to secure the safety of the employees if it is faithfully obeyed,⁷ or that it protects the servant, as far as reasonably can be done, against the hazard of the negligence of coemployees;⁸ or that, if faithfully and carefully observed, it will give reasonable protection to the employee concerned;⁹ or that it constitutes a safeguard upon which a person of ordinary prudence may rely, as affording reasonable protection against the danger to which the workman was exposed in the particular case.¹⁰

One of the tests of the sufficiency of the rules adopted by a master for the government of his servants and his business is that they have

such that the danger or safety of an employee at any given time depends upon the way in which some other employee is engaged at the same time. In such a case, where the action of one employee may make that dangerous which, if he took no action, would be safe, it is undoubtedly the duty of the common employer to make such rules as will enable the person whose safety is put at risk, to be advised of the danger and to avoid it." *Eastwood v. Retsof Min. Co.* (1895) 86 Hun, 91, 34 N. Y. Supp. 190.

³ *Reagan v. St. Louis, K. & N. W. R. Co.* (1887) 93 Mo. 348, 6 S. W. 371. In a case in which the absence of regulations was held to raise for the first time the question whether the master was guilty of negligence, the court remarked, *arguendo*: "It is the duty of the master having control of the times, places, and conditions under which the servant is required to labor, to guard him against probable danger in all cases in which that may be done by the exercise of reasonable caution." *McGovern v. Central Vermont R. Co.* (1890) 123 N. Y. 280, 25 N. E. 373.

⁴ *Texas & N. O. R. Co. v. Echols* (1894) 87 Tex. 339, 27 S. W. 60, 28 S. W. 517.

⁵ *Fordyce v. Briney* (1893) 58 Ark. 206, 24 S. W. 250.

⁶ See *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266.

⁷ *Hannibal & St. J. R. Co. v. Kanelley* (1888) 39 Kan. 1, 17 Pac. 324. For similar expressions, see *Warn v. New York C. & H. R. R. Co.* (1894) 80 Hun, 71, 29 N. Y. Supp. 897; *Texas & P. R. Co. v. French* (1893) Tex. Civ. App. 22 S. W. 866; *Evansville & T. H. R. Co. v. Tohill* (1895) 143 Ind. 60, 41 N. E. 709, 42 N. E. 352. A rule easily followed by servants, and, when followed, securing safety to co-servants, is a reasonable compliance with the duty owing by the company to them. *Niles v. New York C. & H. R. R. Co.* (1897) 14 App. Div. 70, 43 N. Y. Supp. 751.

⁸ *Abel v. Delaware & H. Canal Co.* (1891) 128 N. Y. 662, 28 N. E. 663.

⁹ *Abel v. Delaware & H. Canal Co.* (1886) 103 N. Y. 581, 57 Am. Rep. 773, 9 N. E. 325; *Davis v. Staten Island Rapid Transit R. Co.* (1896) 1 App. Div. 178, 37 N. Y. Supp. 157.

¹⁰ *Fordyce v. Briney* (1893) 58 Ark. 206, 24 S. W. 250.

been in force for a considerable length of time and have accomplished the purpose contemplated.¹¹

The presumption of law is in favor of the sufficiency of the rules adopted by a master for the government of his servants and business, as bearing upon the question of negligence of the master renders him liable for injury to a servant.¹² Unless those rules are shown to be "palpably unreasonable, or clearly insufficient," the master is not to be charged with negligence on account of their adoption or use.¹³

That the risks arising from a defective system are *prima facie* among those assumed is a necessary consequence of predicating a duty to put in force and maintain a safe system.¹⁴ See § 2, *ante*. But the presumption thus entertained in the servant's favor is, of course, to be overcome by evidence showing that the servant went on working with a full comprehension of the hazards to which the master's system exposed him. See chapter xvii. Since, however, rules are merely a formal statement of certain arrangements which the master intends to conform to himself, and which he expects his servants to conform to also, the mere fact that the servant knew that no proper rules had been promulgated on a given instance will not prevent a recovery, if the arrangements themselves were such as to indicate a lack of due care.¹⁵

¹¹ *Murphy v. Hughes* (1898) 1 Penn. (Del.) 250, 40 Atl. 187 (in charge to jury); *Rer v. Pullman's Palace Car Co.* (1897) 2 Mary. (Del.) 337, 43 Atl. 246. Compare note 13, *infra*.

¹² *Murphy v. Hughes* (1898) 1 Penn. (Del.) 250, 40 Atl. 187 (in charge to jury).

¹³ *Little Rock & M. R. Co. v. Barry* (1898) 43 L. R. A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944, holding that rules of a railroad company, based upon the wisdom and experience of many years of railroad operations, which do not provide for warning the employees upon special or extra trains of the movements and whereabouts of other locomotives liable to meet or be overtaken by the special or extra trains, are not unreasonable, and the operation of a railroad in accordance therewith is not negligence.

¹⁴ "The rule that the servant takes the risks of the business is subject to the qualification that the master must exercise reasonable care to guard the servant, while engaged in his duties, from unnecessary hazards, including hazards from negligence of coemployees. In

the business of a railroad this rule is especially important in view of the dangers of the employment, and the serious consequence likely to ensue from the negligence of coemployees." *Delaware & H. Canal Co.* (1891) 125 N. Y. 662, 28 N. E. 663.

¹⁵ *Texas & P. R. Co. v. Elliott* (1897) 91 Tex. 321, 43 S. W. 519, affirming 40 S. W. 1060 (instruction erroneous which declared, without qualification, that the servant could not recover if he knew of the master's failure to establish suitable rules). In *Shanahan v. New York C. & H. R. R. Co.* (1883) 91 N. Y. 332, it was argued by the defendant's counsel that the plaintiff took the risk of defects in the defendant's system of running trains by telegraphic orders; but the court said: "There are cases where such an argument might apply, but I am not aware of any principle which releases the master from liability to an employee who has been injured by the very act of the employer, or by the omission on his part, to provide rules which, faithfully carried out, would insure safety. There was no such bargain between the parties."

211. Limits of the duty to promulgate rules.—The extent and quality of the obligation of the master to make rules for the guidance of his servants will be more clearly understood if we advert to the decisions in which the language used has a special relation to the limits of that obligation. On the one hand we find in the cases such positive forms of statement as these: That the law imposes the duty of making and enforcing reasonable rules and regulations, in so far as that is reasonable and practicable;¹ and that the master in "making rules for the government of his employees is bound to use ordinary care, and to anticipate and guard against such accidents and casualties as may reasonably be foreseen by its managers exercising such ordinary care."²

The same or similar conceptions are also expressed by negative forms of phraseology such as these: That an employer is only bound to use ordinary care in formulating rules, and it is not reasonable to proceed upon the assumption that every injury to an employee can be guarded against and prevented by making such rules, and that it is the duty of the employer to anticipate and guard against, by rules or otherwise, only such accidents and casualties as might reasonably be foreseen by him in the exercise of ordinary prudence and care;³ that the failure to adopt rules is not proof of negligence, unless it appears from the nature of the business in which the servant is engaged that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity of such precaution;⁴ that an employer

ties, and public policy forbids that one should be implied." Compare *Wild v. Oregon Street Car & L. Co.*, 21 Or. 153, 27 Pac. 954; *Ford v. Del. Shore & H. S. R. Co.*, (1891) 121 N. Y. 493, 12 E. R. A. 151, 26 N. E. 1161.

¹ *Conrad v. New York, O. & W. R. Co.*, (1897) 151 N. Y. 579, 45 N. E. 1028.

² *Conrad v. New York C. & H. R. R. Co.*, (1891) 80 Hun. 71, 29 N. Y. Supp. 587.

³ *Conrad v. New York, L. E. & W. R. Co.*, (1892) 131 N. Y. 582, 30 N. E. 57.

⁴ *Conrad v. Hudson River Ore. & L. Co.*, (1892) 133 N. Y. 666, 31 N. E. 234. To the same effect, see *Ely v. New York C. & H. R. R. Co.*, (1895) 83 Hun. 323, 34 N. Y. Supp. 739; *Burke v. Syracuse, B. & N. Y. R. Co.*, (1893) 69 Hun. 21, 23 N. Y. Supp. 458; *Daley v. Brown*, 15 App. Div. 428, 60 N. Y. Supp. 810. The unanticipated character of the accident was also one of the grounds of the decision in *Norfolk & W. Vol. I. M. & S.—30.*

R. Co. v. Graham, (1898) 96 Va. 439, 31 S. E. 604. Whether, in the operation of trains, emergencies which no system of rules can anticipate and provide for have arisen, and whether, in view of such emergencies, the company has acted with the care which the circumstances demand, are questions of fact for the trial court. *Sprague v. New York & V. E. R. Co.*, (1896) 68 Conn. 345, 37 E. R. A. 638, 36 Atl. 791. There, a collision was caused by the incompetence of an inexperienced engineer, and the appellate court refused to review the following conclusion of the trial court: "The superintendent and train dispatchers did not give Conrad special orders or proper messages to guide him in the movement of his train from Hawleyville, and failed to exercise reasonable care in this regard, in view of Conrad's known inexperience and the condition of business and situation of trains on the road on that day. The defendant was guilty of negligence amounting to a want of reasonable

cannot be held liable on the ground of a failure to make rules to provide for a contingency which could not reasonably be anticipated.

Where specific testimony is introduced for the purpose of establishing that the work in question should have been methodized by formal rules, it is for the court to say, in the first place, whether that testimony is sufficient to show a case in which the duty to make rules rested upon the master.⁶ If that point is decided in favor of the plaintiff, the question whether the master's duty in the premises has been properly performed is for the jury.⁷ Where the necessity for and practicability of providing rules to meet the given circumstances are apparent from the averments of the complaint and from the testimony by which those averments are supported, the mere fact that neither the pleadings nor the evidence indicate exactly what rules should have been established does not render it a misdirection to charge the jury that the defendant would be liable if he did not establish rules to protect his employees.⁸ But in the absence of evidence showing that rules would be useful or feasible under the circumstances, the master cannot be found negligent in not having promulgated them.⁹ It is, therefore, error to leave the case to the jury where the plaintiff has offered no evidence which indicates that other employers in the same business had promulgated any such rule, or that the suggested rule was necessary or practicable, or that the

care in not providing, in some way, for the special direction of Conrad under the circumstances disclosed by the evidence. The collision was due to the incompetency of conductor Conrad, and to the negligence and want of reasonable care of the defendant, its superintendent, train-master, and dispatchers, as above stated.¹⁰

⁶ *Whalen v. Michigan C. R. Co.* (1897) 114 Mich. 512, 72 N. W. 323 (unexpected, unusual, and unexplained failure of air brake to work).

⁷ *Texas & N. O. R. Co. v. Echols* (1894) 87 Tex. 339, 27 S. W. 60, 28 S. W. 517. In an action by an employee, working under the directions of his foreman, for an injury sustained in attempting to shift a heavy engine into place, the fact that defendants had made a rule requiring the boom, which was attached to the engine, to be lowered before moving or shifting the engine, and that other contractors had made similar rules, is sufficient to authorize the submission of the question of the necessity of such a rule to the jury. *Dalen v. Brown* (1899) 45 App. Div. 428, 60 N. Y. Supp. 840.

⁸ *Laror v. New York, L. E. & W. R. Co.* (1891) 61 Hun. 11, 15 N. Y. S. 384; *Warn v. New York C. & H. R. Co.* (1891) 80 Hun. 71, 29 N. Y. S. 897; *Texas & N. O. R. Co. v. Echols* (1894) 87 Tex. 339, 27 S. W. 60, 28 S. W. 517; *Southern P. Co. v. Webb* (1896) Tex. Civ. App. 36 S. W. 1111, 11 Tex. Civ. App. 61, 32 S. W. 1111. In the cases cited *passim* in subtitle C of this chapter. In a case where the injured person was a passenger it was laid down that, when the reasonableness or unreasonableness of a rule depends upon the existence of particular facts and circumstances, it is a question for the jury, under proper instructions, but that, if the facts are undisputed, the question is a proper one for the court. *Pittsburgh, C. & St. L. R. Co. v. Lyon* (1888) 123 Pa. 140, 2 L. R. A. 489, 16 Atl. 607.

⁹ *Texas & P. R. Co. v. Carpenter* (1897) 15 Tex. Civ. App. 493, 40 S. W. 546.

¹⁰ *Atchison, T. & S. F. R. Co. v. Cuthers* (1896) 56 Kan. 309, 13 Pac. 230.

cessity and propriety of making such a rule was so obvious as to make the question one of common knowledge and experience.¹⁰ Especially is it unwarrantable to infer culpability in the absence of such evidence, where it appears that the rules actually promulgated by the defendant supplied an adequate protection against the occurrence of accidents like the one in question, so far as they could be prevented by rules.¹¹

If the plaintiff relies upon the theory that some specific rule should have been promulgated under the circumstances, he must show not only that the rule suggested was necessary,¹² but that it was reason-

¹⁰ *Belton v. New York, L. E. & W. R. Co.* (1892) 131 N. Y. 582, 30 N. E. 464; plaintiff's counsel contended that the defendant might have made further rules beside those in force, but the court remarked that "so long as the rules which are promulgated will, if observed, secure safety, it is wiser to leave the making of new rules to the company." *Doyle v. New York, O. & W. R. Co.* (1893) 73 Hun. 270, 26 N. Y. Supp. 405, reversed in (1897) 151 N. Y. 549, 45 N. E. 1028, but not upon this point; *Corcoran v. New York, N. H. & H. R. Co.* (1901) 58 App. Div. 606, 69 N. Y. Supp. 73. A sawmill owner cannot be charged with negligence for failing to direct one employed as sawyer by special rules to observe care towards an oilbore engaged in certain work with him, and injured by his negligence, where the work was not complex, and there was no evidence that it was customary in sawmills to direct employees by special rules. *Olson v. North Pacific Lumber Co.* (1900) 40 C. C. A. 427, 100 Fed. 384.

¹¹ *Belton v. New York, L. E. & W. R. Co.* (1892) 131 N. Y. 582, 30 N. E. 57; *Kelch v. Lehigh Valley R. Co.* (1894) 78 Hun. 492, 29 N. Y. Supp. 533. See also *Sherman v. New York C. & H. R. R. Co.* (1883) 91 N. Y. 332; *Frankville & F. H. R. Co. v. Tobill* (1895) 143 Ind. 79, 41 N. E. 709, 42 N. E. 352; *Kansas C. Co. Pl. & M. R. Co. v. Hammond*, (1894) 58 Ark. 324, 24 S. W. 723. In *Torre, Hodge & L. R. Co. v. Becker* (1896) 146 Ind. 202, 45 N. E. 95, the court denied that the company was negligent in omitting to promulgate an additional rule which would have been useless and supererogatory. See § 217, subd. d, for the specific facts of the case. In *Simpson v. Central Vermont R. Co.* N. Y. Supp. 73.

¹² *Corcoran v. New York, N. H. & H. R. Co.* (1901) 58 App. Div. 606, 69 N. Y. Supp. 73.

able and proper, and, if observed, would have adequately protected the employees.¹³

As a master is entitled to conduct his business on the assumption that servants will use ordinary care (see §§ 30-30b, *ante*), he is not under any duty to make rules for the purpose of regulating acts which are in themselves negligent.¹⁴

The principle that a master is not bound to adopt any particular methods of work (see § 35, *ante*) involves, in the present connection, the corollary that, where the rules promulgated by an employer afford ample protection if they are duly observed, the fact that different rules for the same emergency have been adopted by other employers is not sufficient to show that he is negligent.¹⁵

212. Relation of this duty to that of instruction.— One of the main purposes of a rule being to place servants in possession of certain information which they are not in a position to acquire by their own unaided observation, it is only natural that the situations in connection with which the master's duty to promulgate rules is discussed should sometimes be essentially similar to those in which his liability is made to turn upon the performance of his duty to instruct. See chapter XVI. The availability of protective means and appliances, or the possibility of avoiding injury by the adoption of certain methods, are considerations which excuse the master only in so far as workmen may be able to understand the proper course to adopt under the given circumstances.¹ Following out this conception, we are led to

¹³ *Larow v. New York, L. E. & W. R. Co.* (1891) 61 Hun, 11, 15 N. Y. Supp. 384.

¹⁴ "A railroad company is not chargeable with negligence because of its omission to make a rule for the protection of brakemen against injury received in boarding moving freight cars, where there was opportunity to board them while they were standing. *McDugan v. New York C. & H. R. R. Co.* (1894) 10 Misc. 336, 31 N. Y. Supp. 135. An employee is not entitled to a rule forbidding him from walking into an empty elevator shaft. *Poindester v. Benedict Paper Co.* (1900) 84 Mo. App. 352.

¹⁵ *Smith v. New York C. & H. R. R. Co.* (1895) 88 Hun, 468, 34 N. Y. Supp. 881. In *Hannibal & St. J. R. Co. v. Kanaley* (1888) 39 Kan. 1, 17 Pac. 324, the court argued as follows: "A railroad company is not required to change its orders or signals for the movement of its trains, because some other railroad company has adopted a different system of orders or signals. A railroad com-

pany may even have in use a system of orders or signals shown to be less safe than that adopted by another railroad company, without being liable to its employees for the consequences of the use of such orders or signals. If the employee thinks proper to continue in the service of the company with the knowledge of the orders or signals in use, it is at his own risk, and all that he can require of the company is that he not be deceived as to the degree of danger he incurs." Compare also § 209, 218, as to the effect of the servant's appreciation of the risks incident to the master's system, and see further as to the general principle involved in such decisions, chapter XVII.

¹ For this reason it was held, in *Tulla v. New York & T. S. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29, affirmed (1900) 162 N. Y. 614, 57 N. E. 1127, that it was for the jury to say whether the defendant, by furnishing upon the dock lamps and lanterns available to employees engaged in loading a

the conclusion that the omission to frame rules cannot be made the basis of a charge of negligence, where the servant is already in possession of all the information which he could obtain from a rule.² In this point of view it is clear that the simpler the operations to be performed, the less ground will there be for inferring the existence of an obligation to frame rules.³ More especially is it unwarrantable to in-

vessel, and by having materials to cover the hatchways in the lower deck near them, which the employees might have placed over them, had done all at reasonable care required to make the place of work reasonably safe, or whether it should, by means of rules, have directed its agents to advise workmen temporarily employed to work upon its vessels as to any precautionary means which it might be desirable for them to use, in order to secure their safety. Compare *Latorre v. Central Stamping Co.* (1896) 9 App. Div. 145, 41 N. Y. Supp. 99, where the main issue was whether a minor employee should have been instructed, and the court said that, under the circumstances, the jury would have been justified in finding that such instruction was necessary, or that there should have been some rule or regulation on the subject.

Thus, the employer's failure to promulgate a written rule cannot be made the basis of an action, where oral instructions covering the same subject-matter have been given. *Whalen v. Michigan C. R. Co.* (1897) 114 Mich. 512, 72 N. W. 323. In *Houston & T. C. R. Co. v. Strycharski* (1894) 6 Tex. Civ. App. 555, 26 S. W. 253, 642, the court discussed the liability of the employer as follows: "It is certainly the duty of railway companies to have suitable regulations for the doing of their business, which will give reasonable protection to their employees where the exposure is such that prudence requires it. But all risks which an employee incurs in the service cannot be so provided against by previous regulation. There are some from which, by the use of his senses, he must protect himself. Such are those which are open and patent to his observation. Such was that from which appellee suffered. When the circumstances are such that the master is required, in the exercise of due care, to have a rule for the protection of the servant, the latter may presume that the rule exists until he ought to know the contrary; and he may rely

on such presumption without being guilty of negligence, and may hold the master liable for any harm that results from the absence of the rule. But there is no authority that we know of which exacts of the master the duty of cautioning the servant against a danger which the servant, while performing his work, may see and guard against as well as could the master himself if present, or anyone else whom he might put to give the warning."

²Negligence cannot be predicated of the failure of an employer to promulgate rules for the guidance of men engaged in loading ore on cars, and moving them along the track only a few hundred feet in length, not by engines but by their own strength, or that of a horse. *Morgan v. Hudson River Ore & L. Co.* (1892) 133 N. Y. 666, 31 N. E. 234. A complaint is bad which is based on the theory that a railroad company is bound to make rules in respect to the operation of its trains in its freight and coal yards, so as to protect an employee from risks incidental to his employment, or those arising from his own negligence or that of his co-servants. *Voss v. Delaware, L. & W. R. Co.* (1898) 62 N. J. L. 59, 41 Atl. 224. The court there laid down in general terms, that there is no principle of law compelling the establishment of rules prescribing the manner in which the work of the master shall be done by the servant. But this broad statement is, of course, to be read with reference to the facts involved. The decision in *Sanner v. Atchison, T. & S. F. R. Co.* (1897) 17 Tex. Civ. App. 337, 43 S. W. 533, also supports the doctrine enunciated in the text. A railroad company is not negligent in failing to publish rules for the regulation of such simple work as the moving of cars by hand on a siding down a slight grade. *Moore Lime Co. v. Richardson* (1897) 95 Va. 326, 28 S. E. 334 (plaintiff's decedent walked behind the car he was pushing, and was caught by another which overtook it). Negligence is not chargeable to a railroad company for its failure to pre-

for culpability where those operations are of such a nature that the servant's safety cannot be imperiled by any act or omission of his co-employees, but depends wholly upon the degree of skill, care, and caution which he himself uses.⁴

213. Common usage as a test of the performance of the duty.—Common usage being one of the tests by which the question whether a master's duty has been performed is decided (see chapter VI.), the fact that other individuals or corporations engaged in the same business had or had not found it necessary to make rules to regulate the particular subject-matter is one which it is proper to consider in determining whether a rule ought to have been promulgated under the circumstances, or whether the rule actually promulgated protected the servant sufficiently.¹ The fact that no rule covering the circumstances

scribe rules for warning an employee who went under a rear car, without the knowledge of the engineer, to fasten a brake rod, and was injured by the starting of the train. *Norfolk & W. R. Co. v. Graham* (1898) 96 Va. 430, 31 S. E. 604. A railroad company is not bound to make rules to govern its laborers as to what should be done to secure the remnants of the stacks of ties and prevent them from falling. *Texas & N. O. R. Co. v. Echols* (1894) 87 Tex. 339, 27 S. W. 60, 28 S. W. 517. The court said: "In this case the work to be done was of that character which could be performed and understood by any laborer of common intelligence; in its performance there was no danger greater than attends any work commonly done in the ordinary avocations of life. The reason for the rule requiring of the master the precaution of prescribing regulations for the discharge of such duties does not exist here, and therefore the rule does not apply to this case. The same requirements apply to all employers, railroads, manufacturers, merchants, farmers, and in fact in every branch of business, when the business is such that the danger to the servant exists by reason of the very nature of the service to be performed; and it applies to neither when that danger may not be reasonably anticipated on account of the character of the work."

⁴There is no obligation to make rules to lessen the dangers of the work of oiling a dynamo. *Fritz v. Salt Lake & O. Gas & E. L. Co.* (1899) 18 Utah. 493, 56 Pac. 90. Compare § 211, note 15, *ante*.

¹*Eastwood v. Retsof Min. Co.* (1895) 86 Hun. 91, 34 N. Y. Supp. 196. In *Abel v. Delaware & H. Canal Co.* (1891) 128 N. Y. 662, 28 N. E. 663, the trial judge had admitted in evidence, against the objection of the defendant, the rules of other railroad companies, and among other rules those enacted for the protection of firemen, and instructed the jury that the obligation of the defendant to make and promulgate proper rules for the conduct of its business. He relied on the fact that he had admitted the rules of other companies to be proved, "not because it was the duty of this company to adopt the rules of any other company, but to better enable you to judge and determine, in looking at the different rules that prevail, what is a reasonable and proper rule." After some further remarks on this point the judge proceeded: "I think rules might have been suggested, not adopted by any company. You have a right to consider whether some rule which occurs to you, even though no company had adopted it, would have been a better rule, and given better protection, and such a one as ought to have been adopted and maintained." The defendant's counsel excepted to that part of the charge "in relation to the jury determining what were proper rules, and they might conclude what rules should be." But the court of appeals said: "If the charge is to be construed as leaving it to the jury to determine, irrespective of the evidence, what rules ought to have been adopted for the safety of the repairmen, and to find the one way or the other on the question of the defendant's negligence, in conform-

out of which the injury arose has been promulgated by other employers in the same kind of business, at the very least points strongly to the conclusion that the failure to promulgate such a rule is not actionable negligence.² In some jurisdictions, as shown in §§ 44 *et seq.*, compliance with the usage of any considerable majority of the class of employers to which the defendant belongs is treated as being conclusive in his favor. So far as the duty to make rules is concerned, the effect of such compliance is left somewhat obscure by the few New York cases in which the question has been considered.³

ity with a conclusion so reached, the charge was undoubtedly erroneous. But this is not the fair interpretation of the charge. The plain object of the court was to guard the jury against giving undue weight to the fact that more specific, and, as the plaintiff's counsel contended, better, rules had been adopted by other companies than had been adopted by the defendant. This is very apparent from what follows the clause quoted: 'So, that some other company has adopted a rule, you can't hold, as matter of right, that this company should have adopted it. If, on examining the rules of other companies and those that prevailed here, you should think that one set of them was not a reasonable protection, and the other was, it would help you very much in getting at what ought to be done. That is the reason why this evidence was admitted.' The effect of the charge was that the jury were to weigh the evidence, and, in view of the rules adopted by different companies, determine whether the defendant had discharged its duty in the premises, and that they were not to find a rule proper or improper because some other company has adopted or rejected it. The court was endeavoring to aid the jury in weighing the evidence which related to the rule under which the defendant's business was conducted, and that adopted on the same subject by other companies. We do not think the jury were misled." In *Pittsburgh, C. & St. L. R. Co. v. McGrath* (1885) 115 Ill. 172, 3 N. E. 439, it was held proper on the cross-examination of a witness to ask whether it was not the custom of the defendant company, or of all companies, to have a foreman with the section men, to warn them of the approach of trains.

² See this point emphasized in *Berri-*

(1892) 131 N. Y. 582, 30 N. E. 57; *Morgan v. Hudson River Ore & I. Co.* (1892) 133 N. Y. 666, 31 N. E. 234.

³ In *Doing v. New York, O. & W. R. Co.* (1893) 73 Hun. 270, 26 N. Y. Supp. 405, the plaintiff was nonsuited on the ground that no evidence had been given that any rules were in use by other corporations engaged in business of a similar character, and no experts or other witnesses had given testimony tending to show that any rule was necessary or practicable in such a case; nor was the evidence such as to make the necessity and propriety of making and promulgating the rule contended for so obvious as to make the question one of common experience and knowledge. The abstract correctness of this doctrine was not denied by the court of appeals, but it was held that the principle which really controlled the case was that, when a master knows that his employees are doing their work in a reckless and dangerous manner, it is his duty to change the manner of operation by some regulation or rule. (1897) 151 N. Y. 579, 45 N. E. 1028. The decision in (1893) 73 Hun. 270, 26 N. Y. Supp. 405, was followed in *Fly v. New York C. & H. R. R. Co.* (1895) 88 Hun. 323, 34 N. Y. Supp. 739, holding that the failure of a railroad company to adopt rules or regulations governing the loading of rails upon a flat car by gangs of men on either side is not negligence rendering it liable for an injury to one so engaged from the falling of a rail-thrown on the car from the opposite side, unless rules relating to such work have been adopted by other companies, or a rule would be necessary and practicable. But the position taken by the court of appeals in the *Doing Case* renders it difficult to say whether this decision would be upheld upon the facts disclosed, if it came under review in the higher tribunal. In *Crowe v. New York*

213a. Habitual practice; how far a legal substitute for a rule.—

An obvious corollary of the proposition that the master is responsible for the exercise of due diligence in directing the mode and manner of carrying on his business is that he is not liable where the mode in which it is carried on, by his authority, is reasonably safe, prudent, and careful, howsoever that result may be brought about.¹ Whether an employer who is charged with culpability in omitting to promulgate formal rules is entitled to shelter himself under the plea that the casualty which produced the injury would not have occurred if a certain customary method of doing the work had been followed depends upon whether that method has actually become an incident of the management of his business, not only with his sanction and approval, but also in such a sense that his employees comprehend that he requires and expects them to conform to it. In other words, such a method is regarded as the legal equivalent of a rule when it is recognized and regularly enforced by the employer, and not otherwise. Subject to the qualification thus indicated, the accepted doctrine is that a charge of negligence for not making rules is avoided by the proof of a rule and practice, actually in force, which rendered any other rule apparently unnecessary.²

On the other hand, the fact that certain employees were in the

C. & H. R. R. Co. (1893) 70 Hun. 37, 23 N. Y. Supp. 1100, it was laid down that a railway company cannot be held negligent in failing to promulgate a rule which has never been adopted. In *Eastwood v. Retsof Min. Co.* (1893) 86 Hun. 91, 34 N. Y. Supp. 190, on the other hand, the position has been distinctly taken that the fact that no such rules as those suggested had ever been made by other employers is not conclusive against the necessity of making them. The court said: "Where the business is complicated, the circumstances are those which do not occur often, and the danger is not serious, it may well be that the fact that other people engaged in the same business have found no necessity for making rules for the particular case may be almost conclusive that such rules are not necessary. But where the circumstances are such that any person can see what might happen in a given case, and the danger is plain and obvious, the jurors might be at liberty to infer that rules to protect the employee were necessary, although they had no experience in the particular business, and although there was no evidence that other corporations in the

same business had made rules for such cases."

¹ *Rutledge v. Missouri P. R. Co.* (1894) 123 Mo. 131, 24 S. W. 1053, 27 S. W. 327.

² *Kudik v. Lehigh Valley R. Co.* (1894) 78 Hun. 492, 29 N. Y. Supp. 533. In the Missouri case just cited (*Rutledge v. Missouri P. R. Co.* [1894] 123 Mo. 131, 24 S. W. 1053, 27 S. W. 327) a switchman, while uncoupling cars, was thrown to the ground by the sudden checking of the train in response to an unauthorized signal by another employee. The evidence showed that there were printed rules prescribing the signals for movements of trains, and that, according to the custom of the yard, those signals should have been given by the person engaged in the coupling. In discussing the question whether sufficient precaution had been taken to secure the safety of the employees, the court said: "That practice or custom was a part of the mode of conducting defendant's work, and its long continuance implies that it had the sanction of defendant. The employees were expected to conform to it as part of the usual course of the defendant's

habit of observing a custom or rule for their own protection will not operate as a discharge of the employer's duty to see that the department of his business to which it relates is conducted upon a safe system, where there is no evidence that it was published by printing, or generally known to that particular class of employees against whose acts it was supposed to be a safeguard, or that it was regularly prescribed by the employer in some way, or that he required it to be obeyed.³ Still less will the mere supposition or "general under-

business. . . . What greater protection would the plaintiff have had from the existence of a formal rule, directing the work to be done in the manner in which the men already observed? How can it justly be said that there is need of a particular rule, or negligence in failing to declare it, when the practice which it would prescribe has already been adopted and is followed by the men to whom it would apply?

. . . . The practice of the workmen, no less than any possible rule, sanctioned the repetition of the first signal, in some circumstances, by another employee, in order to catch the eye of the engineer. The latter (who testified for plaintiff) declared that he stopped the locomotive and train in response to a lantern signal given by someone. If that signal, at the time plaintiff was hurt, did not originate with the plaintiff, there was a plain violation of the custom and practice of the yard, quite as much as there would have been a violation of the rule, had one existed to the same effect." In *Luebke v. Chicago, H. & St. P. R. Co.* (1885) 63 Wis. 91, 53 Am. Rep. 266, 23 N. W. 136, the court, in ruling that sufficient precaution had been taken to secure an employee working under a car, where the

evidence showed that, while he was under the car, three trainmen in the employ of defendant were standing by the car, and that it was the duty of each of them, incident to his employment, to act as a watchman to protect the plaintiff from injury, said: "True, no written or published regulation of the company to that effect was shown; neither did any witness in the employ of the company testify that he had been charged by any officer of the company with the duty of watching for the safety of other employees working under cars upon the tracks; but many such witnesses testify that their duty in that behalf was well understood by

them and other employees of the company. It was a sort of common law of the company, obligatory upon its employees, and as thoroughly understood by them as though it had been embodied in the printed regulations, and read by the officers of the company to them. It thus became a rule or custom of the company, as well as an understanding between its employees." In *Byrnes v. New York, L. E. & W. R. Co.* (1893) 71 Hun. 209, 24 N. Y. Supp. 517, it was held that the establishment by a railroad company of a rule for the inspection of loaded cars before they are sent out was not proved by the testimony of an employee, having charge of the business at a station, that he considered it a part of his duty to make such inspection and so instructed the men under him, and that it was his custom to give such instructions,—especially where it is possible the fault of such person in failing to inspect such car caused the accident for which recovery is sought, and he was contradicted by two witnesses. In *Texas & P. R. Co. v. Campbell* (1894) 39 S. W. 1104; (1897) 16 Tex. Civ. App. 665, 39 S. W. 1105, failure to reduce to a written rule a custom by a railway company requiring employees engaged in handling cars at a given point to notify those engaged in repairing before setting cars in upon the repair track was held not to render the company liable for an injury to a car repairer caused by the failure to give such notice.

³ *Abel v. Delaware & H. Canal Co.* (1886) 103 N. Y. 581, 57 Am. Rep. 773, 9 N. E. 325. In *Rutledge v. Missouri P. R. Co.* (1894) 123 Mo. 131, 24 S. W. 1053, 27 S. W. 327, *supra*, Macfarlane, J., dissented on the ground that the question whether the master sanctioned and enforced the custom under discussion was, under the circumstances, one for the jury to determine.

standing" of defendant's employees be deemed competent evidence of the existence of a rule.⁴

As illustrative of the above doctrine, it may be noted that, where the consequences of a violation of a rule by the injured employee are in question (see chapter XIX.), a custom which has been regularly observed is, for legal purposes, equivalent to a rule promulgated by the master.⁵ But in such a case as this, it is obvious that the question whether the custom was enforced or not by the employer is immaterial. The servant's incapacity to recover is referable to the principle that he knows himself to be doing his work in a manner which is likely to cause him injury.

In any jurisdiction where the duty to see that a rule is carried out is regarded as non-delegable (see chapter XXXI.), the doctrine that an habitual practice is the juridical equivalent of a rule will sometimes operate to the disadvantage of the master.⁶

213l. Duty to bring the rules to the notice of the servant.—The failure to bring a rule to the knowledge of the employee or employees by whose agency it is to be carried out obviously involves the same consequences, in a juridical point of view, as the entire omission to frame that rule.¹

⁴*James v. Northern P. R. Co.* (1891) 46 Minn. 168, 48 N. W. 783.

⁵An experienced locomotive fireman who, in violation of a well-understood custom among engineers and firemen, went under an engine to clean out the ash pan without notifying the engineer, and was scalded by the engineer's blowing off the engine, was held chargeable with such contributory negligence as to preclude a recovery for the injury in *Crane v. Chicago, M. & St. P. R. Co.* (1896) 93 Wis. 487, 67 N. W. 1132. So, also, a steam ferry company is not liable for the death of an oiler on a ferry boat, caused by the failure of the engineer to warn him before starting the machinery, where a rule of such engineer, known to deceased, requiring him, if he should be going into a dangerous place and the engineer should not be in the engine room, to withdraw the starting bar and place it on the floor of the engine room to notify him not to start, was disobeyed by the deceased. *Stevens v. San Francisco & N. P. R. Co.* (1893) 100 Cal. 554, 35 Pac. 165.

⁶In *Denver & R. G. R. Co. v. Sipes* (1899) 26 Colo. 17, 55 Pac. 1093, it was held that the mere fact that the rules of a railway company did not ex-

pressly provide for the display of a red light in the caboose of a train which turned out at a siding to let another pass, and that they did not designate where any of the red lights which they actually provide for should be carried, did not deprive of its character as the breach of a non-delegable duty, the failure of the train hands to obtain a red light for the cupola on a certain trip, where it was in evidence that the company's cabooses were constructed with a view to carrying such a light, that a particular kind of lamp was constructed for the purpose of being displayed in the cabooses, and that it was customary to carry one to be so displayed. By many courts, however, it may be presumed that the facts thus presented would come within the scope of the rule that the master is not liable for the negligent manner in which the details of the work are carried out. See chapter XXXII.

¹In an action by an employee working under the direction of a foreman for an injury sustained in attempting to shift a heavy engine into place, the fact that defendants had a rule requiring a boom which was attached to the engine to be lowered before shifting the engine, and that other contractors had similar

The duty of promulgation is usually considered in relation to the question of the servant's knowledge of some particular rule as an element which it is necessary to establish before he can be held guilty of contributory negligence in violating it. This aspect of the duty is discussed in subtitle D.

214. Duty to enforce the rules promulgated.—(See also cases cited in § 217, *infra*.)—An employer does not discharge his whole duty by merely framing and promulgating proper rules for the conduct of his business, and the guidance and control of his servants. He is also under the obligation of enforcing the rules, in so far as that result can be attained by exercising a reasonably careful supervision over his business and his servants.¹ In other words, a master's duty does

rules, authorized a finding that the rule should have been communicated to the foreman, who had authority, and whose duty it was, to direct the work of shifting the engine, and who had charge of the work, and hired the laborers, who were to obey his instructions, the men engaged in shifting the engine being all under his direction, and not that of the engineer. *Daley v. Brown* (1901) 167 N. Y. 381, 60 N. E. 752, Affirming (1899) 45 App. Div. 428, 60 N. Y. Supp. 840. A rule which relieves the employer of the obligation to give the employee notice of dangers similar to those against which rules are commonly promulgated as a safeguard stands on the same footing as any other rule. Thus, where a railroad company, in an action for injuries caused by a collision with a "wild" train, admits that it was run without any precaution or notice in advance that such a train was to be expected, and, in order to rebut any presumption of negligence on the premises, relies upon a rule dispensing with such notice, the defense will not be allowed, unless it shows that its employees were duly informed of the rule, or had such knowledge of its usage and practice in the premises as would be equivalent to actual notice of the dangers arising from the particular occurrence which the rule was designed to obviate. *Olson v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. W. 806.

¹ *Sevier v. Ward* (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261. *Whittaker v. Delaware & H. Canal Co.* (1891) 126 N. Y. 544, 27 N. E. 1042. Followed in *Warn v. New York C. & H. R. R. Co.* (1894) 80 Hun. 71, 29 N. Y. Supp. 897, where the court, referring to a certain

rule of the defendant, said "If . . . [it] was intended to apply to a train like the one in the inspection of which the plaintiff was injured, it became a question of fact whether the defendant was guilty of negligence in regard to its proper promulgation and enforcement. If that rule was not intended to apply to such a train, then it became a question of fact whether the defendant had performed the measure of its duty, within the rule" that a railroad company is bound to protect its employees, so far as it can, by the promulgation of reasonable rules. "No distinction exists in principle between permitting the use of defective machinery, and permitting employees to habitually disregard the safeguards that have been provided to insure the safe running and operation of trains." *Coppins v. New York C. & H. R. R. Co.* (1890) 122 N. Y. 557, 25 N. E. 915.

By promulgating a printed rule, the master does not become responsible for its observance in every case which it fits. "A rule is but a direction or command as to the mode of carrying on the work. The master is bound to the use of reasonable diligence in enforcing it; but he certainly is not an insurer of its observance." *Rutledge v. Missouri P. R. Co.* (1894) 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327. Where a mine is operated by a company through an incline extending from the surface several hundred feet into the earth, by means of cars run upon iron rails laid therein, and it is an established rule of the company that a signal called a "tally" shall be sounded at twenty-three minutes before 5 o'clock every evening, at which time the cars shall cease running up and down the incline, and the workmen

not end with prescribing rules calculated to secure the safety of employees. It is equally binding on him honestly and faithfully to require their observance.² It has been said that the duty of seeing that the regulations are obeyed is specially imperative where young persons are employed.³

In some cases negligence in respect to the enforcement of a rule may be inferred where the defendant has noticed that it is constantly being violated, and is therefore insufficient for the protection of certain employees unless some other employee is personally present to see that the precautions which it contemplates are properly observed.⁴

Whether the master was negligent in failing to enforce a rule adopted by it is a question of fact for the jury.⁵

It is evident that, in order to recover for a breach of this duty in cases where the master was not personally supervising his business, the servant must rely on the theory that the agent to whom the enforcement of the rules was intrusted was a vice principal by virtue

shall have the right of way for the space of seven minutes to reach the surface, it is negligence on the part of the company to allow the "tally" to be given by an employee stationed at an intermediate point on the incline, where it is impossible for him to know when cars will be sent down by the engineer at the top. *Silver Cord Combination Min. Co. v. McDonald* (1890) 14 Colo. 191, 23 Pac. 346.

² *Richmond & D. R. Co. v. Hissong* (1893) 97 Ala. 187, 13 So. 209; *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266. Laxity in the enforcement of rules is negligence. *Texas & N. O. R. Co. v. Echols* (1894) 87 Tex. 339, 27 S. W. 60, 28 S. W. 517.

³ *Parent v. Schloman* (1897) Rap. Jud. Quebec, 12 C. S. 283.

⁴ *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266, where the only rule promulgated for the protection of men working on repair tracks was one which forbade men to do switching on such tracks without the permission of the foreman of repairs. It was asserted by the company that if this rule was sufficient, when faithfully observed by its employees, to guard against the danger, the company had discharged its duty. The court, however, said: "This seems to be the general rule of law, when the circumstances are such that a reasonably prudent person might rely upon rules and regulations to afford

protection. But if the master sees proper to rely upon such methods of protection to his servants, and the occasion demands it, he should also adopt such measures as may be reasonably necessary to secure the observance of such rules. The fact that rules have been adopted is only evidence of the degree of care and diligence exercised by the master in any given case."

⁵ *Warn v. New York C. & H. R. R. Co.* (1895) 92 Hun, 91, 36 N. Y. Supp. 336, *Reversed* (1898) 157 N. Y. 109, 51 N. E. 744, but not on this point. Whether masters can be held liable on the ground that they neglected to take proper precautions, in relation to an elevator, to prevent persons in their employ from using it in a manner and for a purpose for which it was not intended, and contrary to the rules of their business, depends upon three questions of fact: First, whether the condition of the elevator, its relation to the business of the defendants, or to the work in which the plaintiff was engaged, and all the circumstances of the case, were such as to require of the defendants some precaution against such improper use; second, whether they were guilty of neglect, either in not taking precautions, or in respect to the sufficiency of the precautions taken by them; third, whether the plaintiff was injured by reason of the want or insufficiency of such precaution. *Acilla v. Nash* (1875) 117 Mass. 319.

either of his official rank, or for the reason that the duty belongs to the non-delegable class. These aspects of the question are discussed in chapters xxviii., xxix., and xxxi., *post*.

215. Construction and meaning of rules.—When duly brought to the knowledge of the servants, and assented to by them, a rule constitutes a written contract between them and the master. Its construction, therefore, must always be a question exclusively for the court.¹ The proper course, therefore, is for the court to instruct the jury as to the meaning of the rule in question.² Yet it has been held that, where the language of a rule, when read in the light of the circumstances inducing its promulgation, is fairly susceptible of a certain construction, and that construction has always been placed upon it by employees, it is a question of fact for the jury, whether one of those employees was negligent in acting on the assumption that this construction was the correct one.³

By one court it has been laid down that, when a rule is clear and explicit, free from ambiguity and equivocation, evidence of usage and custom is inadmissible to vary or alter its terms.⁴ By another, the more restricted doctrine has been formulated that evidence is not admissible to show that employees interpreted and acted upon a rule as bearing a certain signification, without showing that the plaintiff himself so understood or so acted on the rule, or knew that the other employees did so.⁵

Like other written documents, rules are to be given a reasonable construction.⁶

¹ *Western & A. R. Co. v. Moore* (1893) 94 Ga. 457, 20 S. E. 640. The construction of a contract, unless there is something peculiar to the words, by reason of the custom of the trade to which the contract relates, is for the court. Per Lord Cairns in *Bouca v. Shand* (1877) L. R. 2 App. Cas. 455, 46 L. J. Q. B. N. S. 561, 36 L. T. N. S. 857, 25 Week. Rep. 730. See also *Parsons, Contr.* p. 610. This doctrine is assumed to express the correct rule of procedure in all the cases cited below, with one exception to be noted presently. A witness cannot be asked whether, under some particular rule, there would be any objection to doing a certain thing in a certain way, as this would be asking him to construe the rule, and this is not within the domain of verbal evidence. *Pennsylvania Co. v. Stucke* (1882) 104 Ill. 201.

² *Texas & P. R. Co. v. Leighty* (1895) 88 Tex. 604, 32 S. W. 515. Affirming (1895; Tex. Civ. App.) 32 S. W. 799.

³ *Memphis & C. R. Co. v. Graham* (1891) 94 Ala. 545, 10 So. 283. The general rule of evidence is that usage is admissible to explain what is doubtful, but not to vary or contradict what is plain. *Greenl. Ev.* 16th ed. § 292.

⁴ *Western & A. R. Co. v. Moore* (1893) 94 Ga. 457, 20 S. E. 640.

⁵ A provision holding train hands equally responsible for the violation of the rules governing the safety of the train applies to each one within the range of his own duties, and does not make him responsible for the wrongful actions or omissions of others. In the following case one rule declared that a

⁶ *Louisville & N. R. Co. v. Hiltner* (1900) 21 Ky. L. Rep. 1826, 56 S. W.

An ambiguous rule promulgated by a corporation for the government of its employees in a dangerous service should generally be taken in its stronger sense against the corporation and in favor of the

work train "must not leave a station, when directed to run by special order, unless the conductor and engineer have a copy of the same in their possession;" while another required the conductor to show his order to the brakeman, and the engineer to show his to the fireman. The conductor of such a train received a message stating that a certain passenger train was fifty-three minutes late, and kept his train at a station until half an hour after this period had expired, the train crew having meantime taken their dinner at a place about two blocks away, where it was doubtful whether a passing train would have been heard, and then ran out his train without having inquired whether the passenger train had passed through the station, and without having received any message regulating the movements of his own train. A collision took place between the work train and the belated passenger train, and the fireman of the former was killed. The company sought to escape liability on the theory that the fireman was guilty of contributory negligence in not having refused to obey the directions of the conductor until he had first satisfied himself that such directions were authorized by a new telegraphic order superseding the one which announced that the passenger train was late. The court, however, refused to set aside a verdict finding that the fireman was not negligent in remaining at his post, saying: "It is scarcely necessary to say that such a rule would destroy the discipline essential to the proper management of trains, and we find nothing in the record which requires that it be enforced in this case. Whether Davies knew that No. 3 had not passed when the conductor ordered his train out onto the main line is not shown. It is probable, but not certain, that he would have heard the train had it gone through the station while he was at dinner. But conceding that he should have known that it had not yet arrived, it does not follow that he knew his train should not have been ordered out. He knew he had not seen a telegraphic order which announced any further change in the time of No. 3, it is true, but he did not know what information the conductor had received. It may be

said that it was his right to see the order, if one had been received, and that until he saw it he should have acted on the presumption that none had been sent, but such a course on his part was not required by the rules. They provided that train and engine men should be held equally responsible for the violation of any of the rules governing the safety of the trains, and that they should take every precaution for the protection of trains, even if not provided for by the rules; but they also provided that the conductor should have charge and control of the train and of all persons employed on it, and made him responsible for its movements while on the road, 'except when his directions conflict with the rules, or involve risk or hazard,' in either of which cases the engineer was to be held alike accountable. Brakemen and firemen were required to report every instance when the conductors and engineers should fail to show their telegraphic orders as provided by rule 101, but we find nothing in the rules which required them to disobey the orders given." *Haus v. Chicago, M. & St. P. R. Co.* (1894) 90 Iowa, 259, 57 N. W. 894. A special bulletin order regulating the speed of trains when passing certain particular switch points designated therein, has no application to switch points generally; and, in the absence of evidence showing that the point at which the disaster occurred was of the particular class of switch points embraced within the terms of the order, a court does not err in directing the jury that this order could have no application to the point in question. *Western & A. R. Co. v. Bussey* (1894) 95 Ga. 584, 23 S. E. 207. Evidence that a railroad company has promulgated rules requiring track repairers to examine their sections daily to ascertain if the track is safe, and to keep them and the cattle guards in good repair, is inadmissible in an action to recover for injuries received by a brakeman through a collision with the wing fence at a cattle guard, where there is no allegation that the fence which caused the injury is not in good order, and the rules gave the track repairers no authority to remove such fences. *McKee v. Chicago, R. I. & P. R. Co.* (1891) 83 Iowa, 616, 13 L. R. A.

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employee.⁷ Obscurity of language which renders rules unintelligible to employers creates a species of trap for them, and, where the consequence of holding a given rule valid will be to disable an employee

817, 50 N. W. 209. A railroad company is not liable to a section hand injured by a passing engine while he was cleaning the tracks at a crossing, on the ground of failure to observe a rule requiring a lookout on the footboard of an engine backed across a public high way, as the rule is for the protection of the public, and not employees. *Carlson v. Cincinnati, S. & M. R. Co.* (1899) 120 Mich. 481, 79 N. W. 688. A rule of a railroad company requiring that at all stations where automatic block signals are not used, a red signal will be at once displayed next the track on which a train has passed, and kept there until it has been gone the length of time given in the time-table between it and the train which should follow, if not more than ten minutes, but in all cases kept there for five minutes; and that no train will pass such signal until the five minutes have elapsed, unless otherwise ordered in the time-table or by special instructions, does not require the employee whose duty it is to display such signal to place it on the track, or so near thereto he will be struck by a passing train, or to keep it there the full ten minutes, where that is the time before the next train is due. *Foss v. Old Colony R. Co.* (1898) 170 Mass. 168, 49 N. E. 102 (recovery denied on the ground that the servant had either placed the light in an unnecessarily dangerous place, or tried to remove it without taking proper precautions). Where there is no rule which, in express terms requires the engineer to give any signal for sending out a flagman to protect a train, in case of a stoppage on the main line, but a rule states that "five short blasts of the whistle is a signal to the flagman to go back and protect the rear of his train," and the conductor is also required to protect his train by flagging, in case of stoppage, the construction to be placed on the rules is that it is the engineer's duty, upon stopping his train, to give the signal for the flagman to be sent back, and the duty of the conductor to take that precaution without the signal. *International & G. N. R. Co. v. Colpeper* (1898) 19 Tex. Civ. App. 182, 46 S. W. 922. A rule of a railroad company, providing that certain signals on the end of a car shall denote that the car

inspectors are at work under or about the car or train, and that the car or train so protected shall not be coupled to or moved until the signal is removed by the car inspector, and that, when a car or train is standing on a siding so protected, other cars shall not be placed in front of it without first notifying the car inspector, that he may protect himself, does not apply to a regular passenger train which has stopped at a station on the main track. *Ward v. New York C. & H. R. R. Co.* (1898) 157 N. Y. 109, 51 N. E. 744. Reversing (1895) 92 Hun, 91, 36 N. Y. Supp. 336. A rule requiring warning signals to be displayed at an adequate distance from a place where work is to be done "which will render the track unsafe or impassable, or unsafe for trains at their usual rate of speed," has no application to a case where a bridge which has sunk about an inch below its proper level is being "surfaced." Under such circumstances it is rather the duty of the workmen to clear the track for the trains, and the track is not impassable nor even dangerous within the meaning of the rule. *Aurandt v. Chicago, M. & St. P. R. Co.* (1894) 90 Iowa, 617, 57 N. W. 442. The effect of evidence that it was a part of the duty of trackmen to look out for wild trains, and that they had no other means of protection except to take care of themselves, is not qualified by a rule that wild trains "must run cautiously around curves and over grade crossings, looking out for trackmen," the proper interpretation of the rule being that the caution has reference to the safety of the train, not of the trackmen. *Sullivan v. Fitchburg R. Co.* (1894) 161 Mass. 125, 36 N. E. 751. A rule requiring car repairers, while at work on main or side tracks, to put out a blue flag as an indication of their presence, does not apply to cars upon which repairs are being made in the shops or shop yards. *Quick v. Indianapolis & St. L. R. Co.* (1889) 130 Ill. 334, 22 N. E. 704.

⁷ *Western & A. R. Co. v. Moore* (1893) 94 Ga. 457, 20 S. E. 640, holding that, under a rule of a railroad company, in these words: "Conductors and trainmen are required to be at terminal stations thirty minutes before the leaving time of their trains. Brake-

216. Rules prescribed must be definite and intelligible.—It is sufficiently obvious that an employer cannot be said to have discharged his duty in regard to the framing of rules unless their provisions are sufficiently specific to furnish the employees affected with adequate information respecting the acts which are to be done in order to carry out the employer's ideas as to the proper manner of performing the work.¹ So, also, it is as much the duty of a master to specify in a

terms as to make them intelligible to employees, or if they be so far equivocal as to express one thing and mean another, it would be a harsh rule of law which would hold the employee answerable where he conformed to the express direction of the master, but in doing so violated what the latter may be pleased to term the spirit of a rule. There it was held that, notwithstanding a rule of the defendant company requiring all trains to stop at schedule meeting and passing points, it was not error to refuse a request to charge, in attention for injuries caused by a collision that it was the duty of the engineer to stop his train at the point where the collision occurred, it not appearing that the same was either a schedule meeting or passing point. It was also denied to be error to charge the jury that the engineer, under such rule, could pass other than schedule meeting and passing points "at such rate of speed as common prudence dictated as safe." In *Richmond & D. R. Co. v. Mitchell* (1892) 92 Ga. 82, 18 S. E. 290, the plaintiff, as part of his contract of employment with the company, subscribed an instrument to the following effect: "I fully understand that the rules of the Richmond & Danville Railroad Company positively prohibit brakemen from coupling or uncoupling cars except with a stick, and that brakemen or others must not go between the cars under any circumstances, for the purpose of coupling or uncoupling or adjusting pins, etc., when an engine is attached to said cars or train; and in consideration of being employed by said company, I hereby agree to be bound by such rule, and waive all or any liability of said company to me for any results of disobedience or infraction thereof." I have read the above carefully and fully understand it." The court said: "It may be fairly presumed that the rules referred to and quoted from in the contract were carefully prepared, deliberately adopted, and embodied in some written or printed document. It is

allowable, therefore, to notice the phraseology critically in order to ascertain whether or not, fairly construed, that phraseology embraces such a coupling as was attempted in this case. The plaintiff was neither coupling nor uncoupling cars, nor did he go between the cars, nor was the engine attached to any cars or train. The evidence is, in substance, that the plaintiff, who was a brakeman, stationed himself, in the way usually practised by employees, upon the footboard of the pilot on the tender, and while there attempted to withdraw with his hand, without using a stick, a pin and link from the coupling apparatus of the engine, the engine and tender being in motion backwards at the time towards a standing car in the rear, for the purpose of being coupled thereto. Certainly the rules as quoted do not, by their letter, cover such a transaction as that in which the plaintiff was engaged. It is said, however, that they do cover it in spirit and intention. This seems to be altogether too doubtful, for, as we have already said, there is a presumption that such rules would be carefully considered and accurately expressed, and we may add that they ought to be construed more strongly against the party who made and adopted them than against one who merely assented to and agreed to be bound by them when they were presented to him as a basis of contract. The strong probability is that, in preparing the rules, such a case as the present, though it might frequently occur, was overlooked, and therefore was not provided for. We think this is the truth of the matter, and we hold with confidence that the rules have no application to the present case."

"A general rule that freight is to be safely loaded so that it cannot fall off the cars is not sufficient as a rule in regard to load, to load timber above the sides of the car, so as to relieve the railroad company from liability for injury to a servant by the fall of timber from a gondola car on which it was piled above

rule the means by which the notice of danger for which it provides is to be given, as it is his duty to direct that such notice shall be given.² But a rule which requires employees of one class to protect themselves by certain precautions against the possible consequences of certain acts of employees of another class cannot be impugned on the ground of insufficiency because it does not in terms forbid the latter class of employees to do those acts.³

the sides without stakes to hold it, although stakes were furnished by the company, to be used in the discretion of its servants. In the following case the court said: "Method or system as to loading lumber, there was none. Having furnished a good car and stakes that might be used, the manner of loading lumber was left to the judgment and discretion of its agents and servants. It was not sufficient for the defendant to show that its employees knew that the rule I have quoted applied to lumber, and also knew that the general usage required it to be staked, and that stakes were furnished and available to the men in the particular case before us. All this may be assumed to be true, and yet the fact exists that the use of the stakes was not enjoined upon the servants by any rule of the defendant or by any instruction ever given them. Having furnished the car and the stakes, it was left to the judgment and discretion of the foreman whether to use the stakes or not, and in this particular instance they were not used for the reason that they supposed the lumber would stay on the car over the short distance it was to be carried. And it is because of the failure of the defendant to require the use of the stakes in all cases that the neglect of its servants in this case is imputed to it. There was no rule, and the only method or system was such as the foreman in each particular case should deem the safe and proper one to pursue. Under such a state of facts the employer must be deemed constructively present during the loading of the cars, and the acts of his agents are in law deemed to be his acts. The improper and negligent loading of the cars is thus traced directly to the defendant, and its negligence established." *Ford v. Lake Shore & M. N. R. Co.* (1891) 124 N. Y. 493, 12 L. R. A. 454, 26 N. E. 1101. Where car repairers are required to work on a siding which trains may, in the ordinary course of business, enter from either end, and the

custom is to protect such car repairers by placing a blue flag at one end only of a car which is undergoing repair, the company is negligent in not promulgating a more definite rule than one which merely provides that "blue is a signal to be used by car inspectors." *Chicago, B. & O. R. Co. v. McGuire* (1896) 22 Colo. 363, 45 Pac. 383. A rule for the protection of car repairers is essentially defective where it omits to designate the person by whom the danger signal may be removed. *Abel v. Delaware & H. Canal Co.* (1891) 128 N. Y. 662, 28 N. E. 663. A railroad company is guilty of negligence in allowing a number of different employees to undertake the duty of warning or causing to be warned employees engaged on the repair tracks, of the switching of cars onto such tracks, without making it certain who is to discharge such duty in each instance, so as to avoid confusion and mistake. *Texas & P. R. Co. v. Eberhart* (1897; Tex. Civ. App.) 40 S. W. 1060, Affirmed in (1897) 91 Tex. 321, 43 S. W. 510.

² *Evansville & T. H. R. Co. v. Holcomb* (1894) 9 Ind. App. 198, 36 N. E. 39 (rule requiring that actual notice of any switching done in the daytime on repair track should be given to the men working there, but not designating the person by whom notice was to be given, held not sufficient, as a matter of law).

³ *Corcoran v. Delaware L. & W. R. Co.* (1891) 126 N. Y. 673, 27 N. E. 1022. There one of the rules of the defendant provided that "men repairing cars must see for themselves that they are protected by a flag when under and between the cars;" another that "a red flag by day, red light or fire on the track by night, indicates danger; on perceiving such, the engineer shall immediately stop his train before passing such signal." The trial judge, under the defendant's exception, submitted to the jury the question as to the sufficiency of the rules, the only suggestion made as to their insufficiency being that they did not in terms prohibit the co-servants of

C. PERFORMANCE OF THE DUTY IN SPECIFIC CASES.

217. Operation of trains considered with reference to the safety of train crews.—(Compare the cases cited in note 2 to § 209, *ante*.)

a. Generally.—The duty of a railroad company to make and enforce regulations for the safety of its servants embraces the duty of knowing where its trains are, and of giving such orders as are reasonably necessary to protect the trainmen.¹ Such a company, therefore, is bound "to use ordinary care and prudence in making and publishing . . . sufficient and necessary rules for the safe running of its trains."² According to the usual system in vogue, the movement of trains upon each division of a road is controlled by a single person, who is stationed at some convenient point, and issues his directions by telegraph according to a definite system, which rests partly upon fixed time-tables arranged beforehand and promulgated to the employees affected, and partly upon special orders adopted to meet emergencies for which the time-tables have not adequately provided. But the law does not require a railroad company to direct the movement of its trains by orders from the train despatcher alone, nor does the law require it to adopt any particular form of orders, or any particular system for communicating them. It has the right to direct the movement of its trains by train orders alone, or by train orders and signals, or by signals alone, or by time card alone.³

the plaintiff from moving other cars upon the one from which the red flag was shown and under which the plaintiff was. But the court of appeals said: "This idea, however, was necessarily included in the regulation which required a red flag to be hung out from a car in process of repair, and the rule must have been so understood by any person of common intelligence. It is not suggested that . . . [the co-servant] was ignorant of the meaning of the signal. The rule would not be any more effective to prevent the accident, or more likely to insure observance, had it been followed by a provision, in express words, forbidding the employees from moving cars against, or in the direction of, another car from which a flag was exhibited. We think that there was no proof of neglect on the part of the defendant to make and promulgate suitable and proper rules for the information and government of its employees, to warrant the submission of the case to the jury."

¹ *Galveston, H. & S. A. R. Co. v.*

Smith (1890) 76 Tex. 611, 13 S. W. 562.

² *Cooper v. Central R. Co.* (1876) 44 Iowa, 134; *Lewis v. Seifert* (1887) 116 Pa. 628, 11 Atl. 514; *Baltimore & O. R. Co. v. Comp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952. "A railroad company is bound to regulate the time and manner of running its trains, so as to avoid collisions, and to enable all its servants to know when a train may be expected, and thus avoid danger." *Shearn & Redf. Neg.* 3d ed. § 93, quoted in *Reagan v. St. Louis, K. & N. W. R. Co.* (1887) 93 Mo. 348, 6 S. W. 371. An instruction stating the duty of a railway company in regard to the promulgation of rules calculated to secure the safe operation of its trains is not improper, where the complaint alleges generally that the company's mode of operating these trains when the plaintiff was injured was negligent. *Cooper v. Central R. Co.* (1876) 44 Iowa, 134.

³ *Hannibal & St. J. R. Co. v. Kavalen* (1888) 39 Kan. 1, 17 Pac. 324. It is

b. Rules as to the meeting of trains.—Rules cannot be regarded as defective because they permit the despatch of two trains five minutes apart, with orders to stop at the same siding to allow another train to pass.⁴

Culpability is predicable where the form of despatch authorized by a rule is such that there is considerable risk of a misunderstanding as to the time at which the trains are to meet.⁵

It is negligence to order trains to meet at night at a "blind" siding, *i. e.*, one where there was no telegraph station, and no signal house by which it might be recognized.⁶

To require or permit trains to reach a given station at the same moment may or may not be negligence, according to circumstances.⁷

Where a train is ordered to meet, during the night, at a certain siding, another one with an engine designated by a specified number, it is not negligence to omit to notify the employees on the former train that a third train with an engine having a number, which, in a dim light, is apt to be mistaken for the number mentioned in the despatch, will also be met at the same siding.⁸

c. Rules as to notifying the crews of regular trains regarding the position of other trains of the same class.—In a recent case the court held that, in view of the fact that the rules for the operation of trains on 58,000 miles of railroad in the United States are framed on the theory that it is more conducive to safety to require the men at all times to look out for, and protect themselves against, other trains without notice of their whereabouts and movements, than it is to undertake to give them such notice, a company which has adopted such

error to instruct a jury to the effect that information to employees operating a railroad train, as to the position of another train on the road, must be given by the train despatcher. *Houston & T. C. R. Co. v. Stewart* (1899) 92 Tex. 540, 50 S. W. 333, Reversing (1898; Tex. Civ. App.) 48 S. W. 799.

⁴*Terre Haute & I. R. Co. v. Leeper* (1895) 60 Ill. App. 194 (second of the two trains ran too quickly onto the siding and collided with the first).

⁵As, where train despatchers were allowed to use the word denoting the hour at which trains were to meet, and to append the figures corresponding to that word without inserting them in brackets. *McLeod v. Gunther* (1882) 80 Ky. 399.

⁶*Mexican C. R. Co. v. Glover* (1901) 16 C. C. A. 334, 107 Fed. 356.

⁷*Wright v. New York C. R. Co.*

(1858) 28 Barb. 80. The court said "This was a question of fact, to be solved by experience in running trains. If there is no difficulty in stopping the train at the proper place, and no danger of running by at any time, including the night, then timing the trains in this manner would not be negligence, assuming, of course, that the up train should run on to the side track. But if experience shows that there is danger, especially on a dark night, of the down train running by the east switch, then it would be gross negligence to provide for the arrival of the trains at the same moment, as there would be great danger of a collision."

⁸*Brown v. Southern R. Co.* (1900) 126 N. C. 458, 36 S. E. 19 (number specified was "54," the other being "64").

rules is entitled to an instruction that they are neither unreasonable nor insufficient, although three competent witnesses have testified that such notice should be given.⁹ A general rule requiring trains to "approach all stations under full control, expecting to find trains using main tracks within station limits," has been considered far more certain to secure employees against rear collisions than a rule requiring the train despatcher to notify each train of the position of those going in the same direction.¹⁰

On the other hand, it has been laid down that a railway company owes to employees engaged in operating trains the duty of exercising ordinary care to inform them of the whereabouts of other trains upon the track, so as to enable them to guard themselves from injury.¹¹

⁹*Little Rock & M. R. Co. v. Barry* (1898) 43 L. R. A. 349, 28 C. C. A. 444, 56 U. S. App. 37, 84 Fed. 944.

¹⁰*Enright v. Toledo, A. A. & N. M. R. Co.* (1892) 93 Mich. 409, 53 N. W. 536. This case was approved in *Nolan v. New York, N. H. & H. R. Co.* (1898) 70 Conn. 159, 43 L. R. A. 305, 39 Atl. 115, where it was stated that the code of rules under review was substantially the same as that adopted by 90 per cent of the railroad companies of the United States, and the doctrine was enunciated that a railroad company was not negligent in failing to adopt a rule requiring trains proceeding in the same direction (the rear train at a greater rate of speed than the forward train), to be notified of their respective positions, where the rules in force forbade the rear train to leave a station in less than ten minutes after the departure of the forward train, and provided for signaling at a proper distance in case the forward train was detained beyond its usual time, or stopped at an unusual place. It was also held that a case in which a snow plow was at work behind another train did not present conditions so different from those which in general attend the movement of trains in the same direction on the same track that the company was bound to provide for them, as for an exceptional emergency not covered by its general rules (see next subdivision of this section), and to see that the conductors of the two trains were specially notified by telegraph of the relative positions. This was decidedly an extreme application of the doctrine, as the plow was throwing snow so as to render it difficult for the lookout to see ahead, and the forward train was upwards of an hour be-

hind its scheduled time, and had stopped to attach freight cars at a siding where freight trains stopped only occasionally. Another case in which it is held that an extra train may, so far as regards the absence of any duty of notification, be treated as a regular train, is where a special order is issued that a train which is behind time is to follow another train running on its regular schedule at an interval of time, the minimum of which is fixed by the general practice of the road. Such an order, it is declared, raises a clearly defined duty on the part of the men on the following train to look out for the one in front. For a collision between the trains, therefore, the company cannot be held liable on the theory that special directions to be on the lookout should have been given to the crews of both trains. Nor, if the interval between the two trains at the last station passed before the collision exceeded that allowed by the rules, can negligence be predicated of the omission to order the agent at that station to hold the following train. As that was in its proper position, there would have been no reason for holding it. *Kennelly v. Baltimore & O. R. Co.* (1895) 166 Pa. 60, 30 Atl. 1014.

¹¹*Houston & T. C. R. Co. v. Stewart* (1899) 92 Tex. 540, 50 S. W. 333. Whether a system of operating trains, under which, where trains of the same class are going the same way, neither is notified of the movements of the other, although the one following is to make faster time than the other and must overtake it, is consistent with due care, was held to be a question for the jury, in *Illinois C. R. Co. v. Neer* (1888) 31 Ill. App. 126. There it was

d. Rules as to the operation of trains not provided for in the regular time-tables.—When the regular time-tables are departed from in the operation of trains, such orders should be issued by the company as will afford reasonable protection to the trainmen.¹² When it introduces a change into the time-table, a duty immediately arises to notify all the employees who may be affected thereby that such a change has been made, and to specify what course they are to adopt in respect to the movements or stoppages of the trains operated by them.¹³

In the cases so far cited the point to be determined was whether the train despatchers had properly discharged the discretionary duty imposed upon them of regulating the movements of trains in emergencies not provided for in the rules. But circumstances of a similar nature are sometimes viewed as raising the question whether an obligatory course to be followed should have been prescribed by general orders, embodied in rules. Thus, it has been held that a jury is justified in finding that a railroad company is guilty of negligence in failing to make a rule that, in cases where it is desired to give to a wild train the right of way over a regular train, and for that purpose to hold the latter at a certain station, the detaining message received by the operator is to be shown to the conductor or engineer of the regular train, and that a communication shall be sent back from them to the effect that they have received and understood the despatch.¹⁴

also declared that the fact that in a few instances a railroad company has departed from its usual practice of allowing trains of the same class to run along the same section of track without notifying either of the other's movements will not justify the engineer of the following train in relying upon notice as to the position of the one in front.

¹² *Lewis v. Seifert* (1887) 116 Pa. 628, 11 Atl. 514.

¹³ *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 675, 22 S. E. 83, holding that, when a company sends a "wild engine" over its track unexpectedly, it is bound to warn all its employees who are rightfully on and using the track about its business, whether in charge of engine, train, or hand car, of the change in the schedule, and that, if it intrusts this duty to others, by bell, whistle, or otherwise, it makes such others its vice principals to that extent. Similarly, in *Louisville, N. A. & C. R. Co. v. Heck* (1898) 151 Ind. 292, 50 N. E. 988, the failure of a railroad company to observe its rules by notifying an extra train ordered to run over the working limits of a work train, that

the work train is within such limits, and to guard itself against the work train, was held to be negligence rendering the company liable for injuries received by an employee on the work train, which were the proximate result of such failure. In *O'Laughlin v. N. York C. & H. R. R. Co.* (1887) 27 N. Y. Week. Dig. 109, 9 N. Y. S. R. 384, it was held to be for the jury to say whether anything was omitted which might reasonably have been done by the company to prevent a collision which occurred between a regular and an extra train. In *Baltimore & O. R. Co. v. Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952, it was held that evidence that a train despatcher, who he required trains to run under special orders, failed to insist on receiving from the local operator to whom his orders were transmitted an assurance of the additional precautions required by the rules in such cases for the prevention of collisions had been taken was sufficient to support a verdict for the plaintiff. Compare case cited in note 15, *infra*.

¹⁴ *Sheehan v. New York C. & H. R. R.*

The language used in one case indicates that it is optional on the company's part either to provide by specific rules for the discharge of the duty of regulating the movements of extra trains, or to leave those movements to be regulated according to the discretion of the train despatchers.¹⁵ But, so far as the extent of the company's ulti-

Co. (1883) 91 N. Y. 332. The court said: "Having ordered '337' (the wild train) to travel on the time of '50' (the regular train) the defendant was bound to exercise every reasonable precaution that train '50' should not leave Cayuga before the arrival of '337.' No reason is given for not communicating with the conductor and engineer of train '50' before it reached Cayuga, or at least on its arrival there. The defendant annulled its time-table,—made it imperative upon '337' to move in spite of the pre-arranged right of '50,' and not only omitted, as to '50,' the exceedingly proper and wise conditions on which alone '337' was permitted to obey, but failed to send any communication whatever to 'No. 50.' Its omission to do so not only defeated all previous precautions, but converted them into means of destruction. The object should have been to prevent train '50' from running according to the time-table. . . . Instead of communicating with the engineer and conductor, the defendant communicated with a third person—the telegraph operator [at Cayuga] . . . 'for orders.' The train was made subject to his will, and the object in view became dependent upon his memory, and his faithfulness in obeying the order, and the probabilities of its attainment were thereby lessened. It cannot be said, therefore, as matter of law, that the defendant so dealt with the problem before it as not to expose the plaintiff—its servant—to perils against which he might have been guarded by proper diligence on its part, and, as matter of fact, the jury might well find that it did not take such reasonable care to protect him from accident as the exigencies of the situation required. . . . The law does not exact absolute certainty, but when life is at stake it demands that care shall be taken to provide so as far as possible against all contingencies, and whether the importance of a right understanding of the order, actually given, as to train '50,' required that one mode of communication rather than another should be adopted, was for the jury to say.

Among other facts they could consider that the effect of starting train '50' on its prescribed time was as well known to the defendant when it directed '337' to move, as it was after the collision." In *Dana v. New York C. & H. R. R. Co.* (1883) 92 N. Y. 639, involving the same facts as the case just cited, the plaintiff was nonsuited, and the court of appeals set aside the nonsuit for reasons similar to those which had led them to sustain a verdict for the plaintiff in the earlier case. In *Sutherland v. Troy & B. R. Co.* (1891) 125 N. Y. 737, 26 N. E. 609, a similar ruling under similar facts was made. The *Sheehan Case* was also followed by the supreme court in a decision holding that the fact of an extra engine's having been despatched to a specified station without any precautions being taken to notify the crew of a shifting engine in the yard at that station justifies a finding that the company is responsible for injuries caused by the shifting engine after its crew had jumped from it to escape a collision. *Nary v. New York, O. & R. R. Co.* (1890) 29 N. Y. S. R. 630, 9 N. Y. Supp. 153. So, also, where an extra freight train was ordered to run from a station ahead of a passenger train then due by the time-table, it was held that the jury was warranted in inferring negligence from the company's failure to provide a rule that, under such circumstances, the employees in charge of the following train should be always notified to moderate its speed sufficiently to avoid a collision. *Chicago, B. & Q. R. Co. v. McLallen* (1876) 84 Ill. 109.

¹⁵ A railroad company is under the duty of seeing that, at the last telegraph station which extra trains pass before entering upon a section of the road upon which a construction train is at work, they shall, either by the promulgation of appropriate rules, or by special orders issued as occasion may require, receive a notification that the construction train is ahead of them, and be cautioned to keep a sharp lookout. *Chicago, B. & Q. R. Co. v. Young* (1887) 26 Ill. App. 115.

mate responsibility is concerned, it would seem to be entirely immaterial which position is taken in those jurisdictions in which train dispatchers are deemed to be vice principals as regards the control of trains; and this doctrine is believed to be universally accepted in the United States, at all events. See chapter xxxi.

As an employer has a right to conduct his business on the assumption that his employees will discharge a duty which he imposes upon them by his rules, a railroad company operating a single-track road cannot be held negligent in failing to promulgate a rule that the crew of a regular train shall be notified of the position of an irregular train, where there is a rule in force which requires employees in charge of irregular trains to keep them out of the way of regular trains, and forbids, under any circumstance, the occupation of the main track by irregular trains within ten minutes of the schedule time of a regular train.¹⁶ One court has even gone to the length of adducing the doctrine of assumption of risks as a ground for relieving a railroad company of the duty of notifying the men on one train of the movements of another train which had abandoned its schedule time.¹⁷

The adoption and promulgation of rules permitting regular trains to be converted into extra trains running without a schedule, and requiring trains of the latter class to take a side track at least five minutes before the arrival of any schedule train, at the last station to which it is safe for the extra train to run, exonerates the company from liability for the death of an engineer of a schedule train from a collision between it and such extra train running ahead of its ordinary schedule, owing to the fact that the rule as to the side tracking has not been observed by his co-servants in charge of the latter train.¹⁸

¹⁶ *Terre Haute & I. R. Co. v. Becker* (1896) 146 Ind. 202, 45 N. E. 96.

¹⁷ In *Relvea v. Kansas City, Ft. S. & G. R. Co.* (1892) 112 Mo. 86, 18 L. R. A. 817, 20 S. W. 480, it was held, without much argument, that a railroad company is not guilty of negligence in ordering a train to run ahead of schedule time without giving the conductor of the forward train notice thereof, provided this is not an unusual course, and specials are to be expected at all times. The correctness of this decision appears to be more than doubtful. It virtually lays down the doctrine that a railroad company may, without culpability, cast upon trainmen the duty of guarding themselves against the approach of special trains, and there is great difficulty

in conceding this to be good railroad practice. The accident in question was proximately due to the fact that a section of the forward train was left standing on a grade while some of the cars were being switched on to the siding, and, owing to the negligence of a brakeman in not securing them properly, got under way, and running down the incline came into collision with the train which was ahead of its proper time. The actual decision, therefore, may be referred to the doctrine of common employment, and this seems to be the sole ground on which it can be based. See, however, the similar rulings referred to in §§ 209a, 218.

¹⁸ *Evansville & T. H. R. Co. v. Tobill* (1895) 143 Ind. 59, 41 N. E. 709, 42

With regard to the extent of the duty to provide for the prevention of collisions in the special emergency created by a snow storm, it has been held that the fact that a rule requiring that, in foggy weather, when a train cannot be seen at 300 yards, the trackmen shall suspend ordinary work and patrol the track, acting as signalmen to warn trains of danger, had not been extended so as to make it applicable during the existence of unusual snow storms, does not justify an inference by the jury of negligence by the company, rendering it liable for injury resulting from the fact that a train ran past a signal station and struck another train which was standing just beyond it.¹⁹

218. — of employees engaged in track work.— (Compare the cases cited in note 12 to § 209, *ante*.)—Several decisions recognize the existence of a duty on the part of a railway company to provide by rules, or general directions of some kind, for the safety of employees who are

N. E. 352. The court said: "The special verdict before us not only fails to find that the appellant had no rule by which the operatives of extra trains were to so run as to protect regular trains from collision, but it is, as we have seen, expressly found that the company maintained rules under which regular trains might be converted into extra trains; that trains of an inferior class should clear the right of way for trains of superior class, by taking a side track at least five minutes before the arrival of any schedule train at the last station to which it was safe for such inferior train to run; that No. 19 wholly failed to act in accordance with said rules, and did not take the side track at Pursell, where No. 20 could have passed in safety, but continued beyond said station to where the collision occurred. Thus it appears that obedience to said rules by No. 19 would have made the passage of No. 20, running by the schedule, entirely safe."

Niles v. New York C. & H. R. R. Co. (1897) 14 App. Div. 58, 43 N. Y. Supp. 751. It was contended by plaintiff's counsel that the same necessity for patrolling a track arose when there was a severe storm as when there was a dense fog, and that it was for the jury to say whether the company had not been negligent in failing to provide a rule by which the trackmen should be required to act as signalmen in both cases. The court, however, after pointing out that during snow storms the clearing of the track from snow was a matter of paramount importance, and

demanding the particular attention of the trackmen, proceeded as follows: "The doctrine imposing liability upon railroad companies for failure to adopt particular rules, the necessity for which was not apparent to them, should not be unduly or unreasonably extended. And since the company has a paramount interest in protecting its property from injury or destruction, and also in avoiding all liability for damages to employees and passengers, and the officers of the company deemed this system of signals and rules for the management and control of the movements of trains to be fully adequate for all purposes, these considerations must have some weight in determining whether the omission to promulgate a particular rule constitutes a neglect of duty, in not being able to foresee certain contingencies. It is true that the trackmen could have been relieved from the work of clearing the tracks by the employment of other men for that purpose, or by the assignment of other employees; but it is significant that Niles himself, an old and experienced employee, and knowing of the dangers to be apprehended from the storm more fully than others, deemed it unnecessary for the protection of his train, though much impeded by the snow, to adopt the precaution of dropping or sending back a trainman to warn any train that might be following. . . . And yet is it urged that the company itself was negligent in not requiring a precaution of that character during a severe snowstorm."

engaged in repairing the track, or in doing some other kind of work which exposes them to the risk of injury from rolling stock, with the handling of which they have nothing to do.¹

But the advantage which the servants receive from the predication of such a duty is greatly curtailed by the operation of the doctrine

¹ Such employees should be notified of a change in the running time of trains. *Baltimore & O. R. Co. v. Whittington* (1878) 30 Gratt. 805. In the absence of any rule requiring sectionmen to guard against irregular trains, or of any care to notify them of the approach of such a train, proof of the death of a sectionman, while going with a hand car on a special order, through a collision with a wild train, creates a prima facie case of negligence on the part of the company. In the following case the court said: "It [the defendant company] was bound to know the nature of the service it had ordered him to perform, the place where it was required to be performed, and, with this knowledge, it had no right to put him in peril by sending out an irregular train without in some way giving notice that its train had been sent out, or by so regulating its speed and management as to prevent injury to those engaged in the service required of them by the special order. By the order of the appellant, the special duty in which the intestate was engaged was enjoined upon him, and having thus required him to perform the duty, it had no right to send over its road a train which the employees, engaged as was the intestate, had no reason to expect would make obedience to the special order unusually perilous. It may be true that the intestate was bound to know of the danger from regular trains, running according to timetables or rules, and yet not be true that he was bound to know that a wild or irregular train would be run over the road, and so run as to bring about a collision. The peril from the wild train he was not bound to anticipate, for the reason that, from the assurance impliedly contained in the special order assigning a designated duty to him, he had a right to assume, in the absence of countervailing facts, that, if he himself exercised care and diligence, the company would not send out a wild train without exercising ordinary care and diligence to prevent injury to him while traveling in the usual way to the place where he was called by the duty assigned him, and while performing that duty at the place designated." *Cincinnati, I. St. L. & C. R. Co. v. Long* (1888) 118 Ind. 579, 21 N. E. 317. A railway company is negligent in failing to provide suitable rules for the control and operation of hand cars furnished to a bridge repairing gang for the purpose of transportation to the place where they are to work. *Waltham v. Eastern R. Co.* (1901) 83 Minn. 149, 54 L. R. A. 481, 80 N. W. 76. A rule prescribing that a flag should be set by track repairers to serve as a signal to engineers to slacken speed or stop is sufficient for their protection on a trestle. *Brace v. Chalmers* (1899) 41 App. Div. 620, 60 N. Y. Supp. 222 (1898) 30 App. Div. 453, 51 N. Y. Supp. 958. Whether a railway company is negligent in omitting to provide a rule for the purpose of warning a trackman of the approach of trains, where his work requires him to assume such a position that he cannot, without interrupting the work, see any considerable distance along the track, is a question for the jury. *Lake Shore & M. S. R. Co. v. Murphy* (1893) 50 Ohio St. 135, 33 N. E. 403. Evidence that a trackman was run over by a train at a place where there was a double curve rendering it impossible to see an approaching train until it was close at hand; that there were several public crossings within the place; that the neighborhood was a thickly-settled one within the limits of a city; that no signal of the train's approach was given by bell or whistle either at the crossing or in approaching the curve; and that the train which caused the injury was engaged in a brisk race with another train on a parallel road, the pace maintained being so far as appeared, in strict accord with the rules of the company,—is sufficient to take to the jury the question of the company's negligence in failing to provide regulations for the purpose of warning persons working at such places of the approach of trains. *Dick v. Baltimore, C. & L. R. Co.* (1882) 35 Ohio St. 389.

which prevails in some jurisdictions,—that the fact of their having received a general warning, or of their having been in some other way informed that they are to be exposed to constant danger from the irregular movements of trains, is sufficient to let in defense of assumption of risks as respects the general condition of the work, or of contributory negligence as respects the servant's failure to govern his conduct as a prudent man would have done in view of the possible perils to which the rules have called his attention.²

² It has been held not to be negligence on the part of a railroad company to send out a wild train without previous warning to a gang of sectionmen, where its rules, known to such men, provide that the train preceding the wild trains shall carry a red signal, but that if it is impossible for those running the wild train to see that the train preceding carries such signals they must run at a slow rate of speed around all curves. *Shepard v. Boston & M. R. Co.* (1893) 158 Mass. 174, 33 N. E. 508. There, Holmes, J., after quoting the rules mentioned, proceeded thus: "Stopping at this point it is plain that the defendant had a right to send trains over its tracks at whatever times it saw fit, and the rules on their face gave notice that it intended to exercise its right. The rules also gave notice on their face that while the signal ordered would be a warning when it was seen, in some cases no such warning could be given, and therefore that all persons interested must look out for themselves. The moment a man has notice that a train may come along a track without warning at any hour, if he is run down by such a train when he is traveling on the track the other way, it is impossible for him to escape the imputation of negligence merely by showing that such trains were few and the chance of their coming small. Furthermore, the plaintiff implies that they knew the train was coming by his testimony that they did not know when it was coming. On the other hand, despatching a wild train without signal is not necessarily negligence in the defendant." Compare *Criswell v. Pittsburgh, C. & St. L. R. Co.* (1888) 30 W. Va. 798, 6 S. E. 31, where the correctness of the same doctrine appears to have been assumed by the court, though the case really turned upon whether a foreman held to be a vice principal had neglected any of the duties imposed upon him by the rules. *Union v. New York, N. H. & H. R. R.*

Co. (1897) 23 C. C. A. 223, 51 U. S. App. 157, 79 Fed. 903, holding that evidence as to the rules adopted by other companies for the conduct of engineers in approaching a curve is properly excluded in an action for the death of a station master, who was run over on a certain curve where he had worked so long that he must presumably have been familiar with the mode in which his employers allowed their trains to approach the curve. In *Olson v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. E. 866, where the plaintiff was traveling on a hand car which came into collision with a snow plow, it was held that he assumed the risk of injury from this cause. The court said: "The evidence tended to show that a quarter or more of the trains sent out are specials or extra,—despatched without notice,—and that such is the uniform practice of the defendant; and that during the month of February, 1884, to the date of the accident, such trains over that section of the road averaged one or more each day; and also that the exigencies of the business and the impracticability of notifying sectionmen in advance, owing to the nature of their work, extending over miles of track, and often remote from telegraph stations, obviously rendered it necessary to dispense with notice, and to adopt the present uniform practice in conformity with rule 70, i. e., that no notice would be given of the passage of extra trains. And this fact itself, and the nature of the employment, would naturally suggest the importance of extra caution on the part of the men, and a reason for the rule. We think, therefore, there was evidence for the consideration of the jury, tending to prove that the deceased had notice of the usage of the company, and that it was error for the court to refuse the defendant's first request to charge the jury to the effect that, if they should find that the deceased knew of such us-

In Scotland, a distinction is taken between men working on the main line and those engaged in yards where there are numerous sidings. As regards the latter class, it is held that a railway company is negligent in not making regulations calculated to secure their safety when it becomes necessary to run an engine with the tender in front, past the place where they are at work.³

The refusal of a railroad company to make a regulation requiring engineers of trains approaching a quarry to sound their whistles before reaching it, for the protection of workmen at such quarry, is not unreasonable where another rule is established requiring the workmen to give signals to approaching trains when there is any reason for slowing up or stopping the trains, and it does not appear that the proposed regulation would have afforded protection to the workmen.⁴

age and practice of the company, he could not recover." In *Chicago & N. W. R. Co. v. Donahue* (1874) 75 Ill. 106, where a switchman was run over, the evidence showed that a watch or lookout was kept from the engine, but none from the rear car, and, according to a special verdict, the train had on it the usual number of hands and none of the persons in charge was guilty of negligence in discharge of his particular duty. The question, therefore, was presented, whether the company was guilty of negligence in not providing rules whereby a switchman should have been kept on the rear end of the train that produced the injury. The court said: "Whatever might be the duty of the company in this regard, so far as the public are concerned, where its track crosses a public highway, we are not prepared to hold it is under any such obligation to its own employees operating trains on its own private grounds. They are presumed to contract against the hazards incident to the service, and we do not understand it is the duty of the company to place one employee on the lookout to warn others of approaching danger, and that it is necessary for them to observe due care. It is their duty, without warning, to observe such care. This is a part of their undertaking, and any omission is at their peril." So, also, in *Loring v. Kansas City, Ft. S. & M. R. Co.* (1895) 128 Mo. 349, 31 S. W. 6, the supreme court of Missouri in holding that neglect of duty by a railroad company toward a section hand cannot be predicated of its failure to have a brakeman on the end of a car pushed by a switch engine in the rail-

road yard, pointed out that the case was distinguishable from those in which the absence of some such precaution has been held to be negligence in regard to strangers having occasion to cross the track. Compare the cases cited in § 209a, ante.

³ *Cairns v. Caledonian R. Co.* (1889) 16 Sc. Sess. Cas. 4th series, 618.

⁴ In *Kansas City, Ft. S. & M. R. Co. v. Hammond* (1894) 58 Ark. 324, 24 S. W. 723, the court said: "The rule suggested by appellee as a proper one could, under no circumstances, possess any virtue except in cases of persons near enough to the quarry, and the sound of the whistle there, to hear it, and yet far enough away to have more time to get off the track than they would have after the train comes in view and sounds the whistle, as is the rule in vogue, or as was done in the present case. It is impossible to say how far or near, then, persons must be to hear the whistle in any case, and still more so when they are on a running hand car, in a rugged and hilly country, where the transmission of sound is obstructed and the sound itself is lost in the more immediate noise of the running car. Sounding the whistle at the quarry, or at any other point, would, of course, afford no protection to persons out of hearing, and yet so far from their destination as that they would be overtaken. The positive evil of the rule suggested is made apparent, for, having taken the place of a better rule, perhaps, it is nevertheless, of itself, in that case useless. The suggested rule, therefore, would only be applicable to special instances, and its application, if

219. — of car repairers.—The work of repairing a car while it is standing upon a track in a yard where switching is in progress is one of peculiar danger, and the courts have always held railway companies to a strict account in regard to the duty of protecting employees engaged in such work, so far as that object can be attained by proper regulations. In fact, as already mentioned (§ 207, *ante*), one of the very earliest cases, in which the employer's duty in regard to rules was discussed, established the doctrine that it is the duty of railway companies to provide for the protection of this class of workmen by proper regulations.¹ The general principle, therefore, is well settled, that it is the duty of a railroad company to establish regulations advising its servants engaged in moving cars on a track of the where-

attempted to be extended beyond these special instances, might interfere with the application of more salutary general rules. We are unable to say that the refusal of the company to have the regulation suggested by the appellee was unreasonable. At all events, it was error to submit the question to the jury."

Vane v. Lancashire & Y. R. Co. (1858) 2 Hurlst. & N. 728, 27 L. J. Exch. N. S. 249, 4 Jur. N. S. 364. There the trial judge asked the jury, first, whether the deceased was guilty of negligence; secondly, he said that no railway company by establishing rules could justify its servants in not taking due care of human life; if they drove wagons into a place where men were at work, it was the duty of the company to see that proper rules for the safety of such persons were established; and he asked the jury whether there was negligence; whether the shuntsman, point-man, and driver did all that the rules of the company required; and whether the accident was caused by the company not giving proper directions to its servants? The jury found that the accident was owing to the defective rules, and that no person, other than the defendants, was guilty of negligence. A verdict entered for the plaintiff upon this finding was sustained. In *Wild v. Oregon Short-Line & U. N. R. Co.* (1891) 21 Or. 159, 27 Pac. 954, a cause of action on the ground of the failure to promulgate suitable rules for the safety of car repairers was sufficiently stated where the complaint imputed to the defendant carelessness and negligence in causing and permitting a lo-

comotive to run against the place at which the plaintiff was at work. The court said: "The language of this allegation is broad enough to admit evidence of all kinds and grades of negligence on the part of the defendant, which resulted from causing or permitting the locomotive to run down upon the place where the plaintiff was at work, and thereby rendering it unsafe and causing the injury. This would include the failure to provide such rules or to adopt such precautionary regulations as were needful to regulate or oversee the running of the locomotives upon the tracks and switches of the yard as would render the place and employment reasonably safe. While a servant assumes the risks ordinarily incident to his employment, and all open and visible risks, including the negligence of a fellow servant, yet he has a right to presume that the master will exercise due care for his safety by providing, when necessary, all such needful rules for the conduct of its business, or such precautionary measures, as will not needlessly expose him to risks not necessarily resulting from his employment. This being so, we hold the language of the complaint broad enough to cover the negligence imputed to the defendant. Nor does this work any hardship. If it had desired a more specific statement of the negligence imputed to it, that end could have been attained by a motion to make the allegation more specific; but the defect is not fatal to the sufficiency of the complaint as stating a cause of action."

abouts of an employee at work in this dangerous position, and to provide adequate means of warning him of the approach of danger.²

²*International & G. N. R. Co. v. Hall* (1890) 78 Tex. 657, 15 S. W. 108; *Pomeroy v. Milwaukee, L. & W. R. Co.* (1895) 90 Wis. 215, 63 N. W. 90; and the other cases cited in this section. In an action by a car repairer for injuries resulting from the car under repair being struck by a moving train, it is error to nonsuit the plaintiff, where the defendant admits that, while cars are being repaired (as this was), on tracks other than the repair tracks, "ordinary prudence, care, and the customs and regulations of the company, require that such work should not be done except while the car is being protected by watchmen or other suitable protection," and no evidence is offered that any such protection was provided. *Luchke v. Chicago, M. & St. P. R. Co.* (1883) 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870. In *Doig v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579, 45 N. E. 1028, the evidence tended to establish the following facts: The deceased was at work repairing a crippled car in the repair shop, which occupied the whole of a building 50 feet wide and about 200 feet in length. Three tracks passed through the shop through doors which were kept closed, and there were no windows on the side where the tracks entered the building from the yard. These tracks ran from the shop out into the yard and were connected with the main track and other tracks by switches. The three tracks were used for the purpose of moving crippled cars and material into and from the shop to the main and side tracks. The cars were moved by being kicked or shunted by means of force applied to them by engines some distance from the shop, and in that way propelled by the momentum into or near the shop doors and controlled while in motion by the brakes. On the day that the deceased was killed some of the men who worked in the yard or about the shops were moving cars on the tracks outside the shop for the purpose of collecting and moving scrap iron. There was a pile of this iron near one of the tracks, about 20 feet from the shop door, and the men wanted to load it upon a car. With this end in view they placed a car already loaded with 24,000 pounds of scrap iron on one of these tracks at a point about 800 feet from the doors and

there kicked or shunted it towards the shop. The brakeman evidently intended that the force applied would send the car past the pile of iron where they intended to have it stop, and pass through the doors, and he attempted to control the movement with the brake, but, for some reason, it did not work, and the car ran past the pile of iron and killed the deceased, who was working inside one of the crippled cars. It had no means of guarding against such a peril, as it was impossible for anyone to see the approaching car, even if he were at work at which he was employed to permit him to be on the lookout, if the doors were closed and there were no windows. The court said: "The question is whether this was an accident, the result of some neglect or breach of duty on the part of the defendant. A loaded car was driven through the doors of a work-shop filled with busy men, one of them was killed. That the defendant's workmen in attempting to move cars in this manner in the yard were engaged in a very dangerous, if not reckless, experiment, cannot well be denied. The danger of the experiment consisted in moving cars in such a way that no one could tell exactly where or where they would stop. If, upon the occasion in question, the force applied was so measured that the car would stop at the pile of scrap iron, the deceased would not have been killed, but if the force applied was sufficient to send it 20 feet further, and it could not be controlled by the brake, the danger to the men inside the shop was so obvious that the manner in which this part of the defendant's work was carried on may very well be characterized as reckless. We will assume then, what can not be questioned, that the workmen were doing the defendant's work in a dangerous and reckless manner. But these workmen were doing nothing but what, according to the testimony, they had been doing for years before. If the defendant permitted its employees to carry on its operations upon these tracks outside the shop in such a manner as to endanger the lives of those inside, who could not protect themselves, it failed to discharge to the deceased the duty which the law imposed upon it of furnishing him a reasonable safe place to do his work. The defendant

By some companies the rule has been adopted that the switches leading to such a track must always be locked, and this precaution is presumably entirely adequate.¹ Considering the lamentable frequency with which car repairers are injured, and the fact that these employees are, as was observed very truly in the case last cited, entirely helpless so far as any precautionary measures that they might take to protect themselves are concerned, it is perhaps to be regretted that the courts have ever conceded that anything short of this or some other provision for absolutely blocking the repair track should have been deemed adequate to absolve a railroad company from a charge of negligence. But the cases impose a much lower standard of liability, the accepted doctrine being, that the company performs its whole duty by issuing suitable directions for the placing of danger signals to notify the other employees of the fact that the repairs are going on.²

had the power to control and regulate its business. The law imposed upon it the duty of making and enforcing such reasonable rules and regulations as the government of the men in its service, as to prevent or guard against injury by one servant to another, in so far as that was reasonable and practicable. It could certainly put an end to the practice of propelling cars upon these tracks by a force that could not be controlled, and it could provide for moving them in some other and safer way. In other words, it could change this method of doing the work by making proper rules and regulations to that end. The jury could have found from the evidence that the practice of kicking or shunting cars upon these tracks in the direction of the doors of the repair shop was known to the defendant. The danger to be apprehended from such a practice was so obvious that the defendant, in the proper discharge of the duties which it owed to its employees, was bound to guard against it by proper rules and regulations, so far as that was reasonable and practicable." Compare also the cases cited in § 209, note 1, *ante*.

¹ See *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266.

² A railroad company is not required to have a watchman or bumpers to protect repair tracks where one of the rules provides that car inspectors and repairmen, before they go under or between cars, shall display a red signal

in the direction from which a train could approach, and that trainmen shall, under no circumstances, back or couple to any car while such flag is displayed. *Peterson v. Chicago & N. W. R. Co.* (1887) 67 Mich. 102, 34 N. W. 257. An accident caused by failure of a car repairer to move red flag to end of the section of cars last run on the repair tracks. Adequacy of rule decided, as matter of law. A regulation which has been pronounced very efficient is the following: "A blue flag by day and blue light by night, placed in the drawhead or on the platform or step of a car at the end of a train, or car, standing on a main track or siding, denotes that car repairmen are at work underneath. The car or train thus protected must not be coupled or moved until the blue signal is removed by the repairmen." *Abel v. Delaware & H. Canal Co.* (1886) 103 N. Y. 581, 57 Am. Rep. 773, 9 N. E. 325. There the only rule which had been made bearing upon the case was as follows: "A red flag by day and a red lantern by night, or any signal violently given, are signals of danger, on perceiving which the train must be brought to a full stop as soon as possible, and not proceed until it can be done with safety." The court, in upholding the plaintiff's contention that it was, under the circumstances, a question for the jury to determine whether the defendant should not have promulgated such a rule as the former one above set out, or one substantially equivalent to it, said: "This rule

If it is practicable for a railroad company to prescribe a certain distance along which cars to be repaired must be moved on a repair track, in order to prevent any danger of their being struck by moving locomotives or cars on the adjacent tracks, the question should be submitted to the jury whether or not the company was negligent in failing to provide reasonable regulations on the subject.⁵

220. — of employees working in yards.— (As to trackmen working in yards, see § 218, notes 1 and 3, *ante*.) Where an injury is caused by cars running through an open switch on to a siding and coming into collision with other cars standing there, evidence that a rule had been promulgated requiring conductors to look after the switches used by their engines shows that the company had adequately performed its duty in regard to the opening and closing of the switches.¹

seems, from its phraseology, to have been mainly, if not exclusively, intended for the government of moving trains, and was not very well adapted for the protection of men under stationary cars, upon side tracks, engaged in making repairs. There was no rule prohibiting the removal of the signal, and the signal was not intended exclusively for the protection of such men; nor did it give notice that human life was in danger." On the second appeal (1891: 128 N. Y. 662, 28 N. E. 663), the court again held that it "was for the jury to determine whether the rule . . . [in evidence] provided both for the putting up of the danger signal and its removal, so as to protect the repairmen as far as reasonably could be done against the hazard of the negligence of coemployees." The following remarks of the court are worth quoting: "Donnelly, on the first trial, testified substantially that the only rule he heard of was rule 63, and what the repairmen told him, viz.: That they worked under the protection of a red flag. It is evident that if this was the extent of the regulations on the subject, the repairmen had a very inadequate protection. If the red flag was put up and maintained wherever the repairmen were at work, and the meaning of the signal was known by the switchmen, as it probably was, the repairmen would be protected, except as against the reckless or heedless conduct of the switchmen. But it was essential to the efficiency of the rule that it should designate the persons authorized to remove the flag. It was shown that this was done by the rules of the New York Central Railroad which provide that the repairmen alone

should have power to remove the flag from cars on a repair track. The same rule was recommended in railroad manuals published before the occurrence of the accident in question. It is obvious that such, or a similar, regulation, which should place the duty and responsibility of removing the flag upon persons officially designated, was essential to the car repairers' protection. The rule that they should put up a red flag when they commenced work, unaccompanied by a rule prohibiting the brakemen or other employees from taking it down when they desired to remove cars from the crippletrack, unless by the consent or direction of the repairmen engaged in repairing the cars, would leave the repairmen exposed to the danger of the mistake or negligence of the brakemen. If it was left for the brakemen to determine for themselves whether there were men engaged in repairing the cars, and whether the flag might be safely removed or not, and to act upon their judgment in removing it, the chances of accident would be greatly increased." In *P. & S. v. Southern P. Co.* (1899) 20 Utah 210, 58 Pac. 326, the sufficiency of such signals was also implied in the general statement that a railway company is bound to make and promulgate a rule requiring the placing of danger flags on cars when repairs are under way, and forbidding any coupling to be made by a locomotive while they are so engaged.

¹*Campston v. Texas & P. R. Co.* (1895) Tex. Civ. App. 33 S. W. 77, second appeal (1897) 15 Tex. Civ. App. 493, 40 S. W. 546.

²In *Davis v. Staten Island R. Co.*

A railroad company is under the duty of prescribing definite rules for the making of flying switches.²

The doctrine embodied in the larger part of the authorities is that, in the absence of any positive testimony going to show the feasibility or usefulness of any code of rules which might be framed for the purpose of warning employees of the approach of detached cars in railway yards, a jury is not warranted in finding that the failure to promulgate such a system was culpable.³

Transit R. Co. (1896) 1 App. Div. 178, 37 N. Y. Supp. 157, the court said: "Rule 132, if faithfully executed by the conductor, was ample to provide against such an accident as caused the death of Davis. It imposed upon conductors of trains the duty of looking after the switches. All that could be required from the company was that the rule should impose upon some of the employees the duty of seeing that the switches were closed. That is all that the respondent contends for. If the rule had provided, in the form suggested by the respondent's counsel, that the person who opened the switch should close it, it would, in that form, have constituted no greater safeguard against danger than the rule in force. The duty would have rested on an individual, just as the present rule imposes it, and it could have been neglected and omitted with as much ease as it was neglected in the instance before us. The proximate cause of the accident was not due to the failure of the defendant to make a proper rule, but to the neglect of a duty imposed by the defendant upon conductor Sherman. For this neglect the defendant was not liable."

Chicago & N. W. R. Co. v. Taylor (1873) 69 Ill. 461, 18 Am. Rep. 626. An averment that the defendant negligently omitted to provide rules, signals, or systems in cases of flying switches, or of shunting or kicking cars, states a cause of action. *Reagan v. St. Louis, K. & N. W. R. Co.* (1887) 93 Mo. 348, 6 S. W. 371. There the defendant contended that the joining of the cars for the purposes and in the manner described in the petition was so common, necessary, and frequent, especially in the case of freight trains, that it could not be said to involve any extraordinary risk. But the court said: "We do not agree to the proposition. It is certainly a complex business, requiring care, and must be dangerous if not done under proper regulations, at least so

far as other servants are concerned, whose business requires them to be in and out of the cars, liable to be jolted. In these cases of making a flying switch, and of shunting, or kicking of cars, it is feasible and perfectly proper to have some rules and regulations to warn persons liable to be injured."

³As it is utterly impossible for a railroad company to move its trains, when being made up or when being broken up, according to a time-table, there is no negligence in not prescribing regulations for the management of trains engaged in and about the freight and engine houses and depots. *Haskin v. New York C. & H. R. R. Co.* (1873) 65 Barb. 129, affirmed (1874) 56 N. Y. 608. See also *Atchison, T. & S. F. R. Co. v. Caruthers* (1896) 56 Kan. 309, 43 Pac. 230; *Corcoran v. New York, N. H. & H. R. Co.* (1901) 58 App. Div. 606, 69 N. Y. Supp. 73; *Besel v. New York C. & H. R. R. Co.* (1877) 70 N. Y. 171; *Larow v. New York, L. E. & W. R. Co.* (1891) 61 Hun. 11, 15 N. Y. Supp. 384 (negligence alleged here, was that the defendant omitted to make and promulgate a rule to the effect that an engine should not enter upon a siding upon which there was another engine and cars without giving a signal or sending notice to the employees on that train). "A rule which would require no movement of the engine to be made . . . except in response to a signal from one person, when he might be in a position where his signal could not be seen by the engineer," is regarded as being such an unreasonable impediment to the prompt despatch of defendant's business as a public carrier, that the company is not bound to adopt it. *Rutledge v. Missouri P. R. Co.* (1894) 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327. A railroad company is not bound, for the protection of its car repairers when going to or from their places of work in moving cars in its freight yards, to have upon such cars a light, or man to handle it,

But in one case it has been laid down without qualification that it is the duty of a railway company to frame rules for the purpose of regulating the movements of trains in its yards when employees are engaged in coupling cars.⁴ Under either theory it must evidently be unwarrantable to predicate negligence of the failure to frame such rules, where the injury was caused by a car which, to the plaintiff's knowledge, was to return to the place where he was working before a certain duty had been fully performed, and it is manifest that he could have avoided the danger simply by using his eyes.⁵

or to require a man to precede each car to announce its approach. *Croice v. New York C. & H. R. R. Co.* (1893) 70 Hun. 37, 23 N. Y. Supp. 1100. The court said: "Great care and precaution are required on the part of railroad companies when they are moving cars in places where the general public have a right to pass, to in some manner announce their approach; but a different rule obtains in the companies' yards, where cars are being distributed and trains made up. The employees about such yard understand the situation; they know the manner of doing the business therein, that cars frequently pass along without notice of their approach, and they assume the risks incident to the business as thus conducted. Whether the foreman left the work when it was completed, or a few minutes before, is not important. It was completed when Crowe left, and he understood the situation. The men were properly protected while the work was progressing by the two lighted lanterns heretofore mentioned. It is suggested that the work was not completed until the men had arrived at the tool house with their tools, and that until then they were entitled to some special protection to which they might not be entitled perhaps when engaged in other business about the yard. No reason is suggested for such a rule, and none occurs to us. They were entitled when going to the tool house to the same protection and care on the part of the company to which they were entitled when moving about the yard performing their ordinary daily business." In *Berrian v. New York, L. E. & W. R. Co.* (1892) 131 N. Y. 582, 30 N. E. 57, it was held that a company was not bound to formulate a rule which would require a red light by night and a red flag by day to be exhibited from the end of a car which was being coupled. There the contention of plaintiff's coun-

sel, that a rule of this tenor which had been promulgated for the protection of car repairers should have been extended so as to cover the case mentioned in the text, was rejected. The court said: "The question here is whether, by the exercise of such prudence and foresight, they could have adopted any other precautions against injury to the employees than such as they did, or whether there were still others that would suggest themselves to men of ordinary intelligence and vigilance. They had a body of rules embracing every case that was supposed to need regulation. One of these rules provided that when a locomotive was moving backward, its signals must be displayed upon the bumpers. It was made the duty of the yard master to see that cars were brought together with as slight a jar as possible, and coupled with coupling sticks. The engineers were required to use the utmost care in pushing cars into turn-outs, so as to avoid injuring them or other property. Brakemen were required to exercise great care in coupling cars, 'and as, for various causes, it is dangerous to expose the hands, arms, or person between the same,' they were required, before coupling, to examine the situation so as to act prudently. The deceased made the coupling alone, though he was not required to do so, but could have waited for the engine, and had the assistance of some of his coworkers to help him. He could have used a lamp, but did not, though he had a full supply. There were coupling sticks in the caboose for the use of the deceased, which, when used, had the effect, as the court below said, of lengthening the arms."

⁴ *Gulf, C. & S. F. R. Co. v. Finley* (1895) 11 Tex. Civ. App. 64, 32 S. W. 51.

⁵ *Houston & T. C. R. Co. v. St. Louis* (1894) 6 Tex. Civ. App. 553, 26 S. W. 253, 642.

In cases of this type, the servant's appreciation of the risks is also sometimes a material element.⁶

221. Automatic and unauthorized movements of cars.—A railway company may be found negligent if it fails to provide rules for the purpose of ensuring that rolling stock which is left standing on any portion of its tracks shall not be moved to the injury of its employees, whether by the action of physical forces, or by the interference of unauthorized persons.¹ So, also, negligence may be inferred where no rules have been promulgated for the purpose of warning employees engaged in loading or unloading a car that it is to be put in motion.²

222. Track repairing as it affects the safe operation of trains.—A railroad company engaged in repairing or altering its tracks, so as to render them dangerous, owes the duty to its trainmen of providing rules and regulations to protect them against such danger.³

223. Loading of cars.—A railway company may be held liable on

⁶On the ground that the conditions and resulting risks were known to him, it has been held that a railway company does not owe a brakeman the duty of providing for the stationing of a watchman on the rear end of backing trains. *Chicago & N. W. R. Co. v. Donahue* (1874) 75 Ill. 106.

¹*Lake Shore & M. S. R. Co. v. Topliff* (1895) 2 Ohio Dec. 522 (car escaped on to the main line from a siding constructed on an incline). An employer is guilty of negligence toward a brakeman upon a freight train handling the output of a coal mine, in placing fifteen or sixteen heavily loaded cars upon a coal track 600 feet long having a descending grade of 2 feet 7 inches, with no means of preventing their escape upon the main track except by setting the brake on the car nearest thereto. *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* (1898) 32 C. C. A. 44, 59 U. S. App. 283, 87 Fed. 133. A company which requires the brakes to be securely set upon all cars standing upon its coal trestle is not guilty of negligence in failing to promulgate other rules, where the proof is that such rule is entirely adequate, if complied with, to prevent the moving of the cars. *Kudik v. Lehigh Valley R. Co.* (1894) 78 Hun. 492, 29 N. Y. Supp. 533. Compare § 208, notes 8 and 9, *ante*.

A coal company which adopts a system of bumping an empty car against a car which has been loaded with coal, to set the latter in motion, without spe-

cial warning to the employee engaged in loading the car, or general rules affording an assurance of protection, is liable for injury to an employee caused by that system. *Wagon Coal Co. v. Holmquist* (1893) 51 Ill. App. 507. In an action to recover damages for the death of a workman, who, while engaged in unloading gravel from a car, was thrown off by the sudden movement of the car, as to which he received no warning from the company's representative who ordered the movement, it is error to reject evidence going to prove that a railroad company was guilty of negligence in not having adopted a proper system for giving warning to its employees under such circumstances. *Campbell v. New York C. & H. R. R. Co.* (1885) 35 Hun. 506.

²*Lake Shore & M. S. R. Co. v. Topliff* (1895) 2 Ohio Dec. 522. In a case where an injured passenger was the plaintiff, it was held that, where a railroad company employs men to make repairs to the track without interfering with the running of the regular trains, the hours for which were well known, it is the duty of the company to see that the men are furnished with an accurate timepiece, and that, if there is evidence that the foremen were left to procure and regulate their own watches without any attention to the subject on the part of the company's officers, the question whether the company was negligent is for the jury. *Mattison v. New York C. R. Co.* (1862) 62 Barb. 364.

the ground that it had established no system with regard to the use of side stakes on flat cars, and that it is not absolved from liability merely by reason of the fact that the station agent at the place in question had, according to his custom, made a casual inspection to see if the load had been properly placed.¹

224. Work in concerns other than railways.—The failure of the owner of a machine shop to make and enforce rules as to the use of screens to prevent employees from being injured by flying chips of iron warrants a jury in finding him to have been negligent.¹

It is the duty of a lumber company to provide rules, by means of which servants working at the foot of a chute down which heavy logs are constantly being thrown shall receive warning that a log is about to fall.²

A mine owner is negligent in not providing a signaler, and a proper code of signals, to regulate the hoisting of a cage in a shaft.³ But the fact that such an employer did not frame rules to regulate the movement of ore cars moved by horse or hand power on a slightly inclined track cannot be imputed as negligence, where there is no

¹ *Bushby v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374, 14 N. E. 407. In *Ford v. Lake Shore & M. N. R. Co.* (1891) 124 N. Y. 493, 12 L. R. A. 454, 26 N. E. 1101, the same subject underwent an elaborate discussion, the court saying: "In the case before us it was clearly the duty of the defendant to adopt some system for the loading of lumber upon open cars, that would have regard for the safety, not only of its servants and those traveling over its road, but to the safety of all persons who should be in the vicinity of its cars. The importance and extent of the business, and the manifest danger from the falling of heavy sticks of timber from the cars, required this. But there was no rule on the subject. The only rule shown to exist had no particular reference to lumber more than any other freight, and it expressed nothing more than the obligation which the law put upon the corporation,—viz., to take due care that freight was safely loaded and should not fall from the car. But method or system as to loading lumber, there was none. Having furnished a good car and stakes that might be used, the manner of loading lumber was left to the judgment and discretion of its agents and servants. It was not sufficient for the defendant to show that its employees knew that the rule I have

quoted applied to lumber, and also knew that the general usage required it to be staked, and that stakes were furnished and available to the men in the particular case before us. All this may be assumed to be true, and yet the fact exists that the use of the stakes was not enjoined upon the servants by any rule of the defendant or by any instruction ever given them. Having furnished the car and the stakes, it was left to the judgment and discretion of the foreman whether to use the stakes or not, and in this particular instance they were not used for the reason that they supposed the lumber would stay on the car over the short distance it was to be carried. And it is because of the failure of the defendant to require the use of the stakes in all cases that the neglect of its servants in this case is imputed to it. There was no rule, and the only method or system was such as the foreman in each particular case should deem the safe and proper one to pursue."

² *Smith v. Lidgerwood Mfg. Co.* (1900) 56 App. Div. 528, 87 N. Y. Supp. 533.

³ *Hartig v. V. P. Lumber Co.* 1890, 19 Or. 522, 25 Pac. 358.

⁴ *Murdock v. Mackinnon* (1886) 12 Sc. Sess. Cas. 4th series, 810.

evidence that such rules are in use in any business of a similar character, or that any rules were necessary or practicable in such cases.⁴

Where a servant sent into a grain bin is buried under a mass of grain which had adhered to the sides, it is properly left to the jury to determine whether the omission to make rules and regulations prescribing the conditions under which servants should be required or permitted to enter the bins at the bottom was or was not a neglect of such reasonable care and precaution as a master engaged in such business was bound to take under the circumstances of the case.⁵

Negligence may be inferred where employees working in a salt bin are not protected by rules which either provide for warning them when the salt is about to be drawn off, or forbid the drawing off when they are in the bin.⁶

D. WHEN A RULE IS BINDING UPON A SERVANT.

225. Introductory statement.—In a later chapter (xix.), the cases exemplifying the doctrine that a servant who violates a rule promulgated for the guidance and protection of himself and his coemployees is guilty of contributory negligence, as a matter of law, will be collected. But it will be convenient to review, in the present chapter, the principles upon which the courts have determined, under its various aspects, the question which in every instance must be answered before that doctrine is applied; viz., whether the rule alleged to have been disobeyed was one which was binding upon the servant.

226. No rule deemed to be binding unless it is brought to the knowledge of the servant.—Both on principle and authority it is manifest that, in so far as the servant's contributory negligence is predicated merely from his failure to perform the duty prescribed by a rule, he must be shown to have had knowledge of it before he can be held culpable on the ground of his not having obeyed it. In other words, he cannot be held negligent in respect of an act which is only improper because forbidden by a rule, unless he knows of the rule.¹ This doctrine is a corollary of the general principle that "negligence can only

¹ *Morgan v. Hudson River Ore & I. Co.* (1892) 133 N. Y. 666, 31 N. E. 234 (plaintiff was one of several workmen engaged in loading ore cars, and had crept under one of the cars to sweep some ore off the rails, when a car on the grade above him was started in some way, owing to the improper act of some co-servant or outsider in removing the blocking).

² *McGovern v. Central Vermont R. Co.* (1890) 123 N. Y. 280, 25 N. E. 373.

³ *Eastwood v. Retsof Min. Co.* (1895) 86 Hun. 91, 34 N. Y. Supp. 196.

⁴ *Alabama Midland R. Co. v. McDonald* (1895) 112 Ala. 216, 20 So. 472. Cases recognizing this doctrine are *Fay v. Minneapolis & St. L. R. Co.* (1883) 30 Minn. 231, 15 N. W. 241; *Little Rock, M. R. & T. R. Co. v. Leverett* (1886) 48 Ark. 333, 3 S. W. 50; *Georgia P. R. Co. v. Davis* (1890) 92 Ala. 300, 9 So. 252; *Central R. & Bkg. Co. v. Ryles* (1889) 84 Ga. 420, 11 S. E.

be affirmed in respect of circumstances and conditions known to the party to whom it is imputed."² (Compare chapter x., *ante*.) The rules of the master, accordingly, are not admissible as evidence on the issue of the servant's negligence in violating them, unless there is also testimony going to show that he had knowledge of them.³

So far as regards the binding effect of a rule, it is immaterial how it has come to the knowledge of the employee. Knowledge, either express or such as the law will imply, without reference to the means by which it is acquired, binds the employee to compliance.⁴

The general question as to when knowledge is imputed to the servant is discussed in chapter xxi., *post*.

227. When a servant is deemed to have knowledge of a rule.—The obligations predicated as a result of the principle stated in the preceding section affect both the master and the servant.

In the case of a rule issued by a private person, there can evidently be no presumption indulged like that which, in the case of a public statute, charges the persons affected by it with knowledge of its

499; *Corey v. Hannibal & St. J. R. Co.* (1887) 27 Mo. App. 170; *Picart v. Chicago, R. I. & P. R. Co.* (1891) 82 Iowa, 148, 47 N. W. 1017; *La Croy v. New York, L. E. & W. R. Co.* (1890) 57 Hun, 67, 10 N. Y. Supp. 382 (Reversed in [1892] 132 N. Y. 570, 30 N. E. 391, but merely on the ground that the evidence showed that the plaintiff had knowledge of the rule which he violated); *Sprong v. Boston & A. R. Co.* (1874) 58 N. Y. 56; *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 675, 22 S. E. 83; *Louisville, E. & St. L. Consol. R. Co. v. Utz* (1892) 133 Ind. 268, 32 N. E. 881; *Bonner v. Moore* (1893) 3 Tex. Civ. App. 416, 22 S. W. 272; *Georgia P. R. Co. v. Propat* (1887) 83 Ala. 518, 3 So. 764; *Louisville & N. R. Co. v. Perry* (1888) 87 Ala. 392, 6 So. 40; *Louisville & N. R. Co. v. Hawkins* (1890) 92 Ala. 241, 9 So. 271 (sustaining a demurrer to a plea which did not aver knowledge on the servant's part); *International & G. N. R. Co. v. Hinzle* (1891) 82 Tex. 623, 18 S. W. 681 (disapproving instruction which would absolve the master from liability if he merely had rules which, if observed, would have prevented the injury); *Chicago, B. & Q. R. Co. v. Oyster* (1899) 58 Neb. 1, 78 N. W. 359; *Gregory v. Ohio River R. Co.* (1893) 37 W. Va. 606, 16 S. E. 819.

²*Brown v. Louisville & N. R. Co.* (1895) 111 Ala. 275, 19 So. 1001.

³*Atchison, T. & S. F. R. Co. v. Plunkett* (1881) 25 Kan. 188; *Louisville, A. & C. R. Co. v. Berkey* (1893) 136 Ind. 181, 35 N. E. 3. In *Parker v. Georgia P. R. Co.* (1889) 83 Ga. 539, 10 S. E. 233, the court approved of the admission of a rule book as evidence, there being sufficient testimony to show that it contained the rules in force when the plaintiff was injured. The court took the ground that, as the question whether he had knowledge of them or not was one not going to their admissibility, but to their binding effect upon his conduct, there could be no objection to introducing them as one step in the defendant's case. Their verification would be a subsequent matter. But in *Memphis & C. R. Co. v. Ashe* (1890) 90 Ala. 5, 7 So. 823, it was said that the mere fact that the plaintiff denies all knowledge of the rule which he is charged with violating is not sufficient to prevent its being put in evidence.

⁴A request to charge to the effect that, if the rules be written or printed, each employee should either be furnished with a copy, or advised as to where he can read or hear them read, and which leaves out of consideration all other means of acquiring knowledge, should be denied. *Port Royal & W. R. Co. v. Davis* (1894) 95 Ga. 292, 22 S. E. 833.

provisions.¹ Hence, "where rules are prescribed or regulations adopted for the government of employees in and about the discharge of their duties, it is the duty of the employer to give notice of their existence, and so to promulgate them as to afford to the employee a reasonable opportunity of ascertaining their terms."² The duty of informing a servant of a rule is specially imperative where he is hired to fill a position temporarily.³

The question whether the master had adequately performed this duty is bound up, and is always considered in connection, with the question, whether the servant was chargeable with notice of the contents of the rule under discussion. Each of these questions is primarily one of fact for the jury.⁴ But, as in all the employers' liability cases in which the knowledge, actual or constructive, of the servant is to be determined, the courts have exercised very freely their privilege of controlling or setting aside verdicts.

In the absence of evidence going to show fraud, it is clear that a servant cannot be heard to assert that he was ignorant of a rule, when he had expressly contracted with reference to its provisions.⁵ The same conclusion is unavoidable where an employer has taken the precaution of requiring an employee to sign a written statement to the

¹ *Gregory v. Ohio River R. Co.* (1893) 37 W. Va. 606, 16 S. E. 819. In one case it has been held that, in the absence of proof to the contrary, it will be presumed that the master notified the servant of the rules by which he was to be bound. *Pilkinton v. Gulf, C. & S. F. R. Co.* (1888) 70 Tex. 226, 7 S. W. 805. But this decision seems to be contrary to general principles.

² *Port Royal & W. C. R. Co. v. Davis* (1894) 95 Ga. 292, 22 S. E. 833. This general principle holds although the plaintiff, in a written application for employment, has undertaken to "study the rules governing employees, carefully keep posted, and obey them." *Carroll v. East Tennessee, V. & G. R. Co.* (1889) 82 Ga. 452, 6 L. R. A. 214, 10 S. E. 163. A railroad company is responsible for an injury caused by the servant's ignorance of rules, where his superior officer has failed to comply with his repeated requests to furnish him with a copy of them. *Gulf, C. & S. F. R. Co. v. Kizziah* (1893) 4 Tex. Civ. App. 356, 22 S. W. 110, 26 S. W. 242. That a traffic manager omits to see personally that the printed notices of alterations in the movements of trains are served upon the employees who ought, in the course of business, to

be warned of such alterations, is no evidence of systematic mismanagement on the part of the company. His duty is fully performed if the notices are handed to his subordinates for distribution. *Conway v. Belfast & N. C. R. Co.* (1877) 1r. Rep. 11 C. L. 345, Affirming (1875) 1r. Rep. 9 C. L. 498.

³ *East Tennessee, V. & G. R. Co. v. Turraville* (1893) 97 Ala. 122, 12 So. 63.

⁴ *Picart v. Chicago, R. I. & P. R. Co.* (1891) 82 Iowa, 148, 47 N. W. 1017; *McNee v. Coburn Trolley Truck Co.* (1898) 170 Mass. 283, 49 N. E. 437; and the cases cited below.

⁵ *Matchett v. Cincinnati, W. & M. R. Co.* (1892) 132 Ind. 334, 31 N. E. 792. In *Brennan v. Michigan C. R. Co.* (1892) 93 Mich. 157, 53 N. W. 358, the servant's knowledge of a particular rule was proved by a writing in which he acknowledged, over his signature, that he had received a copy of the rules, and promised to make himself familiar with them. In another case no question was raised as to the servant's knowledge where he had subscribed the rules. *Ward v. Chesapeake & O. R. Co.* (1894) 39 W. Va. 46, 19 S. E. 389. In *Finley v. Richmond & D. R. Co.* (1893) 59 Fed. 420 (1894) 12 C. C. A.

effect that he has read and understands the rules.⁶ But where the express agreement simply binds the servant to ascertain the provisions of the employer's rules, it will not be construed as referring to any rules except those which the master has taken some active steps to bring to the servant's knowledge. The undertaking of an employee, entered into in writing as one of the terms of his employment, to "study the rules governing employees, carefully keep posted, and obey orders," does not extend to any unknown rules not promulgated to him.⁷

Another situation in which it is probable that no court would permit a servant to plead ignorance of a rule is presented in those cases where it is shown that printed copies of the rules were distributed among the employees whom they concerned, with instructions to study their provisions.⁸

595, 25 U. S. App. 16, 63 Fed. 228 think the plaintiff's knowledge was assumed where he had signed an agreement waiving all and any liability of the company to him for the results of an infraction of the rule. See also *Lake Erie & W. R. Co. v. Craig* (1897) 25 C. C. A. 585, 47 U. S. App. 647, 80 Fed. 488, where a similar assumption was made in a case where the servant had acknowledged the receipt of the rules, and had agreed carefully to study and abide by them.

⁶ In *Sedgwick v. Illinois C. R. Co.* (1887) 73 Iowa 158, 34 N. W. 790, an action by a brakeman for personal injury received while attempting to uncouple cars in motion, it appeared that a contract had been signed by him, in which he acknowledged that he had been made acquainted with a rule of the company, strictly forbidding any attempt to uncouple moving cars, and in which he also agreed to assume all risks of the forbidden act, and hold the company harmless for any injury he might sustain while doing it. The trial court excluded the paper on plaintiff's objection, on the ground that it was incompetent and immaterial, and was in conflict with the provisions of the statute (Code, § 1307), and in contravention of public policy. This exclusion the supreme court held to be erroneous, saying: "It may be that, regarding the instrument simply as a contract between the parties, some of its provisions could not be upheld; but we do not have occasion to go into that question; for, aside from its character as an agreement, there are grounds upon which we

think it very clear that defendant was entitled to have it admitted in evidence. It is the agreement upon which Oakes entered its service, and it contains specific directions as to the manner in which he was expected to perform the duties of his employment. It advised him that it was regarded as a dangerous act to attempt to uncouple when the cars are in motion, and that he was expressly forbidden to attempt to do that. The article signed by him is an admission by him that he knew of that prohibition, as well as an agreement that he would assume all the risks of the forbidden act, and hold the company harmless for any injury he might sustain while doing it. . . . The fact that he contracted to hold it harmless is quite immaterial. The defendant had the right to introduce the paper in evidence, then, because it showed not only the existence of the rule, and that it constituted one of the conditions of the employment, but that its existence was known to Oakes."

⁷ *Carroll v. East Tennessee, V. & G. R. Co.* (1889) 82 Ga. 452, 6 L. R. A. 214, 10 S. E. 16.

⁸ In *Lu Croy v. New York, L. E. & W. R. Co.* (1892) 132 N. Y. 570, 30 N. E. 391, the court assumed that, if the rules of the company had been put in possession of the employees concerned, with instructions to read and observe them, the plaintiff could not have recovered. In this case the plaintiff's knowledge was inferred from his own testimony that, although he had not been furnished with a book of the rules nor required to read it, he had had ac-

It is also clear that the servant is subject to something more than the obligation of merely acquainting himself with the contents of the rules which have been actually placed in his hands, and that he is, to some extent at least, bound to take active steps to ascertain their provisions. As bearing upon the question of the servant's knowledge of a certain rule, therefore, it is always competent to introduce evidence showing that printed copies of that rule had been posted at the places where it was customary to post the rules affecting the class of employees to which the injured servant belonged.⁹ The effect of such

cases to it and had actually read it. In *Concoran v. Delaware, L. & W. R. Co.* (1891) 126 N. Y. 673, 27 N. E. 1022, one of the rules provided that "every employee must acquaint himself with these rules and directions, and keep a copy of them in his possession. New rules are made from time to time as occasion requires. Notice of them is given on the bulletin boards of the company at Buffalo, East Buffalo, Elmira, and Binghamton. Employees must keep themselves informed of new rules by examining these bulletin boards." It was shown that the rules were printed on the back of the time-tables, and were kept for distribution at all points where the men could get them. They were kept for distribution in the office of the master mechanic and yard master at East Buffalo, where the plaintiff was at work. Upon this state of the evidence no suggestion was made that the rules had not been properly published. In *Darracott v. Chesapeake & O. R. Co.* (1887) 83 Va. 288, 2 S. E. 511, the servant's knowledge of the rule was proved by the fact that he had received for a copy.

⁹ *McDonald v. Fitchburg R. Co.* (1897) 19 App. Div. 577, 46 N. Y. Supp. 600 (rule requiring the use of coupling sticks posted in the yard where the servant worked); *Francis v. Kansas City, St. J. & C. B. R. Co.* (1894) 127 Mo. 658, 28 S. W. 842, 30 S. W. 129 (rule affecting a switchman had been duly posted in the yard and the round-house). On the first appeal of this case (1892) 110 Mo. 387, 19 S. W. 935, the court approved a charge to the effect it was the duty of the servants to acquaint themselves with rules which were posted in the manner stated in the text above. In an earlier case the same court remarked: "In numerous instances it has been held that passengers must equip themselves with a sufficient knowledge of the regulations of the

common carrier which transports them from place to place (*Lake Shore & M. S. R. Co. v. Roszniceig* (1886) 113 Pa. 519, 6 Atl. 545), and sound reasoning would seem to lay an employee under a greater stress of necessity and of duty of becoming acquainted with rules, the observance of which would promote, not only his own safety, but, as well, those with whom he jointly labors, and that, having sufficient opportunity therefor, the inference should be drawn that he did not remain ignorant of that which the highest promptings of duty and self interest demanded he should know; and so the point has been ruled." *Alcorn v. Chicago & A. R. Co.* (1891) 108 Mo. 81, 18 S. W. 188, where it was held error to refuse to admit in evidence a rule forbidding the coupling of cars in motion, where testimony had been introduced by the defendant going to prove that it had been in force several years; that it was printed on the back of the time-tables distributed to employees; and that a special copy was posted in all particularly public places along the road. In this case the court followed the doctrine laid down in *Alexander v. Louisville & N. R. Co.* (1886) 83 Ky. 589, where it was said that the fact of the plaintiff's not having been furnished with a copy of the printed rules, and being ignorant of their existence, did not constitute sufficient reason for rejecting them in this case, and they were properly admitted; for it was his duty to acquaint himself with those rules which manifestly he might have done by the use of ordinary diligence. *Memphis & C. R. Co. v. Askew* (1890) 90 Ala. 5, 7 So. 823; holding that where plaintiff has denied all knowledge of a rule requiring the use of a coupling stick, it is competent for the defendant to prove, as bearing upon the fact of the plaintiff's knowledge, the fact that he had frequently seen other employees using such sticks, but not the mere fact

evidence is, according to some of the authorities, always for the jury.¹⁰ This position would doubtless be taken by all courts where the rule in question was not included among those contained in the general printed schedule, and the testimony upon which the defendant relies, as tending to show promulgation in another way, is vague and indefinite.¹¹ Nor can it be held, as a matter of law, that a servant had constructive notice of a rule which the evidence fails to show was posted during the term of his employment;¹² or of one which was posted in such a manner that it could not be seen without making a more minute search than can reasonably be demanded from him;¹³ or of one which is not satisfactorily shown to have been sent to the intermediate agents who were responsible for the final steps by which it was to be brought to the servant's knowledge.¹⁴ But, in some cases, posting on the regular bulletins in the ordinary way seems to be treated as sufficient to carry constructive notice of a rule to the servants affected by it.¹⁵

The longer the period during which the servant has had an opportunity to make himself acquainted with the rules for his guidance, the

that the rules were frequently referred to by the employees generally in the discharge of their duties.

¹⁰ In a Missouri case the court refused to declare, as a matter of law, that a servant had notice of a rule, because it had been recorded in an order book, and posted in public places where the servants doing the same kind of work were called by their duties. *Francis v. Kansas City, St. J. & C. B. R. Co.* (1892) 110 Mo. 387, 19 S. W. 935.

¹¹ *Doig v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579, 45 N. E. 1028 (defendant sought to establish posting by blackboard).

¹² *Francis v. Kansas City, St. J. & C. B. R. Co.* (1892) 110 Mo. 387, 19 S. W. 935. Compare the decision that knowledge of a standing order not included among the printed rules cannot be presumed from the fact that it had been posted at some previous time, where there is no evidence going to show whether it had been torn down, or was still up during the servant's term of service. *Wooden v. Western N. Y. & P. R. Co.* (1892) 46 N. Y. S. R. 77, 18 N. Y. Supp. 768.

¹³ A servant is not affected with notice of a rule printed on the back of a timetable which is nailed with its face outward, upon the wall of the office of the

department to which he belongs. *Mackey v. Baltimore & P. R. Co.* (1890) 8 Mackey, 282.

¹⁴ In *Seene v. Northern P. R. Co.* (1889) 39 Fed. 487, the question of the servant's knowledge of a rule was held to have been rightly submitted to the jury, where a witness testified for the defendant that the rule was in force at the time that plaintiff received his injury; that it was one of those made for the information of the employees in the operating department; and that these rules were sent and distributed to the different heads, but could not testify positively that they were sent to the heads of the management of the yards at the place where the accident occurred. While, on the other hand, the plaintiff, in rebuttal, testified that the rule had never been enforced while he was at that place, and that he "never knew anything about rules whatever."

¹⁵ See *Sutherland v. Troy & B. R. Co.* (1893) 74 Hun. 162, 26 N. Y. Supp. 237, where this was apparently taken for granted by the court. In *Fitz v. Missouri, K. & T. R. Co.* (1895) Tex. Civ. App. 30 S. W. 85, no question as to the servant's knowledge was raised, where his attention had recently been called to the violated rule by a special bulletin.

less hesitation will a court feel in setting aside a verdict in his favor.¹⁶

Both on principle and authority it is clear that, in the absence of specific notice, a servant is not chargeable with a knowledge of the contents of rules designed to regulate the conduct of a class of employees different from that to which he belongs.¹⁷

The fact that a rule was not printed will not absolve the servant from the consequences of disobeying it, if it was one which was well recognized, and was duly promulgated by word of mouth. The object of writing or printing rules is merely that the proper course of conduct may be definitely prescribed, and more certainly brought to the attention of every person having to enforce or execute the rules, or to rely on their execution.¹⁸

228. Reasonableness.—The general principle is that a master has the right to make such reasonable rules as to the manner in which his business shall be conducted as are necessary either for his own protection or for the safety of his employees.¹ Such a mode of stating the nature of the right implies that, when the consequences of a servant's violation of a rule are in question (see chapter XIX., *post*), its reasonableness is always a preliminary issue in the case. In most instances the rules are so obviously calculated to secure the servant's safety that this issue is not directly discussed, the decision that the servant's action is barred on account of his violation of a rule being an implied declaration that it is reasonable. But in some cases the courts have rendered specific decisions upon the reasonableness of the rule under

¹⁶ One who has acted as assistant station agent for eighteen months will be presumed to know the rules of the company pertaining to the duties of that position. *Helm v. Louisville & N. R. Co.* (1895) 17 Ky. L. Rep. 1004, 33 S. W. 396. In *Shenandoah Valley R. Co. v. Lucado* (1889) 86 Va. 390, 10 S. E. 422, the court, after quoting one of the defendant's rules, said: "These rules were in force, and had been for several years, when the accident occurred, although they had not been formally promulgated by the receiver after his appointment. They are printed, and copies of them had been duly furnished to section foremen, Jennings among the number, for the guidance of themselves and the men under their charge. The deceased had been in the employ of the company as a section hand for many

months prior to the accident, and the presumption is that he was acquainted with the rule above quoted. At all events, the fair inference from the record is that he had reasonable opportunity to become acquainted with it, which for the purposes of the present case, is equivalent to actual knowledge."

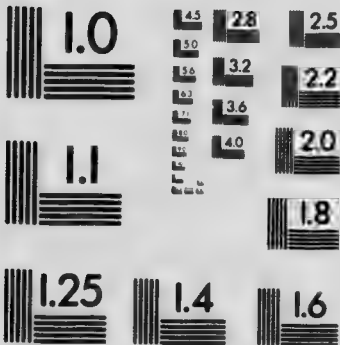
¹⁷ A baggage master is not presumed to know whether the rules and schedules provided for the running of the defendant's trains on its road were defective or ambiguous, inasmuch as it was not his business to run the defendant's trains, or either of them. *Georgia R. & Bkg. Co. v. Rhodes* (1876) 56 Ga. 645.

¹⁸ *Grady v. Southern R. Co.* (1899) 34 C. C. A. 494, 92 Fed. 491.

¹ *Sedgwick v. Illinois C. R. Co.* (1887) 73 Iowa, 158, 34 N. W. 790.



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review, as a step towards the final conclusion that its breach disabled the servant from recovering damages.²

The doctrine that conformity with general usage is a conclusive defense (see § 44, *ante*) has been applied in one case, with the harsh result that the servant was held to be bound by a rule which virtually required him to do his work in an unnecessarily dangerous way.³

Whether the reasonableness of a rule is a question for the court or the jury is one as to which there is much apparent conflict between the authorities. One theory is that this question is always for the court, the reason assigned for this view being that it would otherwise be impossible to secure a uniformity of view, or to insure that a rule pronounced reasonable in one case by a jury might not be pronounced unreasonable by another jury in a subsequent case.⁴ Another view is

²The following rules have been expressly held valid: A rule setting apart a special time for the wiping of machinery, and forbidding employees to wipe it while it was in motion. *Shanny v. Androscoggin Mills* (1876) 63 Me. 429. A rule prohibiting the coupling or uncoupling of cars by going in between them while they are in motion. *Low v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 420, 56 N. W. 519. A rule requiring coupling and uncoupling of cars to be done by means of a stick, and forbidding employees to go between cars when a locomotive is attached. *Richmond & D. R. Co. v. Rush* (1894) 71 Miss. 987, 15 So. 133. A rule which prohibits jumping on a switch engine while it is in motion, by standing in the middle of the track, and stepping on the footboard. *Francis v. Kansas City, St. J. & C. B. R. Co.* (1892) 110 Mo. 387, 19 S. W. 935. Rules by which it is directed that section foremen shall "carefully flag their truck and hand cars against special and extra trains or engines, which may be run at any time, day or night, without previous notice to them;" and that "special care must be taken in running hand cars and truck cars on all sections of the road where, by reason of fogs, sharp curves, or other circumstances, risk or danger is involved;" and that "[hand] cars must always be protected by a flag when a clear track cannot be seen for a safe distance." *Kansas & A. Valley R. Co. v. Dye* (1895) 16 C. C. A. 604, 607, 36 U. S. App. 23, 28, 70 Fed. 24, 27.

³In *Gideon v. Enorce Mfg. Co.* (1895) 44 S. C. 442, 22 S. E. 598. It was decided that a master was not neg-

ligent in requiring, in accordance with a universal practice in cotton mills, a loom to be fanned for cleansing purposes while it was in motion, where by such method time was saved and the work facilitated, to the benefit of an employee who worked by the piece, and no similar accident had occurred although the process had sometimes to be repeated twice a day, and even more frequently.

⁴*Kansas City, Ft. S. & M. R. Co. v. Hammond* (1894) 58 Ark. 325, 24 S. W. 723; *Pittsburg, Ft. W. & C. R. Co. v. Powers* (1874) 74 Ill. 341. To the same effect, see *Louisville, N. & G. S. R. Co. v. Fleming* (1884) 14 Lea, 128; *State v. Overton* (1854) 24 N. J. L. 435, 61 Am. Dec. 671; *Norfolk & W. R. Co. v. Wysox* (1886) 82 Va. 250—cases in which a passenger was the plaintiff. In *Little Rock & M. R. Co. v. Barry* (1898) 43 L. R. A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944, the doctrine was laid down broadly and emphatically that, when a railroad company adopts certain rules for the operation of its trains, the reasonableness and sufficiency of such rules is always a question of law for the court. Thayer, C. J., dissented on the ground that judges could not arrogate to themselves the power of determining such a question in a case where competent witnesses expressed different opinions upon the matter, without depriving suitors their constitutional right to a trial by jury. The mere fact that greater uniformity would be secured by taking the issue out of the hands of juries did not, he thought, justify such a practice. It was also pointed out by the learned

that the question is primarily one for the jury.⁵ Some courts have enunciated an intermediate doctrine which seems to be more in harmony with general principles,—*viz.*, that the reasonableness of a rule is a mixed question of law and fact, except in plain cases.⁶

In one case a consideration is introduced which, if it were always regarded as controlling, would obviate all necessity for a demarcation between the respective provinces of court and jury, the position taken being that, as between a master and a servant who has deliberately entered into his contract of employment, with full opportunities for ascertaining all his duties and the rules he may be required to comply with, and who is at liberty to withdraw from the service at any time that he finds it objectionable, it is neither for the court nor the jury to determine the reasonableness of a rule.⁷

229. Rules making servants the insurers of their own safety.--

By some courts, as will be shown more at length in the third volume of this treatise, all express contracts which limit or take away the serv-

judge that all the cases cited to show that the reasonableness of rules was a question of law were, with one exception, cases in which no testimony was introduced to show whether the rule was or was not reasonable, and that the decisions were simply to the effect that, under such circumstances, the court could properly determine the reasonableness of a rule.

⁵*International & G. N. R. Co. v. Hall* (1890) 78 Tex. 657, 15 S. W. 108; *Texas & N. O. R. Co. v. Echols* (1894) 87 Tex. 339, 27 S. W. 60, 28 S. W. 517. See also *South Florida R. Co. v. Rhodes* (1889) 25 Fla. 40, 3 L. R. A. 733, 5 So. 633; *Illinois C. R. Co. v. Whittemore* (1867) 43 Ill. 420, 92 Am. Dec. 138—cases in which the plaintiff was a passenger.

⁶*Bass v. Chicago & N. W. R. Co.* (1874) 36 Wis. 459, 17 Am. Rep. 495 (passenger case); *Arery v. New York C. & H. R. R. Co.* (1890) 121 N. Y. 31, 24 N. E. 20 (passenger case); *Day v. Owen* (1858) 5 Mich. 520, 72 Am. Dec. 62. In one case the court, in applying the doctrine thus enunciated to an order suspending a rule by which the running of certain classes of trains was regulated, said: "Whether a rule of a railroad company is or is not a reasonable rule is in many cases a question of law; but in this case it cannot be affirmed, as matter of law, that the special order made by superintendent Bar-

rett was reasonable. On the contrary, whether such order was reasonable or unreasonable was a question of mixed law and fact, proper for the determination of the jury in view of the circumstances under which the order was to be executed, and under proper instructions as to the law. The jury found that the order was unreasonable under the circumstances, and we are not prepared to say that the finding was wrong." *Pittsburgh, C. & St. L. R. Co. v. Henderson* (1882) 37 Ohio St. 549. In *Pittsburgh, C. & St. L. R. Co. v. Lyon* (1889) 123 Pa. 140, 2 L. R. A. 489, 16 Atl. 607 (passenger case), it was contended that certain instructions were erroneous for the reason that they withdrew from the consideration of the jury the reasonableness or unreasonableness of the regulation under consideration, and disposed of it as a question of law. The court said: "While this position is not without the sanction of respectable authority, the better opinion appears to be that the question is generally a mixed one of law and fact. So far as the reasonableness of a given rule depends upon the existence of particular facts and circumstances, it is necessarily a question for the jury, under proper instructions from the court; but if the facts are undisputed, the question is a proper one for the court."

⁷*Wolsky v. Lake Shore & M. S. R. Co.* (1877) 33 Ohio St. 227.

ant's right of action for the master's negligence are indiscriminately upheld.¹

In jurisdictions where the position thus indicated is taken, the sole prerequisites to the establishment of an effective defense on this ground is that the servant should have known that the rule had been promulgated,² and that the agreement which it evidences should have been based upon a sufficient consideration.

Most of the American courts, however, decline to permit employers to stipulate for exemption from the consequences of their own negligence, and in all of these it would doubtless be held, as it has been declared in some cases, that a rule which virtually amounts to such a stipulation is invalid.³ This point of view, however, is not inconsis-

¹ See *Buddley v. Granville* (1887) 19 Q. B. Div. 423, 56 L. J. Q. B. N. S. 501, 57 L. T. N. S. 268, 36 Week. Rep. 63, 51 J. P. 822; *Western & A. R. Co. v. Bishop* (1873) 50 Ga. 465; *Western & A. R. Co. v. Strong* (1874) 52 Ga. 461; *Galloway v. Western & A. R. Co.* (1876) 57 Ga. 512; *Cook v. Western & A. R. Co.* (1883) 72 Ga. 48; *Fulton Bag & Cotton Mills v. Wilson* (1892) 89 Ga. 318, 15 S. E. 322.

² In Georgia, however, the distinction is taken that the principle under which a rule is binding upon an employee whenever it is actually or constructively known to him is not applicable where the rule requires him to waive certain rights not connected with his duties as an employee. To bar his rights it must be shown that he expressly agreed to that particular rule. The mere fact that he kept a copy of the rules in his possession, and remained in the service will not disable him from recovery. *Georgia P. R. Co. v. Dooley* (1890) 86 Ga. 294, 12 L. R. A. 342, 12 S. E. 923.

³ The duty of a master to furnish reasonably safe machinery, being nonassignable, cannot be shifted to his servants merely by the promulgation of a rule requiring them to inspect the appliances handled by them. *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598 (rule required that the driver of an engine should be held responsible for the condition of his engine, and must be sure that it is in good working order). A railroad company cannot escape liability for injuries caused by the defective quality of the side stakes of a lumber car by the plea that, according to its system, the duty of loading and adjusting the stakes was

imposed on the shipper. *Bushby v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374, 14 N. E. 407. So far as a rule contravenes the principle of law which requires the master to furnish and maintain suitable material and appliances for the safe prosecution of its business, it will be regarded as wholly inoperative. *Memphis & C. R. Co. v. Graham* (1891) 94 Ala. 545, 12 So. 283 (rule here related to the examination of appliances). A contract by which an employee agrees that he will not attempt to couple or uncouple a car unless he knows the coupling is in proper condition is an invalid attempt to impose on him a duty which the law imposes upon the master, to see that the implements are in a reasonably safe state of repair. *Missouri, K. & T. R. Co. v. Wood* (1896; Tex. Civ. App.) 55 S. W. 879. It has been held that, under such a statute as the employers' liability act of Alabama, a rule which requires an employee "to look after and be responsible for his own safety" is invalid. *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 548, 8 So. 360. This decision was followed in *Richmond & D. R. Co. v. Jones* (1890) 92 Ala. 218, 9 So. 276, where the employee had agreed especially to be bound by certain rules, one of which ran as follows: "The conditions of employment by this company are that the regular compensation paid for the services of employees shall cover all risks incurred, and liability to accident from any cause whatever, while in the service of this company. If an employee is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized."

ent with the position that servants of a particular class may be required by a rule to protect themselves against certain sporadic dangers which are obviously incidental to their special work, and which do not imply the existence of any defect in the plant of the employer.⁴

230. Rules requiring the servant to examine the appliances used by him.—See § 416, *post*.

231. Conflict between the obligation of a rule and other duties.—

The question of the extent of a servant's duty to observe a particular rule is sometimes determined by the application of the general principle that a person upon whom two inconsistent obligations are imposed by a contract may, without culpability, act upon the assumption that the less binding one may be disregarded. It is considered that a rule has no binding force where the conditions existing at the time the injury was received rendered it practically impossible to obey the rule, and at the same time perform the services required by the employer.¹ In other words, the fact that the plaintiff has disobeyed a rule will not, as matter of law, debar him from recovering, if the defendant conducted his business in a manner which rendered a violation of such rule necessary or probable.² Under such circumstances it will be inferred that it must have been enacted to serve some

¹A rule which provides that no notice will be given to trackmen of the passage of extra trains, and that they must govern themselves accordingly, is valid. Where they knew of the rule, they must be taken to have assumed the risk of the passage of such trains without blowing a whistle or ringing a bell. *Jolly v. Detroit, L. & N. R. Co.* (1892) 93 Mich. 370, 53 N. W. 526. Rules providing that extra trains may pass over the road at any time without previous notice, and that the foreman of gangs of track repairers must be always prepared for them, and requiring him to take various appropriate precautions for the safety of his subordinates, are reasonable. *Criswell v. Pittsburgh, C. & St. L. R. Co.* (1888) 30 W. Va. 798, 6 S. E. 31; *Olson v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. W. 866 (validity of rule was here assumed). Yet it has been held that a regulation making it the duty of the track foreman to protect himself against all trains, regular and extra, without having any notice whatever of the same, is an unreasonable one. *Willis v. Atlantic & D. R. Co.* (1898) 122 N. C. 905, 29 S. E. 941 (first appeal [1897] 120 N. C. 508, 26 S. E. 784). A paper signed by a railroad employee, by

which he waives all liability of the company to him for any results of disobedience or infraction of a rule, is not a contract against public policy. It is merely a declaration on his part that the company will not be liable to him for the consequences of certain acts which the company forbids him to perform. *Russell v. Richmond & D. R. Co.* (1891) 47 Fed. 204.

²A master is deemed to have waived the observance of a rule forbidding an act not necessarily negligent in itself, where the duty which his servant owes to him cannot be performed without a violation of such rule. *Brown v. Louisville & N. R. Co.* (1895) 111 Ala. 275, 19 So. 1001. In *Sedgwick v. Illinois C. R. Co.* (1887) 73 Iowa, 158, 34 N. W. 790, the court remarked, *arguendo*, that a servant's violation of a known rule was excusable if "there existed some necessity which imposed upon him a higher duty than that created by the rule." In *Newport News & M. Valley R. Co. v. Campbell* (1894) 15 Ky. L. Rep. 714, 25 S. W. 267, the fact that an abandoned rule was not required for safety has been mentioned as an additional reason for declaring it to be of no binding force as regards a servant.

³*Hayes v. Bush & D. Mfg. Co.* (1886)

purpose other than the protection of the property of the master, or the proper conduct of his business, or the safety or protection of his employees.⁸

This general principle involves the corollary that the effect of a special order issued by an employee who is the master's *alter ego* in respect to the subject-matter will operate so as to suspend *pro tanto* the obligation of a general order embodied in a rule, and thus convert into

41 Hun, 407; *O'Malley v. New York, L. E. & W. P. Co.* (1893) 67 Hun, 130, 22 N. Y. S. pp. 48. See § 416, note 3, *post*. It is error to nonsuit the plaintiff where a rule forbids the coupling of cars while in motion, if the evidence is that there was a grade in the yard which rendered it necessary for the cars to be moved while they were being uncoupled, on account of the links and pins being tightened when they were stationary. *Wright v. Southern P. Co.* (1896) 14 Utah, 383, 46 S. W. 374. A conductor's infringement of one regulation requiring him to remain in the middle of his train on descending grades, so as to be better able to direct his crew, is not necessarily negligence where another regulation imposes on him the duty of "taking the safe side in all cases of doubt." What is the "safe side" in any given exigency is a question for the exercise of judgment. A court, therefore, cannot say, as matter of law, that a conductor would, under such circumstances, be guilty of negligence in quitting his post temporarily to warn the engineer of the possibility that he might meet some obstruction not known to, or not considered by, the company in making out the special order under which the train was running. *Somerset & C. R. Co. v. Galbraith* (1885) 109 Pa. 32, 1 Atl. 371. In *Hall v. Chicago, B. & N. R. Co.* (1891) 46 Minn. 439, 49 N. W. 239, the plaintiff was allowed to recover on the ground that he could not conform to the time-table, and at the same time keep his train "under complete control," as one of the rules required. In *Alabama G. S. R. Co. v. Richie* (1895) 111 Ala. 297, 20 So. 49, the injury occurred while the plaintiff, who was a brakeman, was between moving cars. For a special plea the defendant set out a rule of the company which, among other things, prohibited employees "from getting between moving cars, while in motion, to uncouple them."

To this special plea the plaintiff filed a replication, which, in substance, averred that, at the time and place where the injury occurred, it was the duty of the plaintiff to uncouple the cars, and that this duty could not be performed without going between the cars while they were in motion, and that it was the custom of plaintiff, acquiesced in by the defendant, to go between the cars while in motion, for the purpose of uncoupling them, whenever it was necessary to do so. To this replication the defendant demurred, assigning several grounds. The court held that the replication was defective in that it failed to state the facts and circumstances which rendered it necessary for the plaintiff to go between the cars while in motion to uncouple them, in discharge of his duty; and that the defendant was accordingly not informed by the replication what facts were relied upon by the plaintiff to absolve him from an observance of the rule, and could not prepare to meet the issue presented by the replication. *Louisville & N. R. Co. v. Mothershed* (1895) 110 Ala. 143, 20 So. 67, holding that there is no such conflict of rules as will invalidate them, where one requires that trains, upon approaching a "time-table station," shall be under full control, with the expectation that the main track is occupied, and another provides that the general direction and government of a train are vested in the conductor, who shall be responsible for its proper conduct, and requiring all employees on the train to yield obedience to his proper orders.

⁸ *Strong v. Iowa C. R. Co.* (1895) 94 Iowa, 380, 62 N. W. 799. The court remarked: "A rule which, if obeyed, would prevent the defendant from properly carrying on its business, does not commend itself to the courts as being made in good faith, and in furtherance of any legitimate purpose."

a nonculpable act one which, apart from that special order, would have entailed the consequences of disobedience.⁴

A special order, however, will supersede a standing rule only where they are essentially conflicting in their terms, or where it is or ought to be foreseen, at the time when the order is given, that its execution is incompatible with the rule, or where such incompatibility afterwards arises owing to some action taken by the giver of the order, with reasonable ground for expecting such a result.⁵ Nor is the recipient of a special order which has the effect of superseding a general rule deemed to be free from culpability in obeying the order, unless he has actual knowledge that the employee who gives it is acting within his powers.⁶

⁴*Alabama G. S. R. Co. v. Roach* (1895) 110 Ala. 266, 20 So. 132; *Richmond & D. R. Co. v. Radd* (1892) 88 Va. 648, 14 S. E. 361. An engineer's noncompliance with general rules for the operation of trains will not disable him from recovering, where the orders given by the governing officers of the company required him to run his train in a manner different from that prescribed in those rules. *Pennsylvania Co. v. Roncy* (1883) 89 Ind. 453, 46 Am. Rep. 173. A brakeman who stands on the pilot of the engine for the purpose of making a running switch, by direction of the conductor and engineer, who know that the making of running switches is expressly prohibited by the rules of the company, is not guilty of contributory negligence, when his duty in that respect cannot be performed in any other place, and the accident results from the engineer's failure to stop his engine in time. *Louisville Southern R. Co. v. Tucker* (1899) 20 Ky. L. Rep. 1303, 49 S. W. 314. An employee in a paper mill is not, as matter of law, guilty of contributory negligence in attempting, on direction by a superior, to pull the broken paper off a press at night while the lights are out, so as to prevent a recovery for an injury caused by the unexpected breaking of the paper and his failure to catch hold of a hand-rail to prevent his falling, notwithstanding an order to stop the presses at night when the paper broke while the lights were out, where such order had been previously disobeyed by others. *Sauger v. Rumford Falls Paper Co.* (1897) 90 Me. 354, 38 Atl. 318. The court remarked that the servant "was under no obligations to obey an order to remove broken paper while the

press was in motion in the darkness, but he evidently believed that he was expected to do it, if requested by the machine tender."

⁵A special order to a locomotive engineer to make a run in a certain time must be executed with due regard to the general rules which are not incompatible therewith, and there can be no recovery against the company if he is killed by his breach of a rule requiring him to approach a station with "great care," in view of the possibility of finding "some other train occupying the main track." *Illinois C. R. Co. v. Neer* (1889) 31 Ill. App. 126.

⁶Thus, where one of the rules of a railroad company provides that the conductor shall have control of all persons employed on his train, except when his directions conflict with the rules, or involve risk or hazard, in which case the engineer will be held equally accountable, and another rule requires that a certain train shall remain at a specified station until the arrival of a train from the opposite direction,—the engineer of the waiting train must, at his peril, detain it as so prescribed unless he actually knows that the dispatcher has sent special directions that it is to proceed before the arrival of the expected train. He is not permitted to infer that the conductor has received information which will justify his moving his train in a manner different from that prescribed by the rules, and to act on that assumption. *York v. Chicago, M. & P. R. Co.* (1896) 98 Iowa, 544, 67 N. W. 574. The schedule of hours for the running of trains is obligatory upon both conductors and engineers, and if an engineer is injured by a collision due to the starting of his train at

232. Waiver of rules, when inferable from the master's acquiescence in their violation.—A principle established by a large number of decisions is that a rule ceases to be binding upon employees, where the master has sanctioned its repeated violation for a length of time sufficient to warrant them in acting upon the assumption that it was abrogated.¹ Other logically equivalent forms in which this principle

a time not set down in the schedule, he cannot excuse himself for his disobedience of the printed orders of his superiors on the ground that he allowed himself to be prevailed upon by the conductor to depart from the schedule time. *Georgia R. & Bky. Co. v. McDade* (1877) 59 Ga. 73.

¹"There is no doubt that a person or company having authority to establish rules for the government of employees may, in any particular instance, waive obedience to the rules, or may knowingly acquiesce in a disregard of the rules so continuously and for such a length of time as to justify the inference that they are no longer in force, and that obedience will not be required." *Alabama G. S. R. Co. v. Roach* (1895) 110 Ala. 266, 20 So. 132. "Where a certain rule of the employer . . . has been habitually disobeyed since its inception, or for a long period of time, in the presence or to the knowledge of the employer, without an attempt to enforce it, or has been disregarded in such a manner, and for such length of time as to raise a presumption that it was done with his knowledge and approval, the rule will be regarded as abrogated or waived." *Wright v. Southern P. Co.* (1896) 14 Utah, 383, 46 Pac. 374. "Abrogation of a rule . . . may be presumed when it is frequently and openly violated for such a length of time as that the company [employer] could, by the use of ordinary care, have ascertained its non-observance." *Texas & P. R. Co. v. Leighty* (1895; Tex. Civ. App.) 32 S. W. 799. "A railway company cannot escape liability by showing a violation of rules which are never enforced, and which are habitually disregarded with the knowledge and apparent acquiescence of officers whose duty it is to enforce them." *Spaulding v. Chicago, St. P. & K. C. R. Co.* (1896) 98 Iowa, 205, 67 N. W. 227. A railroad company cannot plead violation of rules by an employee, where the work was being done in the manner in which it had been done for years. *Eustman v. Lake*

Shore & M. S. R. Co. (1894) 101 Mich. 597, 60 N. W. 309. To the same effect, see *Hayes v. Bush & D. Mfg. Co.* (1886) 41 Hun, 497; *Louisville & N. R. Co. v. Roagan* (1896) 96 Tenn. 128, 33 S. W. 1059; *Newport News & M. Valley R. Co. v. Campbell* (1894) 15 Ky. L. Rep. 714, 25 S. W. 267; *Knickerbocker Ice Co. v. Ice* (1897) 25 C. C. A. 579, 51 U. S. App. 256, 80 Fed. 483; *Georgia P. R. Co. v. Davis* (1890) 92 Ala. 300, 9 So. 252; *Atchison, T. & S. F. R. Co. v. Slattery* (1896) 57 Kan. 499, 46 Pac. 941; *Atchison, T. & S. F. R. Co. v. Shu* (1889) 41 Kan. 729, 21 Pac. 790; *Kansas City, Ft. S. & G. R. Co. v. Kim* (1889) 41 Kan. 661, 21 Pac. 770; *International & G. N. R. Co. v. Hinz* (1891) 82 Tex. 623, 18 S. W. 681; *White v. Louisville, N. O. & T. R. Co.* (1894) 72 Miss. 12, 12 So. 248; *Chicago & W. L. R. Co. v. Flynn* (1895) 154 Ill. 448, 40 N. E. 332; *Bocass v. Clausen & P. Brewing Co.* (1896) 12 App. Div. 366, 42 N. Y. Supp. 848 (conductor on a freight elevator not, as matter of law, negligent in allowing other employees engaged with him in handling freight, to go upon the elevator, notwithstanding a notice that riding on the elevator without permission is strictly forbidden, there being evidence that employees had frequently ridden with the knowledge and consent of the employer); *McNee v. Coburn Trolley Truck Co.* (1898) 170 Mass. 283, 49 N. E. 437; *Hunn v. Michigan C. R. Co.* (1889) 78 Mich. 526, 7 L. R. A. 500, 44 N. W. 502; *Fluhrer v. Lake Shore & M. S. R. Co.* (1899) 121 Mich. 212, 80 N. W. 23; *Northern P. R. Co. v. Nichols* (1892) 1 C. C. A. 625, 4 U. S. App. 369, 50 Fed. 718; *Galveston, H. & S. A. R. Co. v. Collins* (1900) 24 Tex. Civ. App. 143, 57 S. W. 884. In the following case an instruction was approved which told the jury that an employee is not bound by a rule of the company, which is habitually violated with the knowledge of his superior officers, and without any effort on their part to enforce it, or where the usage and practice of the company would tend

is stated are these: That a custom in violation of a rule, known and acquiesced in by the employer or his representatives, amounts to an abandonment of the rule;¹ to the extent to which the custom infringes the rule;² that the servant's disobedience of a rule is no bar to his action where the master has waived obedience to that rule;³ that an employer is not permitted to set up as a valid defense the injured employee's violation of a rule which the employer has knowingly permitted to be practically abandoned;⁴ or that, when rules and regulations established by the master are habitually disobeyed with his knowledge or express consent, or have been disregarded without his express consent in such a manner and for such a length of time as to raise a presumption that he must have become aware of such habitual disregard and approved the same, such rules and regulations will be disregarded.⁵

It is proper to leave the case to the jury, wherever there is evidence

to mislead him into a violation of the rule. *Little Rock, M. R. & T. R. Co. v. Everett* (1886) 48 Ark. 333, 3 S. W. 50. Instructions ignoring evidence tending to show that the master did not require obedience to the rule alleged to have been infringed, and had sanctioned its violation, are properly refused. *Louisville & N. R. Co. v. Richardson* (1893) 100 Ala. 232, 14 So. 209; *Chicago & W. L. R. Co. v. Flynn* (1895) 154 Ill. 448, 40 N. E. 332. Where an employee had, on many occasions, violated a rule, some of the instances being in the presence of his superior officers, who made no objection, it is not error to deny a request by the defendant to charge the jury that, if the plaintiff did not follow the course prescribed by the rule, and was consequently injured, he could not recover. *Central R. & Bkq. Co. v. Maltby* (1892) 90 Ga. 630, 16 S. E. 953. In *Wilson v. Michigan C. R. Co.* (1892) 94 Mich. 20, 53 N. W. 797, the court considered that the doctrine which predicates a waiver of rules from the master's knowledge of their repeated violation applies only to strangers, and limits the cases in which an abrogation of rules by a railroad company will be inferred as to an employee, to those in which he is compelled by positive orders to violate such rules, or when such a system of timing the trains or conducting the business is adopted as to make it necessary to violate rules in order to do the work re-

quired of him. But this ruling is not supported by any other case which has come to the writer's notice, and seems to be irreconcilable with the Michigan cases cited in the ensuing notes.

¹*Barry v. Hannibal & St. J. R. Co.* (1888) 98 Mo. 62, 11 S. W. 308 (engineer permitted fireman to make short moves with the engine, while the engineer himself was not on it). It need scarcely be said that there can be no recovery where the only custom which the plaintiff succeeds in establishing by his evidence is one which he appears to have been disregarding equally with the rule itself. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* (1888) 69 Fed. 353 (principle also assumed to be correct in *Alexander v. Louisville & N. R. Co.* [1886] 83 Ky. 589).

²See the passages quoted in note 1, *supra*, from *Alabama G. S. R. Co. v. Roach* (1895) 110 Ala. 266, 20 So. 132, and *Wright v. Southern P. Co.* (1896) 14 Utah, 383, 46 Pac. 374. The same phraseology is found in *Nichols v. Chicago & N. W. R. Co.* (1900) 125 Mich. 394, 84 N. W. 470; *Cleveland, C. C. & St. L. R. Co. v. Baker* (1899) 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224, and many other of the cases cited in this section.

³*Northern P. R. Co. v. Nickels* (1892) 1 C. C. A. 625, 4 U. S. App. 369, 50 Fed. 718.

⁵*Konold v. Rio Grande Western R. Co.* (1900) 21 Utah, 379, 60 Pac. 1021.

that the rule which the servant is alleged to have disobeyed was customarily violated, with the knowledge of the master or his agents.⁶

In other words, evidence that the rule in question was habitually violated to the knowledge of the employer is admissible for the purpose of repelling the inference of contributory negligence which would otherwise be drawn, as a matter of law, when such violation is proved.⁷

An analysis of the principle above explained shows that, to enable a servant to take advantage of it, three evidential elements must be established.

In the first place, the servant must show that there had been violations of the rule, so frequent that they might properly be described as habitual. Evidence which shows a violation of a rule on only two occasions, one of them being the occasion of the accident, is not sufficient to show an abrogation of such rule.⁸ On the other hand, evidence that a rule was habitually disregarded is, therefore, always admissible to excuse a servant's violation of such rule,⁹ provided the infringements occurred within a reasonably short time before the injury was received.¹⁰

In the second place, the servant must show that these habitual violations were known to the master himself, or the employee whose duty it was to enforce the rule.¹¹ To establish such knowledge the serv-

⁶ *Wright v. Southern P. Co.* (1896) 14 Utah, 383, 46 Pac. 374; *Northern P. R. Co. v. Nichols* (1892) 1 C. C. A. 625, 4 U. S. App. 369, 50 Fed. 718, and the other cases cited in this section.

⁷ *Louisville & N. R. Co. v. Borcock* (1899) 21 Ky. L. Rep. 383, 51 S. W. 580; *Louisville & N. R. Co. v. Hiltner* (1900) 21 Ky. L. Rep. 1826, 56 S. W. 654 (judgment reversed on rehearing [1900] 22 Ky. L. Rep. 1141, 60 S. W. 2, but this point was expressly reaffirmed).

⁸ *Konold v. Rio Grande Western R. Co.* (1900) 21 Utah, 379, 60 Pac. 1021. The strongest case of habitual violation is presented where there is no evidence that the rule in question was ever obeyed. See *Northern P. R. Co. v. Nichols* (1892) 1 C. C. A. 625, 4 U. S. App. 369, 50 Fed. 718; *Tullis v. Lake Erie & W. R. Co.* (1901) 44 C. C. A. 597, 105 Fed. 554. The fact that the servant returned a coupling stick to the office immediately after receiving it, and never used that or any other stick, is evidence tending to show that it was not expected that the rule as to using a stick for coupling would be ob-

served. *Horan v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 328, 56 N. W. 507.

⁹ *Tullis v. Lake Erie & W. R. Co.* (1901) 44 C. C. A. 597, 105 Fed. 554; *Northern P. R. Co. v. Nichols* (1892) 1 C. C. A. 625, 4 U. S. App. 369, 50 Fed. 718; *Loose v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 420, 56 N. W. 519; *Spaulding v. Chicago, St. P. & K. C. R. Co.* (1896) 98 Iowa, 205, 67 N. W. 227; *Louisville & N. R. Co. v. Hiltner* (1900) 21 Ky. L. Rep. 1826, 56 S. W. 654 (judgment was reversed on rehearing [1900] 22 Ky. L. Rep. 1141, 60 S. W. 2, but the reversal does not touch this particular point).

¹⁰ Evidence that it was the custom of engineers, seven years before the time under investigation, to disregard a rule of a railroad company limiting the speed of trains, was not admissible to prove that the rule had been abandoned or revoked. *Louisville & N. R. Co. v. Seanton* (1901) 22 Ky. L. Rep. 1400, 60 S. W. 643.

¹¹ *Cleveland, C. C. & St. L. R. Co. v. Baker* (1899) 33 C. C. A. 108, 63 U. S. App. 553, 91 Fed. 224; *O'Neill v. K.*

and need not show that it has been habitually disobeyed in the actual presence of the master or his agents. It is not material how the knowledge of the disobedience has been obtained.¹² Nor is he required to show that the agents of the master who were charged with the enforcement of the rule had actual knowledge of the custom to violate the rule. Such knowledge may be inferred from circumstances; it may be implied from the universality and notoriety of the custom.¹³ If the waiver is claimed as a result of acquiescing in the violations of the rule by some particular employee at a certain post of duty, the question whether knowledge shall be imputed to the master depends upon the opportunities which he may be supposed to have had, under the circumstances, for ascertaining the misconduct of the employee, and the length of time during which that misconduct has continued. Compare §§ 198, 200, *ante*.¹⁴

Lastly, the servant must show that the master, being thus aware of the violations of the rule, took no steps to secure its enforcement. This fact must be established as a necessary step in the chain of proof which leads up to the conclusion that he acquiesced in the continued infraction of the rule. Courts have sometimes used language which, if taken literally, would imply that acquiescence is a necessary inference in all cases where the master had actual or constructive knowledge of the repeated violations of a rule.¹⁵ Such language, however, merely implies that, in the absence of some countervailing factor, it is justifiable to infer acquiescence wherever it appears that the master had such knowledge. Both on principle and authority, it is clear

Luk & D. M. R. Co. (1877) 45 Iowa, 546 (proof of custom to violate, held not to establish a waiver); *Nichols v. Chicago & W. M. R. Co.* (1900) 125 Mich. 394, 84 N. W. 470 (disapproving of an implied instruction that the existence of a custom in violation of a rule was evidence from which a waiver might be inferred). See also *Fluhrer v. Lake Shore & M. S. R. Co.* (1899) 121 Mich. 212, 80 N. W. 23 (where master or his agents knew of such violation); *Louisville & N. R. Co. v. Scanlon* (1901) 22 Ky. L. Rep. 1400, 60 S. W. 643; and the cases cited in the following notes. That frequent disobedience to the general orders of an employer cannot of itself operate as a nullification of them, was recently laid down by Hawkins, J., in *Vickery v. Great Eastern R. Co.* (1898) 14 Times L. R. 562.

¹² *Strong v. Iowa C. R. Co.* (1895) 94 Iowa, 380, 62 N. W. 799.

¹³ *Fluhrer v. Lake Shore & M. S. R. Co.* (1900) 124 Mich. 482, 83 N. W. 149; *Loare v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 420, 56 N. W. 519.

¹⁴ Negligence cannot be imputed to a railroad company for its failure to discover, after a period of four months, that an employee has been guilty of an habitual violation of rules framed to secure the safety of trains at switches. *Cameron v. New York C. & H. R. R. Co.* (1895) 145 N. Y. 400, 40 N. E. 1.

¹⁵ See, for example, *Cleveland, C. C. & St. L. R. Co. v. Baker* (1899) 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224; *Fluhrer v. Lake Shore & M. S. R. Co.* (1899) 121 Mich. 212, 80 N. W. 23; *Nichols v. Chicago & W. M. R. Co.* (1900) 125 Mich. 394, 84 N. W. 470; *Newport News & M. Valley R. Co. v. Campbell* (1894) 15 Ky. L. Rep. 714,

25 S. W. 267.

that the servant's right to claim the advantages of a practical abrogation of a rule is conditional upon there being no evidence that the master did not attempt to enforce it.¹⁶

The jury is entitled to infer a practical abrogation of a rule, even though there is no evidence tending to show nonobservance of it under circumstances exactly similar to those existing at the time of the accident.¹⁷

The custom or usage which the doctrine contemplates is that of the employees of the defendant himself, not that of the employees of persons in the same line of business.¹⁸

To justify the conclusion that a rule has been abandoned "it must

¹⁶ See the statements of the doctrine in *Wright v. Southern P. Co.* (1896) 14 Utah, 383, 46 Pac. 374; *Little Rock, M. R. & T. R. Co. v. Lovett* (1886) 48 Ark. 333, 3 S. W. 50. The necessity of proving the master's acquiescence is also emphasized in *Francis v. Kansas City, St. J. & C. B. R. Co.* (1892) 110 Mo. 387, 19 S. W. 935; *Shannon v. Georgia P. R. Co.* (1890) 85 Ga. 13, 12 S. E. 179; *Georgia P. R. Co. v. Davis* (1890) 92 Ala. 300, 9 So. 252; *Fay v. Minneapolis & St. L. R. Co.* (1883) 30 Minn. 231, 15 N. W. 241; *Oreby v. Chesapeake & O. R. Co.* (1893) 37 W. Va. 524, 16 S. E. 813; *O'Neill v. Keokuk & D. M. R. Co.* (1877) 45 Iowa, 546; *Gleason v. Detroit, G. H. & M. R. Co.* (1896) 19 C. C. A. 636, 43 U. S. App. 89, 73 Fed. 647; *Loire v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 420, 56 N. W. 519. Where an instruction as to what would amount to abrogation of a published rule of the master was predicated on evidence which was insufficient to show abrogation, an objection thereto should be sustained. *Konold v. Rio Grande Western R. Co.* (1900) 21 Utah, 379, 60 Pac. 1021. No waiver can be implied where the employees violating the rule, or saying they could not do the work in the manner prescribed by the rule, had been promptly discharged. *Richmond & D. R. Co. v. Rush* (1894) 71 Miss. 15, 15 So. 133, as explained in *W. & A. Louisville, N. O. & T. R. Co.* (1894) 72 Miss. 12, 12 So. 248. Nor is habitual violation material where the evidence shows that the rule was actually enforced by the company, and the rule itself states that the employees for whose guidance it was promulgated were in the habit of doing the forbidden act, and that its express purpose was to put an end to this practice. *Francis v. Kansas City, St. J. &*

C. B. R. Co. (1892) 110 Mo. 387, 19 S. W. 935.

¹⁷ *Lake Erie & W. R. Co. v. Crane* (1897) 25 C. C. A. 585, 47 U. S. App. 647, 80 Fed. 488 (second appeal after new trial ordered in [1896] 19 C. C. A. 631, 37 U. S. App. 634, 73 Fed. 642). The circuit judge had assumed that habitual disregard of a rule forbidding the coupling of cars in motion would not avail a servant where the only previous disregard established was in case where the coupling was done in the day time and on ground free from ice and snow, whereas the injury in suit was received at night and on ground covered with ice and snow; and in cases where the coupling had been done while the cars were moving 2 miles an hour, whereas the injury was received when the cars were moving 5 miles an hour.

¹⁸ In *Alabama G. N. R. Co. v. Rouch* (1895) 110 Ala. 266, 20 So. 132, the court said, with regard to a phrase which had been used in an earlier case, —that "custom and usage may be relied upon to excuse the violation of a rule" (*Anderson v. Birmingham Mineral R. Co.* [1892] 99 Ala. 438, 12 So. 432).

that it was intended as a statement of the principle that "a principal may knowingly acquiesce in or assent to a continuous disregard of rules established and promulgated, and for such a length of time as to justify those for whom they were intended to consider that the principal has abandoned them, and that they have ceased to be binding," and laid down the following general doctrine: "The custom and usage of prudent persons and well-regulated railroads, acting independently of any rule regulating the matter, is never admissible to excuse or exempt from liability for the consequences of the violation of a rule, reasonable and proper,

satisfactorily appear that notice or knowledge of such disregard by the persons for whom they were intended has been brought home to the principal, or to someone whose duty it is to take action, and is authorized to bind the principal. The mere habit of the employee or person bound by the rule to disregard the rule, though done with the knowledge of any immediate superior less than the principal or person authorized to bind the principal by acquiescence or failure to object, will not be sufficient to justify the conclusion that the rules are no longer binding."¹⁹

The doctrine of waiver, as above explained, merely serves to absolve the employee from the imputation of contributory negligence, insofar as that imputation is based upon his infraction of the rule in question. It does not operate so as to relieve him of the obligation of exercising due care for his own safety, irrespective of that rule.²⁰

233. Rationale of the doctrine of waiver.—In some of the cases, the inability of the master to take advantage of the servant's disobedience of a rule which has been habitually disregarded is viewed as a deduction from the existence of a duty to enforce the rules.¹ But this consideration would seem to be quite out of place in such a connection. Servants who do what they know to have been prohibited, or fail to do what they know to have been prescribed, cannot be free from culpability simply because the control exercised over their conduct by the master was not as efficient as it should have been. Under such circumstances the negligence of the servant still remains as the proximate cause of his injury.

The correct theory undoubtedly is, either that the employer's intention to abolish a rule is deduced from his omission to enforce it, or that this omission amounts to a kind of equitable estoppel *in pais*, which precludes him from relying on the defense of contributory neg-

adopted and promulgated by proper authority, for the protection of the person of employees and the property of those adopting the rule; nor will casual and usage excuse the voluntary and unnecessary risk of an obvious danger, whether a rule exist or not."

¹⁹*Alabama G. S. R. Co. v. Roach* (1895) 110 Ala. 266, 20 So. 132; *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698; (1894) 114 S. C. 718, 19 S. E. 362; *Northern P. R. Co. v. Nickels* (1892) 1 C. C. A. 625, 4 U. S. App. 369, 50 Fed. 718; *Spaulding v. Chicago, St. P. & K. C. R. Co.* (1896) 98 Iowa, 205, 67 N. W. 227; *Ohio & M. R. Co. v. Collarn* (1881) 73 Ind. 261, 38 Am. Rep. 134;

and the cases cited *passim* throughout this section.

On the ground that such an instruction ignored this principle, it has been held that it is a mis-direction to charge the jury, without qualification, that, as regards a brakeman who, in violation of a rule, had gone between cars in motion to couple them, the company had waived that rule by knowingly permitting it to be violated. *Chicago & A. R. Co. v. Myers* (1899) 86 Ill. App. 491.

²⁰See *Kanold v. Rio Grande Western R. Co.* (1900) 21 Utah, 379, 60 Pac. 1021; *Louisville & N. R. Co. v. Reagan* (1896) 96 Tenn. 128, 33 S. W. 1050; *Richmond & D. R. Co. v. Hissong* (1881) 97 Ala. 187, 13 So. 209.

ligence so far as it might be predicated from the servant's disobedience to orders.²

234. Waiver considered with reference to an express agreement to obey the rules.—The general principle does not seem to be disputed, that the fact of the employee's having signed a stipulation, which shows not only that he had knowledge of the rule, but also that he understood the dangers incident to the employment, does not furnish any reason for excepting the case from the operation of the general principle that a rule may be waived by its being disregarded for such a time and in such a manner that the employer or his agent is chargeable with notice.¹ But in some cases the theory has been advanced

¹The latter conception seems to be apparent in the statement that the master's knowledge of an habitual custom to disregard a rule may be regarded as "a practical invitation to violate it." *McNee v. Coburn Trolley Track Co.* (1898) 170 Mass. 283, 49 N. E. 437. And in the statement that, if the master permits a certain course of conduct, it should not be allowed to hold its employees to the very letter of its rules in order to shield itself from liability for what it had tacitly permitted. *Hunn v. Michigan C. R. Co.* (1889) 78 Mich. 526, 7 L. R. A. 500, 44 N. W. 502. Compare the language used in *Strong v. Iowa C. R. Co.* (1895) 94 Iowa, 380, 62 N. W. 799, § 231, note 3, *ante*. See also *Northern P. R. Co. v. Nickels* (1892) 1 C. C. A. 625, 4 U. S. App. 369, 50 Fed. 718, where the court said, *arguendo*: "To hold that this defendant company could make this rule on paper, call it to plaintiff's attention, and give him written notice that he must obey it and be bound by it on one day, and know and acquiesce, without complaint or objection, in a complete disregard of it by the plaintiff and all its other employees associated with him, on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty toward the plaintiff because he disregarded this rule, would be neither good morals nor good law."

²*Fish v. Illinois C. R. Co.* (1896) 98 Iowa, 702, 65 N. W. 995. In *Northern P. R. Co. v. Nickels* (1892) 1 C. C. A. 625, 4 U. S. App. 369, 50 Fed. 718, the court thus commented on the effect of a writing by which the servant agreed to take upon himself the risk of a violation of the rules: "There is some doubt whether this writing, under the evidence in this case, rises to the dignity

of a solemn contract made for a valuable consideration. It is styled 'Personal Record,' and consists very largely of questions and answers relative to the qualifications of the plaintiff to serve as a brakeman. It is dated November 12, 1889, and is alleged to have been made in consideration of the employment of the plaintiff by the defendant at a subsequent date, but the evidence discloses the fact that he was employed by the defendant on June 26, 1889, more than four months before this paper was signed, and that he remained in the defendant's service continually from that date until he was injured, so that it would seem that this writing could not be successfully claimed to be proof of anything more than notice to the plaintiff of the existence of the rule in this particular case. But, if it was a contract, it is clear that it could not bar the plaintiff from proving a waiver or abandonment of the rule. This writing was prepared by the defendant; all that the plaintiff had to do with it was to answer the questions and sign his name. It contained in it these words: 'The company expects you and all other employees to comply strictly with all its rules and regulations, and does not, and will not, in any case, acquiesce in or consent to any violation of them. Do you understand that all violations of the rules of the company by you or any other employee of the company, whether habitual or otherwise, are not consented to or acquiesced in by the company? Yes.' There are at least two parties to every contract, and this provision was a representation and a contract on the part of the defendant, that it did not and would not acquiesce in the violation of any of its rules. The plaintiff signed the contract and proceeded with his service. He must have immediately

that a written undertaking of this description obliterates the legal consequences of any previous acquiescence in the violation of the rules. The rights of the parties, it is laid down, are to be determined upon the assumption that these rules were in full force at the time the contract was signed, and the question whether there has been any waiver as regards the signer will depend upon whether the subsequent violations were of such frequent and long-continued occurrence as to create the presumption that the employer had assented to the disuse of the rule. In other words, a rescission of the particular contract thus entered into must be deducible from the acts of the employer before the doctrine of waiver can take effect, and the length of time which had elapsed between the execution of the contract and the accident, and the opportunities which the employer may have had for ascertaining the habitual nonobservance of the rule during that period, became the material circumstances to be considered in deciding whether the servant is entitled to the benefit of that doctrine.²

The doctrine thus enunciated is far from being satisfactory. In

discovered that, if there really was any rule about the use of sticks and pins in coupling cars, it was constantly violated on this railroad, and that the defendant knew of this violation, and acquiesced in it. This uniform and constant acquiescence of the defendant in the violation of this rule, if such a rule were really in existence, was a violation of the contract on the part of the defendant that it did not and would not acquiesce in the violation of any of its rules, and relieved the plaintiff from further compliance therewith; and if, on the other hand, the rule was not really in force, if it had been waived or abandoned, the utter disregard of the rule and the defendant's acquiescence therein were competent evidence of the abandonment. In either case the plaintiff had a right to rely on the conduct of the defendant, and to introduce his evidence in this behalf." In *Tellis v. Lake Erie & W. R. Co.* (1901) 44 C. C. A. 597, 105 Fed. 554, another very recent decision of a Federal court of appeals, it was held erroneous to exclude evidence of habitual violation, the trial court having taken the position that, as a result of the servant's signing a contract to observe the rules, he was bound by his agreement, though every man on the railroad may have disregarded them. In *Nichols v. Chicago & W. M. R. Co.* (1900) 125 Mich. 394, 84 N. W. 470, the court disapproved of an in-

struction to the effect that if there was a custom on defendant's road to do the work in question as the plaintiff had done it, and it was in conflict with plaintiff's agreement, it was a waiver by defendant of the agreement. But the disapproval was based on the fact that the instruction ignored the necessity of showing that the master was affected with notice of the custom.

² *Richmond & D. R. Co. v. Hisson* (1893) 97 Ala. 187, 13 So. 209, where the court modified its decision on the previous hearing ([1890] 91 Ala. 514, 8 So. 776) where the theory of the cases above cited had been applied, and refused to infer a waiver where the plaintiff was injured the day after he had signed the contract. The decision was followed in *Louisville & N. R. Co. v. Mothershed* (1895) 110 Ala. 143, 20 So. 67, where the period was nine days of service on an extensive system of railroad, during which it did not appear that the company had had time, in the regular course of business, to receive any reports as to the conduct of the employees respecting the observance of rules. Similarly, in *Russell v. Richmond & D. R. Co.* (1891) 47 Fed. 204, the court refused to admit that a regulation recognized in writing by the plaintiff's intestate at a certain date could be held obsolete by him three weeks later.

the first of the Alabama cases cited it is based upon the general principle that parol evidence of a custom is not admissible to vary the terms of a written contract. It is not apparent why this principle, if it is applicable at all under the circumstances, should not preclude the inference of a waiver from what occurs after the execution of the contract as well as the inference that the habitual violations of the rule had made it a dead letter previous to such execution in such a sense that it could not be regarded as embraced by the terms of the contract. Yet, in the case just cited, the court admits that the former of these inferences may be drawn under an appropriate showing of facts. The true view seems to be that the controlling factor in these cases is not the technical rule of evidence thus relied upon, but the broader principle that, where the employer has acted in such a manner as to justify the conclusion that he no longer regards the regulation as binding, every servant whom he hires while the regulation thus remains virtually abrogated should be entitled to the benefit of the assumption that it is not in force. A doctrine which has the practical effect of requiring a servant who is bound by some particular regulation to work amongst other servants in whose favor a waiver of the same regulation may, as a result of the greater length of their service, be implied, seems to be highly anomalous and must certainly be productive of gross injustice in its actual operation.

CHAPTER XVI.

DUTY TO INSTRUCT AND WARN THE SERVANT.

235. Introductory.

A. GENERAL PRINCIPLES.

236. Master's knowledge of the abnormal conditions; necessity for showing.

237. No duty of instruction predicable where the danger in question was actually known to the servant.

238. No duty to instruct a servant as to dangers of which knowledge is imputable to him.

239. Master is *prima facie* under no obligation to give instruction as to normal or ordinary risks.

240. Master is *prima facie* bound to give instructions as to all abnormal or extraordinary risks.

240a. Servant's comprehension of the risk, and not merely of the conditions, is the material point to be determined.

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242. Relation of the duty of instruction to the defenses of assumption of risks and contributory negligence.

243. Relation of the duty of instruction to the duty of employing competent servants.

B. DUTY OF INSTRUCTION CONSIDERED WITH REFERENCE TO THE EXPERIENCE OR INEXPERIENCE OF THE SERVANT.

244. Generally.

245. Servant's experience; deductions from.

246. Servant's inexperience; deductions from.

C. DUTY OF INSTRUCTION CONSIDERED WITH REFERENCE TO THE SERVANT'S MINORITY.

247. Generally.

248. No duty to instruct minors as to risks which they presumably comprehend.

249. Instruction of minors, considered with reference to their age merely.

250. Instruction of minors, considered with reference to their experience.

251. Position of minor servants after being properly instructed.

D. SUFFICIENCY OF THE INSTRUCTION.

252. Generally.

253. What particularity in the instruction is obligatory.

254. Adequacy of the means by which instruction is conveyed to the servant.

As to the duty of a master to bring his rules to the knowledge of his servants, and the effect of a servant's knowledge or ignorance of a rule which he is alleged to have violated, see §§ 213a, 226, 227, *ante*.

As to the necessity of showing that the omission to instruct the servant was the proximate cause of the injury, see volume 2, chapter XLII.

As to the relation between the duty of instruction and the duty of promulgating rules, see § 212, *ante*.

As to the duty of warning against transitory dangers incident to the mere use of the appliances, see §§ 209, 209a, *ante*.

Since the ultimate question to be determined in the cases in which recovery is sought on the ground that no instruction was given is whether knowledge of the particular risk from which the injury resulted should or should not be imputed to the servant, and this question is also involved in the cases in which one or other of the various defenses reviewed in the four succeeding chapters is set up, it has been deemed advisable, for the purpose of facilitating the comparison of the authorities, to collect in a single chapter (xxi.) all the decisions which show the specific circumstances under which constructive knowledge is or is not inferred. In this chapter, only the more general aspects of the master's duty of instruction will be discussed.

235. Introductory.—In the earliest American case in which the master's failure to inform his servant of the existence of a danger was set up, the gravamen of the complaint was a fraudulent misrepresentation as to a material fact.¹ The writer has not found any other example of a resort to this form of action for the same purpose. In a logical point of view it is manifestly preferable to consider the duty of instruction as being an obligation naturally and directly deducible from the general principle reviewed in § 58, *ante*, viz., that it is negligence to expose a servant to risks of which he is actually or excusably ignorant. But passages like those in the subjoined note show how easily bridged is the interval between the idea of deceit, as suggested by the fact that a danger was wrongfully concealed, and the idea of a mere want of care, as inferred from the fact that certain information was not imparted in a case where a prudent man would have seen that without it the servant was likely to be exposed to unreasonable risks.² Compare

¹ *Perry v. Marsh* (1854) 25 Ala. 659. ter knows of danger which the servant does not, it is clearly the duty of the master to communicate his knowledge of the danger to the servant." *Griffiths v. London & St. K. Docks Co.* (1884) L. R. 12 Q. B. Div. 493. The following sentence occurs in a charge held to be proper in a case where the evidence was susceptible of the construc-

² "If a master employs a servant to do work for him, not knowing of any special or latent danger in the work, the servant takes the consequence of any danger there may be in it. The master does not mislead the servant, but only avails himself of his voluntary service. On the other hand, if the mas-

§ 59, *ante*. Viewed under one aspect, the essence of the situations in which a duty of instruction is predicated is that a master is liable as for negligence if he or his representative without any warning exposes a servant to danger in a place where the latter has a right to expect safety.³ That such situations may, by merely changing the juridical standpoint, be treated as charging the master with a quasi-deception, is sufficiently manifest.

The servant's right to maintain an action on the ground of the nonperformance of the duty of instruction or warning depends upon his ability to establish the following propositions:

(1) That the master was chargeable with knowledge, actual or constructive, of the existence of the risk. See chapter x., *ante*.

(2) That the servant himself did not appreciate the risk, and that his nonappreciation thereof was excusable.

(3) That the master knew, or ought to have known, that the plaintiff was thus excusably ignorant of the risk, and was by reason of

tion that the servant, although he knew of the conditions, might not have understood the resulting risk: "In such case it is the duty of the master, not only to exercise due care, but good faith, towards the servant, and to inform him of the risks he undertakes." *Pullman's Palace-Car Co. v. Harkins* (1893) 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. 932.

³ *Mayhew v. Sullivan Win. Co.* (1884) 76 Me. 100 (servant fell through ladder hole in a platform left without light or railing). In *Spaulding v. Forbes Lithograph Mfg. Co.* (1898) 171 Mass. 271, 50 N. E. 543, the court thus commented on the evidence: "Whether the direction of Lehan be called an order or an instruction, it concerned the mode of using the permanent machinery, for which the defendant was responsible; and if it was an order, the defendant might be held liable for not seeing that the plaintiff was warned in connection with the duty imposed upon him; if it was an instruction, for leading him into a trap. Possibly the plaintiff's injury might be attributed to the defendant's maintaining the trap, even if its responsibility was in no way affected or enlarged by Lehan's words. The defendant might be held answerable, whatever the particular accident which led to the plaintiff's throwing his weight on the end of the board" (*i. e.*, of a seat which had tipped up). Compare also the following decisions: An employer is liable for an injury to

an employee caused by his falling through a flooring formed partly of glass and partly of wood, the whole of which was covered by dust and the nature thereof unknown to him, upon which he was directed to go without warning by the employer's foreman. Here there was apparent safety, but actual danger. *Raferty v. Central Park, N. & E. River R. Co.* (1895) 14 Misc. 560, 35 N. Y. Supp. 1067. So, an employer who knows the danger to an employee from stepping upon a rotten canvas covering a hole in a third story floor is required to notify the employee of such danger, where he is ignorant thereof. *Muncie Pulp Co. v. Jones* (1894) 11 Ind. App. 110, 38 N. E. 547. Yet, in *Reinig v. Broadway R. Co.* (1888) 49 Hun, 269, 1 N. Y. Supp. 907, the court said that there was no decision which required that a master who directs his servant to clean off the snow from a roof should notify him of the existence of a skylight in another roof suddenly covered by a heavy fall of snow. The evidence went to show that the servant, when he reached the bottom of the ladder by which he had reached the roof to which he was sent, jumped off on one side to avoid a snow drift, and so alighted on the skylight through which he fell. It is not apparent from the report what the court regarded as the controlling feature in the case. Carriages running along an overhead wire for the conveyance of parcels in a store, and so adjusted that

such ignorance, exposed to an abnormal hazard, over and above those which he was presumed to contemplate as incidents of the employment.⁴

A. GENERAL PRINCIPLES.

236. Master's knowledge of the abnormal conditions; necessity for showing.—The general principle embodied in the first of the three propositions stated at the close of the preceding section is a controlling element in all actions of which the gist is the master's breach of a duty owed to his servants. The full discussion of this subject in chapter x., *ante*, renders it unnecessary to enter into it at any length in the present connection. But it will be useful to collect some decisions which explicitly recognize the existence or absence of knowledge on the master's part, as being a material element in actions for a breach of the duty now under review.¹

when pushed backwards they are likely to leave the wire and fall, constitute a dangerous appliance under certain conditions; and the storekeeper is bound to inform the employees of this peculiarity, when he furnishes them with poles to push the carriages. *Stock v. Le Boutillier* (1897) 19 Misc. 112, 43 N. Y. Supp. 248, Affirmed (1896) 18 Misc. 349, 41 N. Y. Supp. 649. The hypothesis underlying the decision apparently was that the danger was not apparent, and that the act which would create that danger was likely to be done for the purpose of loosening the carriages when they happened to stick at some point on the wire. But the precise theory of the court is not altogether clear from its opinion. It will be noticed, also, that the cases cited in § 242, *infra*, might readily be referred to the principle that the circumstances are such as to induce a false sense of security in the servant, if the implied obligations arising from the contract of service were not available as a ground of decision.

⁴ If a distinction between the words "warn" and "instruct" is to be drawn, the former evidently implies merely the imparting of information as to the existence of a danger, while the latter includes, not only this conception, but also that of explaining to the servant the appropriate means for avoiding the danger. Sometimes this distinction is recognized; as, for example, in the following passage: "One of the well-recognized duties of a master is not to ex-

pose an inexperienced servant, at whose hands he requires a dangerous service, to such danger without giving him warning. He must also give him such instruction as will enable him to avoid injury, unless both the danger and the means of avoiding it while he is performing the service required are apparent." *Atlas Engine Works v. Randall* (1885) 100 Ind. 293, 50 Am. Rep. 798. But as long as the word "instruct" covers by one of its meanings a domain which is logically coextensive with that of the word "warn," it would obviously be extremely inconvenient, if not impossible, to make this distinction the basis of a classification. In the following chapter, therefore, it will be disregarded so far as the grouping of the cases is concerned. The nature of the circumstances involved in the action will always indicate the precise ground upon which a breach of duty is predicated, whether the failure to point out a danger, or the failure to show how it can be avoided.

¹ *Rooney v. Sewall & D. Cordage Co.* (1894) 161 Mass. 153, 36 N. E. 789; *Ciriack v. Merchants' Woolen Co.* (1890) 151 Mass. 152, 6 L. R. A. 733, 23 N. E. 829; *Stuart v. West End Street R. Co.* (1895) 163 Mass. 391, 40 N. E. 180; *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 7; 2 N. E. 115; *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 165, 5 N. E. 187; *Colorado City v. Lila* (1901) 28 Colo. 468, 65 Pac. 630; *Wood v. Heiges* (1896) 83 Md. 257, 34

One particular application of the general principle under its negative aspect merits special notice in the present connection; viz., the nonliability of the master for injuries caused by conditions which he was not bound to foresee or anticipate.² No right of action is established where, taking into consideration the nature of the work assigned to the servant, the master had no reason to expect the contingency of the servant's placing himself in such a position as to incur the danger with regard to which it is alleged that he should have been instructed.³ Nor is he guilty of negligence in failing to warn a

Atl. 872; *Gowen v. Bush* (1896) 22 C. C. A. 196, 40 U. S. App. 349, 76 Fed. 349. The master may not wilfully expose his servant to danger of loss or injury in the course of his employment, the risk of which is known to him, but notice of which is wrongfully withheld. *Gurney v. St. Paul, M. & M. R. Co.* (1890) 43 Minn. 496, 40 N. W. 78. *Kriegel v. Iitken* (1896) 94 Wis. 432, 35 L. R. A. 249, 69 N. W. 67 (servant exposed to infectious disease); *Hysell v. Swift* (1899) 78 Mo. App. 39 (servant injured owing to his ignorance of the fact that decayed flesh produces poisonous bacteria which may destroy the sight if brought into contact with the eye). It is a master's duty not to send his servants without notice into a place which he knows to be dangerous. *Clark v. Liston* (1894) 54 Ill. App. 578; *Lorentz v. Robinson* (1883) 61 Md. 64; *Consolidated Coal Co. v. Graber* (1900) 188 Ill. 584, 59 N. E. 254. Affirming 91 Ill. App. 15. A complaint is not demurrable which alleges in substance that the master, knowing that the place of work to which he assigned the servant, or an appliance which he was ordered to use, was dangerous, did not instruct him as to its condition. *Paola v. Hunter* (1896) 3 App. Div. 528, 38 N. Y. Supp. 356; *Ellis v. Northon P. R. Co.* (1900) 103 Fed. 416. Where plaintiff, an inexperienced workman, was injured while removing shavings from beneath a planer, evidence that the blower pipe intended to remove the shavings was defective, and that defendant had knowledge thereof, was admissible, since it tended to show conditions likely to lead the plaintiff to put himself in a position in which he would be likely to suffer injury, and a resultant duty on the defendant's part to warn him against the danger incident to clearing the blower pipe.

On the other hand, it is error to leave

it to the jury to say whether a master should have warned his servants how to handle heavy locomotive wheels without danger, where no evidence has been offered tending to show that any such method was either known to him, or generally known and practiced by other employers. *Richmond Locomotive & Mach. Works v. Ford* (1897) 94 Va. 627, 27 S. E. 509. In *Melchert v. Smith Brewing Co.* (1891) 140 Pa. 448, 21 Atl. 755, the plaintiff's proposition was that the danger of explosion was an actual, latent danger which was known to the defendant, or ought to have been known, and therefore it was the duty of the defendant to warn the plaintiff of this latent danger, and for not doing this the defendant was negligent. The co. said: "It will be seen at once, from the above review of the testimony, that the plaintiff entirely failed to show any knowledge by the defendant of this alleged danger, since the fact of the explosions was not communicated by either of the witnesses who say they had knowledge, and all the other testimony proves there was no such danger, because there never were such explosions. The learned court below could not possibly commit that question to the jury upon such a state of testimony."

²See *Wagner v. R. W. The Chemical Co.* (1892) 147 Pa. 23, 23 Atl. 772; *Ash v. Vereluden Bros.* (1893) 151 Pa. 247, 26 Atl. 374; *Burns v. Petheal* (1894) 75 Hun. 437, 27 N. Y. Supp. 499. The proprietor of a factory is not bound, in the discharge of its duty to its employees, to instruct an ordinary employee in regard to her conduct in so unexpected an emergency as the discovery of a fire. *Gilmore v. Mittenague Paper Co.* (1897) 169 Mass. 471, 48 N. E. 623. See also § 237, note 15, and § 240, note 7, *infra*.

³In *Neff v. Broom* (1883) 70 Ga. 256,

servant of a special danger which could not have arisen without negligence on the part of the plaintiff's fellow servants.⁴

237. No duty of instruction predicable where the danger in question was actually known to the servant.—The second fact which, as stated in § 235, *supra*, must be established in order to justify the conclusion that the master was negligent, is that the dangers with regard to which there is alleged to have been a duty of instruction were not known, either actually or constructively, to the servant. The absence of any obligation to instruct a servant who is proved by direct evidence actually to have had as complete knowledge of the danger and of the appropriate means of avoiding it as the master could have imparted to him is too obvious to admit of controversy. Manifestly it cannot be "the duty of the master to admonish his servant to be careful, when the servant well knows his danger and the importance of using care to avoid it. It is the duty of the servant to exercise care proportionate to the danger of his situation as he understands it, and if he fails to do so the fault is his, and not his master's."⁵

an omission to instruct was held not to be culpable where the defendants had employed women to work at one end of a room 72 feet in length, to wrap soap in papers which were brought to them, and one of the women, returning out of working hours, had gone to the back part of the room to get some paper, and there fallen into a reservoir of lye. The court expressed its agreement with the position of defendants' counsel that negligence could not be predicated of the mere omission to inclose the reservoir, but said that this contention did not exactly meet the complaint, which charged that defendants were negligent in keeping the reservoir in a part of the room too dark for the plaintiff to discover it herself, and in failing to notify her of its existence. The liability of the defendants from this standpoint was then discussed as follows: "We recognize their obligation to provide her with a perfectly safe place for the performance of the duties in which she was engaged; and if, for any proper purpose, she was expected or required to expose herself to the danger of falling into their reservoir, it was their duty to have notified her of its existence that she might have guarded against it. It is shown by the proof, beyond question, as it looks to us, that there was neither necessity for, nor expectation of, her going near the danger; that the accident occurred out of the accustomed

hours for work; that those whose duty it was to furnish her with the paper, of which she was in search, were away, and their absence known to her; that she chose to wait upon herself rather than be delayed; that she voluntarily went into this unlighted part of the room, and, by her own negligence, occasioned her injuries; that she was paid by the quantity of work she did, and, being unwilling to await the return of her coemployees, sought to perform, not only her own, but their duties."

⁴*Simpson v. Gerken* (1897) 19 App. Div. 68, 45 N. Y. Supp. 1100. Plaintiff and his fellow workmen had constructed in an elevator shaft a scaffold so placed that, if the elevator were raised, the loop of the rope suspended from the cage caught in it. Defendant's vice principal had been requested not to lower the cage, but had not been told about the danger from the rope if it should be raised.

⁵*Ciriack v. Merchants' Woolen Co.* (1890) 151 Mass. 152, 6 L. R. A. 733, 23 N. W. 829. Failure of a corporation to give warning to the master machinist employed in its establishment that there was danger that the wall or walls of the gas room would fall in case an accident occurred, where he was not ignorant of the danger or of the causes which produced it, does not make it criminal, liable for his death, caused by the fall of such walls, while breaking down the

It will be shown in a later chapter (volume 2, chapter xlv.) that, according to many of the authorities, the servant, for the purpose of negating his assumption of the risk and his contributory negligence, must always allege his ignorance of that risk. The analogue of this doctrine in the present connection is that a servant who relies on a breach of the duty of instruction must introduce a specific averment that he did not know of the danger from which his injury resulted.² But the rule of pleading would doubtless be less strict in some jurisdictions. See the chapter just referred to.

The possession of the knowledge which will negative the existence of the duty of instruction may be inferred from the testimony of the plaintiff himself,³ or from specific testimony which establishes beyond

door of the gas room during the fire, under instructions from the superintendent. *Allen v. Augusta Factory* (1888) 82 Ga. 76, 8 S. E. 68. See also, to the same effect, *Goodman v. Walpole Energy Mills* (1888) 146 Mass. 261, 15 N. E. 576; *Perry v. Old Calumet R. Co.* (1895) 164 Mass. 296, 41 N. E. 289; *Hathaway v. Illinois C. R. Co.* (1894) 92 Iowa, 337, 60 N. W. 651; *Junior v. Missouri Electric Light & P. Co.* (1895) 127 Mo. 79, 29 S. W. 988; *Yeager v. Burlington, C. R. & N. R. Co.* (1894) 93 Iowa, 1, 61 N. W. 215; *King v. Morgan* (1901) 48 C. C. A. 507, 109 Fed. 146; *Foley v. Chicago & N. W. R. Co.* (1882) 48 Mich. 622, 42 Am. Rep. 481, 12 N. W. 879; *Arkadelphia Lumber Co. v. Betha* (1892) 57 Ark. 76, 20 S. W. 808.

² *Brainard v. Van Dyke* (1899) 71 Vt. 359, 45 Atl. 758.

³ A court may declare, as a matter of law, that there has been no breach of the duty to instruct a boy of twelve and a half years as to the danger of coming into contact with uncovered cogs, where he testifies on cross-examination that he knew if anyone got his fingers between the cogs his fingers would be smashed, and that he knew enough to keep away from the cogs when they were in motion. *Borch v. Michigan Bolt & Nut Works* (1896) 111 Mich. 129, 69 N. W. 254. Where a servant injured by having her hand caught while operating a mangle testifies that she was doing the work in a proper manner at the time of the injury, and that she knew that she would be injured if her fingers were caught, it is error to submit the issue of the failure of the master to instruct the servant. *Groth v. Thomann* (1901) 110

Wis. 499, 86 N. W. 178. Where the only evidence in the case, including that of the plaintiff himself, is to the effect that he had complete knowledge of the danger which caused his injury, it is the duty of the court to direct the jury to return a verdict for the defendant; and a charge setting forth the character of the obligation of the master to instruct the plaintiff is erroneous and misleading, inasmuch as it has no relevancy to the facts of the case. *Cincinnati, N. O. & T. P. R. Co. v. Meuler* (1892) 1 C. C. A. 633, 6 U. S. App. 86, 50 Fed. 725. A verdict is rightly directed for the defendant in an action in which the servant seeks to recover on the ground that he, being immature and inexperienced, was sent by his master into danger the full extent of which he did not comprehend, where it appears from his own testimony that he was over twenty years of age, that he was not wanting in the average intelligence of his age, that his duties were explained to him when he entered on his employment, and that he understood the very danger into which he fell (an unblocked floor), and had in mind the purpose to avoid it. *Metlton v. Canada Southern Roadway Co.* (1882) 49 Mich. 466, 13 N. W. 819. A charge which leaves to the jury to say whether, as a matter of fact, the plaintiff knew what, according to his own testimony he did know, and whether he could appreciate a danger which he was just as much bound to appreciate as the defendant was,—here the liability of a stool to slip on a greasy floor,—and thus impliedly authorizes a finding that the defendant was guilty of an omission of duty in failing to warn the plaintiff as to the danger, is erroneous and a ground for ordering a

all reasonable doubt that he had received adequate information as to the danger from a notification proceeding directly from the master himself,⁴ or from some extrinsic source.⁵

new trial, even though the court may also have charged the jury that it was unnecessary to instruct the plaintiff if he knew the conditions and the danger which was likely to result therefrom. *Kochler v. Syracuse Specialty Mfg. Co.* (1896) 12 App. Div. 59, 42 N. Y. Supp. 182, 1105. See also *Roth v. Northern P. Lumbering Co.* (1889) 18 Or. 205, 22 Pac. 842; *Missouri P. R. Co. v. Callbreath* (1886) 60 Tex. 526, 1 S. W. 622; *Manton v. Hagan* (1890) 9 App. Div. 98, 41 N. Y. Supp. 86; *Galveston, H. & S. I. R. Co. v. Garrett* (1889) 73 Tex. 262, 15 S. W. 62; *Wolski v. Knapp-Stout & Co. Co.* (1895) 90 Wis. 178, 63 N. W. 87; *Ogden v. Miles* (1893) 139 N. Y. 458, 34 N. E. 1059; *American Strachford Co. v. Foust* (1895) 12 Ind. App. 421, 39 N. E. 891; *Vardelli v. Gray's Harbor Commercial Co.* (1897) 115 Cal. 517, 47 Pac. 361.

⁴*Davis v. Port Huron Engine & Thresher Co.* (1901) 126 Mich. 429, 85 N. W. 1125 (no recovery where plaintiff's decedent came into contact with a live electric wire, of the dangerous character of which he had been informed); *Simmmons v. Chicago & T. R. Co.* (1884) 110 Ill. 340 (servant had been cautioned as to the danger that a bank which he was excavating might fall); *Cantwell v. Brennan* (1900) 125 Mich. 349, 84 N. W. 299 (servant had been instructed as to the method of applying a compound to a belt when ever it slipped; and while he was in the performance of this duty the compound broke, and he was caught on the belt and pulley). A motorman of an electric car, twenty-four years of age, and of ordinary intelligence, after being instructed for eight days in his duties, and told that it is a motorman's duty to clean the "commutator" at the end of every alternate trip of his car, and seeing it cleaned on at least two occasions, assumes the risk of cleaning such commutator. *Burnell v. West Side R. Co.* (1894) 87 Wis. 387, 58 N. W. 772.

⁵"Even if a master is negligent in not giving his servant instructions and cautions as to the dangers of his employment, yet if the servant receives the same information and cautions from other sources, whether from other persons or from his own observation, and

is nevertheless thereafter injured, the negligence of the master is not the proximate cause of the injury." *Truitt v. North Star Woolen-Mill Co.* (1894) 57 Minn. 52, 58 N. W. 832. Compare also the statement that, if the servant had already obtained, at the time his injury was received, the information which it is alleged the master should have given, it cannot be said that the injury was the result of the failure of the master to impart the information. *Bessmer Land & Improv. Co. v. Duhose* (1899) 125 Ala. 442, 28 So. 380 (servant himself admitted that he had been told that the mule which kicked him was vicious). A servant cannot recover if he has been sufficiently notified and cautioned by a co-servant. *Alabama C. Coal & Coke Co. v. Pitt* (1893) 98 Ala. 285, 13 So. 135. A servant cannot hold his master liable for failing to instruct him as to the danger of moving heavy locomotive wheels by hand, where, before his own injury was received, he had seen an accident in which one of the workmen had very narrowly escaped injury while a wheel was being moved in this manner, and his own testimony is to the effect that his fellow servants had told him that this method of doing the work was dangerous, and that this was also his own opinion. *Richmond Locomotive & Mach. Works v. Ford* (1897) 94 Va. 627, 23 S. E. 509. The plaintiff is not entitled to a charge that "the duty of cautioning a boy of the plaintiff's age [fourteen years], and giving him full notice of the risks attending the work, is a responsibility from which the company cannot free itself by delegating it to a foreman or to a second hand. Such an instruction would create the erroneous impression that, even if the plaintiff had full instructions, it would have been of no avail, if they proceeded from the defendant's foreman or second hand. The master cannot escape the responsibility, if there be one upon him, of notifying the servant of the risks of the work by merely delegating it to one of the servants, but if the duty thus delegated was performed, the servant had all the notice requisite for his safety." *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396. The following charge has been held correct: "If the

238. No duty to instruct a servant as to dangers, of which knowledge is imputable to him.—The juridical consequences of constructive knowledge being the same as those of actual knowledge, it follows that no duty to instruct a servant can be predicated in a case in which the instruction will not add to the knowledge which, under the circumstances, is attributed to him.¹ In other words, the master is not required to point out dangers which are readily ascertainable by the servant himself if he makes an ordinarily careful use of such knowl-

plaintiff (servant) had such instruction, caution, information, or knowledge as would enable him, with a reasonable exercise of care on his part, to do his work with safety to himself, the defendant was not liable, and that it made no difference whether he derived it [such knowledge] from the defendant's officers, from a second hand in another part of the room, from a stranger, or from his own perceptions and intelligence." *Id.* (minor servant was injured here.) In *Tann v. Metcalf* (1893) 155 Pa. 368, 26 Atl. 674, plaintiff requested the court to charge that, if the jury found the boy to be young and inexperienced, it was the duty of defendants to explain to him the danger. The answer was: "I affirm that point, . . . also, with the qualification, perhaps, that, if he had that experience from any other source, then it would not be necessary." In the general charge the court explicitly instructed the jury that, if the boy had knowledge of the dangerous character of the machine by information from others or by experience, he could not recover. Held, that the use of the word "perhaps" was not, under the circumstances, sufficient ground for reversing the judgment in favor of the plaintiff. Other cases recognizing the doctrine that the disability of the servant to recover on the ground of his previous acquaintance with the conditions is altogether independent of the source from which he has derived his information are: *Durbin v. Sturges* (1892) 157 Mass. 418, 32 N. E. 654 (Citing *Pratt v. Pratt* (1891) 153 Mass. 333, 26 N. E. 1002; *De Souza v. Stafford Mills* (1892) 155 Mass. 476, 30 N. E. 81); *Emmott Cotton Seed Oil Co. v. Hale* (1892) 56 Ark. 232, 19 S. W. 600. The principle of the above cited cases seems hardly reconcilable with a recent ruling that, where a switchman was injured while endeavoring to couple cars in defendant's yard in the nighttime,

by stumbling over a ground switch, it was error to permit plaintiff to testify that he had been warned by a certain person as to ground switches in the yard, but not warned as to the special switch. The reason assigned was that it was not shown that the person warning him was an officer or agent of defendant, whose duty it was to give such warning. *Galveston, H. & S. A. R. Co. v. Taylor* (1900) Tex. Civ. App. 59 S. W. 620. Rehearing denied in 59 S. W. 912. See also § 254, *post*.

¹ *Rosen v. Sewall & D. Cardage Co.* (1894) 161 Mass. 153, 36 N. E. 789. "Not only must he [the master] provide suitable implements and means with which to carry on the business which he sets them to do, but he must warn them of all the dangers to which they will be exposed in the course of their employment, except those which the employee may be deemed to have foreseen as necessarily incidental to the employment in which he engages, or which may be open and obvious to a person of his experience and understanding." *Wagner v. H. W. Jones Chemical Co.* (1892) 147 Pa. 475, 478, 23 Atl. 772.

Whether a master is negligent in failing to notify a servant of a danger depends upon whether the peril involved was "such as could be seen and known by ordinary care and prudence, . . . or such as was obscured and could not be seen or appreciated." *Holland v. Tennesse Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524. In the early case, the doctrine [as to instruction] was applied in favor of boys. In favor of adults it should be applied with great caution. Where the elements of the danger are obvious to a person of average intelligence using due care, it would be unreasonable to require an employer to warn his employee to avoid dangers which ordinary prudence ought to make him avoid without warning. The mere fact that he cannot tell the

edge, experience, and judgment as he possesses.³ The failure to give instruction, therefore, is not culpable where the servant might, by the exercise of ordinary care and attention, have known of the danger, or, as the rule is also expressed, where he had all the means necessary for ascertaining the actual conditions, and there was no concealed danger which could not be discovered.⁴

exact degree of the danger, if the nature and character of it can easily be seen. It is not enough to require warning and instruction to a man of full age and average intelligence. Something may properly be left to the instinct of self-preservation, and to the exercise of the ordinary faculties which every man should use when his safety is known to be involved." *Stuart v. West End Street R. Co.* (1895) 163 Mass. 391, 40 N. E. 180.

³*Chicago & A. R. Co. v. Pettigrew* (1898) 82 Ill. App. 33.

⁴*Cunningham v. Bath Iron Works* (1899) 92 Me. 501, 43 Atl. 106.

⁵*Gibson v. Smith* (1898) 172 Mass. 50, 51 N. E. 460 (guard of molding machine too narrow).

The classes of danger which fall within the scope of the rule thus laid down are indicated by the words and phrases collected in the following paragraphs:

Dangers which the servant "can at a glance observe for himself." *Simms v. South Carolina R. Co.* (1886) 26 S. C. 490, 2 S. E. 486.

Elements of the danger so obvious to a careful person of average intelligence that ordinary prudence should make him avoid them without warning. *Ribjian v. Woonsocket Rubber Co.* (1895) 164 Mass. 214, 41 N. E. 265.

Danger "so simple that it can as well be ascertained at a single view as at many." *Hathaway v. Michigan C. R. Co.* (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634.

Dangers which the servant "may see and guard against as well as could the master himself, if present, or anyone else" deputed by him. *Houston & T. C. R. Co. v. Strzechowski* (1894) 6 Tex. Civ. App. 555, 26 S. W. 253, 642.

"Obvious" dangers. *Connors v. Morton* (1894) 160 Mass. 333, 35 N. E. 860; *Ciriack v. Meriden Woolen Co.* (1890) 151 Mass. 152, 6 L. R. A. 733, 23 N. E. 829; *Hoyle v. Eccleslar Steam Laundry Co.* (1894) 95 Ga. 34, 21 S. E. 1001; *Gibson v. Oregon Short Line R. Co.* (1893) 23 Or. 193, 32 Pac. 295; *Bohn v. Havemeyer* (1889) 114 N. Y.

206, 21 N. E. 402; *Brady v. Ludlow Mfg. Co.* (1891) 154 Mass. 408, 28 N. E. 301; *Robinson v. Sewall & D. Cordier Co.* (1894) 161 Mass. 153, 36 N. E. 789; *Castello v. Judson* (1880) 21 Hun 396; *Mississippi River Logging Co. v. Schneider* (1896) 20 C. C. A. 390, 31 U. S. App. 743, 74 Fed. 195; *Collins v. Locomotive Car Co.* (1891) 68 N. H. 196, 38 Atl. 1047; *Fendley v. Russell Wheel & Foundry Co.* (1896) 108 Mich. 286, 66 N. W. 50; *Ferguson v. Phoenix Cotton Mills* (1901) 106 Tenn. 236, 61 S. W. 53; *Demers v. Marshall* (1901) 178 Mass. 9, 59 N. E. 454; *Thompson v. Norman Paper Co.* (1897) 169 Mass. 116, 48 N. E. 757.

Dangers "obvious even to a casual observer." *Fendley v. Russell Wheel & Foundry Co.* (1896) 108 Mich. 286, 66 N. W. 50.

Danger "obvious to anyone of ordinary capacity." *Connolly v. Eldredge* (1894) 160 Mass. 500, 36 N. E. 469.

Dangers "so open and obvious as that by the exercise of care he [the servant] would know of them." *Yeager v. Burlington, C. R. & N. P. Co.* (1894) 93 Iowa, 1, 61 N. W. 215.

Dangers "open and apparent to casual observers." *Haeble v. Wilson* (1892) 5 Wash. 160, 31 Pac. 469.

Dangers "open and obvious to the senses." *Ratcliff v. Wayne Cordage Turap. Co.* (1894) 10 Ind. App. 622, 38 N. E. 221.

Dangers "plain and open to observation." *Dougherty v. West Superior Iron & Steel Co.* (1894) 88 Wis. 343, 60 N. E. 274.

Dangers "open to the ordinary observation of any person using reasonable care and prudence." *East Tennessee, E. & G. R. Co. v. Turrevill* (1893) 97 Ala. 122, 12 So. 63.

"Apparent" dangers. *Walter v. Harrison Wire Co.* (1883) 14 Mo. App. 592; *Campbell v. Mullen* (1895) 60 Ill. App. 497.

Dangers "plainly apparent." *Illinois C. R. Co. v. Price* (1895) 72 Miss. 802, 18 So. 415.

Dangers "apparent to ordinary ob-

The principle upon which the absence of any obligation to instruct is thus predicated is applicable whether the risk in question arises from the intrinsic qualities of the material substances by which the safety of the servant may be affected while he is engaged in the performance of his duties,⁵ or those which are due to using or arranging those substances in some way which renders them more than ordinarily dangerous for a longer or shorter period,⁶ or those which result from the operation of natural laws upon those substances,⁷ or those which depend upon the selection of one or other of two or more available methods of performing a given piece of work by means of or in

servation." *Keen v. Detroit Copper & Brass Rolling Mills* (1887) 66 Mich. 277, 33 N. W. 395.

Dangers which the servant could only have failed to know by a want of "ordinary care and observation." *Campbell v. Hullen* (1893) 60 Ill. App. 497.

Dangers "apparent on mere casual observation." *Edan v. Vanderhilt* (1897) 20 Misc. 51, 44 N. Y. Supp. 267.

Dangers "apparent to the servant and within his comprehension." *Bohn v. Harvomeyer* (1887) 46 Hun. 557. Affirmed in (1889) 114 N. Y. 296, 21 N. E. 402.

Dangers "apparent from brief observation and experience." *De Souza v. Stafford Mills* (1892) 155 Mass. 476, 30 N. E. 81.

Manifest dangers. *Casey v. Pennsylvania Asphalt Paving Co.* (1901) 199 Pa. 318, 47 Atl. 1128.

Patent dangers. *Standard Oil Co. v. Eder* (1901) 22 Ky. L. Rep. 1641, 61 S. W. 8; *Fouca v. Phillips* (1882) 39 Ark. 17, 43 Am. Rep. 264; *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524.

Dangers which are not latent. *Cunningham v. Ft. Pitt Bridge Works* (1901) 197 Pa. 625, 47 Atl. 846.

The master is not required, in order to relieve himself of liability, to show that the attention of the servant was called to the special risk from which an injury resulted, if the general dangers of the situation were apparent. *Goodridge v. Washington Mills Co.* (1893) 160 Mass. 234, 35 N. E. 484. Where employees of a railroad company know that the road runs through pasture land, and that the road is not fenced, it is not the duty of the company to notify them at what particular place cattle may be expected to be encountered. *Putton v. Central Iowa R. Co.* (1887) 73 Iowa, 306, 35 N. W. 149.

Numerous cases to the same effect are cited in the notes to chapter XXI. post. See especially §§ 394, 396, 399.

Hoard v. Blackstone Mfg. Co. (1900) 177 Mass. 69, 58 N. E. 180 (permanent visible conditions); *Michigan C. R. Co. v. Smithson* (1884) 45 Mich. 212, 7 N. W. 791 (no duty to instruct a switchman as to the danger caused by receiving a foreign car with double deadweights).

*The failure of the superintendent of a factory to notify an employee that soda ash had been used for cleaning purposes is not such negligence as will sustain an action against the company for personal injuries sustained by the employee, who slipped from a beam that had been so cleaned, as he was about to step to a ladder to descend into a vat, when the place was light, the use of soda ash was common, and it does not appear but that plaintiff might have stepped on the ladder at once and avoided the fall. *Thompson v. Norman Paper Co.* (1897) 169 Mass. 416, 48 N. E. 757. There is no obligation to warn a brakeman sent to couple cars in broad daylight, as to the danger created by the projection of pieces of timber over the end. *Lothrop v. Fitchburg R. Co.* (1890) 150 Mass. 423, 23 N. E. 227.

McArthur Bros. Co. v. Nordstrom (1899) 87 Ill. App. 554 (no duty to instruct a servant as to the liability of pieces of stone on a sloping pile to fall down when the lower part of the pile is disturbed); *Willis v. Besser-Churchill Co.* (1901) 126 Mich. 659, 86 N. W. 133 (no duty to instruct a man hired to operate a cut off table and circular saw in a mill, that he would be endangered if sawdust and bark were allowed to accumulate at the bottom of the machine, and the table was thus prevented from moving as to clear the saw properly).

the neighborhood of those substances.⁸ The cases illustrating these various predicaments will be more fully discussed in chapter XXI., *post*.

As the servant is ordinarily deemed to accept such risks as may arise from the existence of defects which it is his special duty to remove (compare § 29, *ante*, and § 268, *post*), there is no obligation to instruct him as to those defects.⁹ On the other hand an employer is not, as a matter of law, relieved of the duty of warning an employee who has been ordered to repair a specific part of the mechanism of a given machine, with regard to a danger which is not apparent and is due to the improper working of some part of the machine distinct from that which he has been asked to repair.¹⁰

A charge to the jury is correct or incorrect according as it takes due account of or disregards the general principle reviewed in this section.¹¹

⁸It is not negligent to omit to instruct an adult servant of average intelligence as to the manner in which he should use a wrench in screwing nuts on a rod so as to avoid falling in case the wrench should break. *Garnett v. Phoenix Bridge Co.* (1899) 98 Fed. 192. The proper method of piling ties in a box car so that they will not fall does not involve any risk which demands instruction. *Brown v. Oregon Lumber Co.* (1893) 24 Or. 315, 33 Pac. 557. An employer is not liable to his packing and shipping clerk—a man twenty-four years old—for injuries sustained by him in falling from the unguarded side of a platform, in endeavoring to save himself from injury by being run upon by a barrel weighing 400 pounds, which he was assisting in unloading from a car by means of a skid 18 inches long and 2 feet wide, with a fall of 10 inches, extending from the car to the platform, although he was ignorant of the usual way of handling such barrels, and was not informed thereof by the foreman under whose direction he was working. *Mantey v. Minneapolis Paint Co.* (1899) 76 Minn. 169, 78 N. W. 1050. Where a servant possesses special skill and experience in the manipulation of an appliance, negligence cannot be predicated of the omission to inform him how to use it so as to avoid injury. *Ray v. Jeffries* (1887) 86 Ky. 367, 5 S. W. 867.

⁹Thus, where an employee of a telephone company was assisting other employees to take down telephone poles

which he knew were old and decayed, the fact that his foreman did not inform him of one defective pole in particular, which fell and injured him while he was at the top thereof removing a wire, will not render the company liable for his injuries. *Saxton v. Northwestern Teleph. Exch. Co.* (1899) 81 Minn. 314, 84 N. W. 109.

¹⁰*Martineau v. National Blank Book Co.* (1896) 166 Mass. 4, 43 N. E. 513.

¹¹Where the danger was obvious, it is not error to refuse to charge that the plaintiff should have been cautioned. *Pearson v. Phoenix Cotton Mills* (1901) 106 Conn. 236, 61 S. W. 53. A charge to the effect that the master owed the duty of instruction as to all dangers reasonably to be anticipated, no exception of patent dangers being suggested is erroneous. *Fones v. Phillips* (1882) 39 Ark. 17, 43 Am. Rep. 264. An unqualified charge to the effect that an employer is liable for failure to warn an inexperienced employee of a more hazardous position than that to which he was employed, as to dangers attending the same, is erroneous, inasmuch as such a liability does not exist where they are so open and obvious that by the exercise of care such employee would know of them. *Newburn v. Gatchel & M. Lumber & Mfg. Co.* (1896) 190 Iowa, 441, 69 N. W. 743. In a case where a drawbar did not enter the drawhead of the car which was being coupled to another, the result being that the deadwoods came very close together, it was held that the jury should

The question whether the servant should have been instructed is for the jury, whenever there is evidence tending to show that it was a proper case for such instruction, and different conclusions may reasonably be drawn from that evidence.¹² But where the facts are clear and only susceptible of one construction, this question is for the court.¹³

239. Master is prima facie under no obligation to give instruction as to normal or ordinary risks.— One frequent application of the general principle enunciated in the preceding section results from the theory that persons who hire themselves out to do a particular kind of work are supposed to understand the ordinary dangers which pertain to it,¹ or, in another point of view, are supposed to accept those dangers as a part of the incidents of their contract.² See chapter xvii., B, *post*. The master, it is held, is always warranted in acting on the presumption that the servant understands any danger which belongs to this category, unless he has notice that the person he is hiring is inexperienced or of less than average intelligence, the most frequent illustrations of this limitation being furnished by the decisions which deal with minors. See subd. B, *infra*. All instruc-

have been instructed as to the effect of the servant's knowledge of the risk. *Way v. Illinois C. R. Co.* (1875) 40 Iowa, 341. Where the evidence points to the conclusion that the servant ought to have known of the hazard from which his injury resulted, a charge which merely tells the jury of the duty of knowing and informing the servant of that hazard, and does not advert to the existence of a correlative duty on the servant's part, is erroneous. *McArthur Bros. Co. v. Nordstrom* (1899) 87 Ill. App. 554.

¹² *Richardson v. Swift & Co.* (1899) 37 C. C. A. 557, 96 Fed. 699; *New Orleans Ice Co. v. O'Malley* (1899) 34 C. C. A. 233, 92 Fed. 108; *Nyback v. Champagne Lumber Co.* (1899) 33 C. C. A. 269, 63 U. S. App. 519, 90 Fed. 774; *Alberts v. Bach* (1890) 32 N. Y. S. R. 1014, 10 N. Y. Supp. 639. See also § 390, *post*, as to the general principle that the question whether the servant comprehended a given risk is primarily one for the jury.

¹³ *Manley v. Minneapolis Paint Co.* (1899) 76 Minn. 169, 78 N. E. 1050. See also § 390, *post*.

¹ *Consolidated Coal Co. v. Scheller* (1892) 42 Ill. App. 619.

² *Chicago & N. W. R. Co. v. Donahue* (1874) 75 Ill. 106.

³ The rule that an employer who places a young and inexperienced person in a dangerous situation is bound to warn him of the danger has no application to a case where an adult servant is injured in the performance of the ordinary duties which he has deliberately undertaken, owing to his own failure to make such use of his senses as is required from a person of average intelligence, when he has the option of doing something in one of two or more ways involving various degrees of danger. *Union P. R. Co. v. Estes* (1887) 37 Kan. 715, 16 Pac. 131. A brakeman is bound to know that, among the cars for the storage of which a side track may be used, may be some loaded with iron projecting over the ends. When, therefore, he is ordered to take certain cars out of a side track, he must be on his watch for any cars of the description that may be standing there, and is not entitled to be warned as to their presence. *Jackson v. Missouri P. R. Co.* (1891) 104 Mo. 448, 16 S. W. 413. There is no duty to instruct a brakeman as to the danger caused by low overhead bridges. *Baylor v. Delaware, L. & W. R. Co.* (1878) 40 N. J. L. 24, 29 Am. Rep. 208. A brakeman need not be warned as to the danger incident to coupling cars with drawbars of different heights. The

court said: "The defendant was not called on to make preliminary measurements, and to warn the plaintiff of the possible difference before setting him to work. The possibility was obvious in a car coming from a different road." *Ellsberry v. New York, N. H. & H. R. Co.* (1898) 172 Mass. 130, 51 N. E. 415. A switchman need not be warned as to the dangers arising from the handling of foreign cars with coupling appliances different from those on the cars of his own employers. *Michigan C. R. Co. v. Smithson* (1881) 45 Mich. 212, 7 N. E. 791. The court said: "The business of the road was of itself a notification that many differences requiring attention in coupling were to be encountered by the switchmen and brakemen. The Michigan Central is a great common way for the cars of all the railroad companies of the country, and every man in the employ of the defendant, if he has ordinary intelligence, is perfectly cognizant of the fact. He knows, too, that the cars of the several railroad and transportation companies differ, and that at one time or another all these differences may appear in the cars he may be called upon to couple or uncouple. Every train is likely to have several kinds, and he cannot assume, as he passes from one to another, that the two will be alike; much less that the whole train will be. To notify him specially of the differences would not only be troublesome and expensive, and oftentimes, as above explained, confusing, but it would be a work of supererogation; for any man capable intelligently of performing the duty would be no wiser after the notice than before; and a man who would not heed the information the very nature and course of the business would impart to him would be protected by no notice." To the same effect see *Simms v. South Carolina R. Co.* (1886) 26 S. C. 490, 2 S. E. 486. That the drawhead of a loaded car which an experienced switchman was required to couple to another car was out of order does not render the company liable for his death while making the coupling, where the car had a card posted thereon marked "bad order," in accordance with its usual method of notifying employees of defects, and he was told of its dangerous condition before the injury, and it was the custom of the company to remove defective cars for the purpose of unloading them. *Gulf, C. & S. F. R. Co. v. Mayo* (1896) 14 Tex. Civ. App. 253, 37 S. W. 659. The fact that one

switch at a station is farther from a cattle guard than another does not constitute an unusual danger against which a brakeman is entitled to a special warning when he is ordered to make a coupling. *Robinson v. Chicago, R. I. & P. R. Co.* (1887) 71 Iowa, 102, 32 N. W. 193. Any adult of ordinary intelligence, even though inexperienced, is presumed to understand the danger that a track walker may be caught by a train on a trestle, and the readiest way of reaching a place of safety, viz., by getting on one of the bent caps at either side of the track, both obvious. *Gibson v. Oregon Short Line R. Co.* (1893) 22 Or. 493, 32 Pac. 295. The failure to instruct a man employed to paint a hot boiler with coal tar, that there is a danger of some of the tar popping and lighting on his person, is not negligence, as the danger is not one which requires special precautions to avoid. *San Antonio Gas Co. v. Robertson* (1900) 93 Tex. 503, 56 S. W. 323 (1899) *Reversine* 55 S. W. 347. In *Mississippi R. Lumbering Co. v. Schindler* (1896) 20 C. C. A. 390, 54 U. S. App. 743, 74 Fed. 195, a servant while supplying wood to the man in charge of a circular saw was injured by being struck by a piece which was caught in it. Discussing one phase of the plaintiff's case the court remarked: "It is said, however, that the servant could not anticipate that the operator at the edge would not remove one piece of lumber before another coming over the live rollers would strike it, force it over the space of dead rollers between the alley and the slab saw, nor that it would be swerved from its natural course by the direction given to it, either by the impinging force or by the operator in striving to secure it. That is true, and is equally true with respect to the master. The possibility was as palpable to the understanding of the one as to the other. The mill had been operated for some ten or eleven years without that safeguard and without accident from that cause. In marshalling the dangers that ordinary care would seek to guard against, it could hardly be anticipated that the piece of lumber would be projected such a distance over dead rollers, and would also be so swerved from its course, that it would strike the slab saw, 22 feet away from the end of the line of live rollers, and north of the line of dead rollers extended west-erly upon a direct line from the live rollers. Nor can it be said that the danger was a concealed one, growing

tions which are inconsistent with this principle are deemed to be erroneous.¹

240. Master is prima facie bound to give instructions as to all abnormal or extraordinary risks.—The doctrine which may be regarded as representing the converse of the propositions discussed in the preceding sections is that a master is prima facie bound to instruct a servant as to all risks which are abnormal or extraordinary and at the same time of such a kind that the servant cannot be held chargeable with an adequate comprehension of their nature and extent, or of the proper means by which to safeguard himself.¹ The presumption

out of any defective machinery. It arose from the manner of operation, not because of defective machinery; and therefore was a risk incident to the business." See also cases cited in §§ 264-269, *post*.

"It is error to instruct a jury that it is the duty of the master to inform his servants of all danger in and about the premises where they are required, by his authority, to perform labor." *Chicago, R. I. & P. R. Co. v. Clark* (1883) 108 Ill. 118. The court said: "Railroad employees, as all the books lay down the doctrine, assumed the ordinary risks and hazards of the employment. The presumption is that the employee understands the nature and dangers of the employment when he engages in the service, and, if not, that he will inform himself. It would be wholly impracticable for railroads and manufacturers to employ men of experience to inform each of the hands that any particular act he is required to perform is dangerous. It would be ruinous to such bodies to hire a person to accompany every brakeman and other employees to inform them of danger in the performance of every act of duty, or of the danger in the manner of its performance. It is impossible that the law can ever impose such requirements,—and that is what this instruction in substance asserts as a legal requirement." In *Missouri P. R. Co. v. Watts* (1885) 63 Tex. 549, the trial judge in substance instructed the jury that, if the appellee was inexperienced as to the operation of the business upon the repair tracks, it was then the duty of appellant to instruct him as to the rules and regulations respecting the same. This instruction the supreme court held to be incorrect, saying: "By seeking and accepting the service the appellee assumed all the risks incident to the em-

ployment. It was not the duty of appellant to instruct him respecting the rules, regulations, and usages by which the service was governed, unless asked for such information, unless the employee was known to be an inexperienced person in the business, and in its transaction subject to danger not open to his observation, known to the employer."

¹ *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 165, 5 N. E. 187. For cases in which the rule in the text was applied or recognized see—*Western U. Telen. Co. v. McMullen* (1895) 58 N. J. L. 155, 32 L. R. A. 351, 33 Atl. 384; *Hightower v. Bamberg Cotton Mills* (1896) 48 S. C. 190, 26 S. E. 222; *Salem Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141, 38 N. E. 411; *Williams v. Walton & W. Co.* (1892) 9 Houst. (Del.) 322, 32 Atl. 726; *Turner v. Goddard Lumber Co.* (1896) 119 N. C. 387, 26 S. E. 23; *McDade v. Washington & G. R. Co.* (1886) 5 Ma. Kes. 144; *Bromley v. Smith, B. & R. Car. Co.* (1882) 12 Mo. App. 594; *K'egel v. Aitken* (1896) 94 Wis. 432, 35 L. R. A. 249, 69 N. W. 67 (servant contracted infectious disease); *Hysell v. Swift* (1899) 78 Mo. App. 39 (servant's eye destroyed by bacteria generated by decayed flesh); *Wentworth & Co. v. Hight* (1898) 56 Neb. 162, 76 N. W. 566. A master is bound to notify his servant of risks which the latter has no reason to believe, from the nature of his employment, he will have to encounter, and which arise from hidden causes or such as would reasonably escape his observation. *Wood v. Heiges* (1896) 83 Md. 257, 34 Atl. 872. One who contracts to perform labor for another takes upon himself such risks only as are necessarily and usually incident to the employment. If the employer has knowledge that the particular employment is, from extraneous causes, hazardous or

is that all risks which belong to this category are not known to the servant. Hence, the question whether the servant should have been warned is always for the jury where the evidence is fairly susceptible of the construction that the peril to which his injury was due was one of this description, and there is no positive evidence tending to charge him with actual or constructive knowledge of that peril. This principle is equally applicable whether the risks in question existed at the time when the servant commenced the performance of his contract,² or were afterwards created by some material change in the

dangerous to a degree beyond what it fairly imports or is understood by the servant to be, he is bound to inform the servant of the fact. *Baxter v. Roberts* (1872) 44 Cal. 187, 13 Am. Rep. 160. Similar language is used in *Thompson v. Chicago, M. & St. P. R. Co.* (1883) 4 McCrary, 629, 14 Fed. 566. Employers "are bound to see that their employees have reasonable notice of any hidden danger known to the employer, but of which the employees might be ignorant without blame." *Dowling v. Allen* (1878) 6 Mo. App. 195. It is culpable negligence in the master to fail to notify the servant of risks which are not patent, and of which he is not cognizant from the nature of his employment. *Consolidated Coal Co. v. Weisacher* (1890) 134 Ill. 57, 24 N. E. 627. Since the obligation of the master is to place the servant on the same footing as himself in respect to knowledge of the dangers of the work it follows that the duty of instruction arises when the master possesses what the courts term "superior means" of knowledge. *Louisville & N. R. Co. v. Shirell* (1892) 13 Ky. L. Rep. 902, 18 S. W. 944. A master who fails to inform a servant employed to remove the latch holding the lever of a movable car, whereby its contents of molten slag are dumped, that the appliance has not at all times worked properly, is liable for injuries sustained by the servant while in the exercise of due care, and because of such latent defect. *Fowler v. Buffalo Furnace Co.* (1899) 41 App. Div. 84, 58 N. Y. Supp. 223, Appeal Dismissed in (1899) 160 N. Y. 665, 55 N. E. 1095. If any structure near a line of railway is so located as to involve unusual danger to employees operating the road, it is the duty of the company to advise such employees as are exposed to danger by such location, or to afford them an opportunity to know the character and extent of that danger by ob-

servation. *Boyd v. Harris* (1896) 170 Pa. 484, 35 Atl. 222. A request for a charge to the effect that the perils of the work were obvious, and that the master was therefore under no obligation to instruct the servant, should not be granted where the servant's duty was to dig under a bank which was not expected to fall by the action of gravitation, and which had, up to the time of the accident, been taken down by prying over the top when an excavation of a sufficient depth had been made at the bottom. *Lynch v. Allyn* (1893) 160 Mass. 248, 35 N. E. 550, distinguishing the cases where a man is set to work to undermine a bank which is expected to fall by the force of gravitation, and he is required to look out for himself. See § 394, note 1, subd. (aa), and § 396, note 1, subd. (bb), *post*. Warning should be given where a servant is set to work with several others to push a car past a bank which at one place comes so close to the track that he will be crushed if he is on the side next to it. *Stackman v. Chicago & N. W. R. Co.* (1891) 80 Wis. 428, 50 N. W. 404. The duty of warning has been said to be especially imperative where the servant is required to handle dangerous explosives. *Decatur Cereal Mill Co. v. Boland* (1900) 95 Ill. App. 601; *Spelman v. Fisher Iron Co.* (1870) 56 Barb. 151. Compare § 395, note 2, subd. aa *post*.

²As, where malt was fumigated with sulphur and salt in the kiln room of a malting house, from which the fumes escaped through crevices, and overcame a workman on another floor, so that he fell into machinery there and was injured. *Deisenrieter v. Kraus-Merkel Malting Co.* (1896) 92 Wis. 164, 66 N. W. 112. Or where a part of a trestle just beyond the place to which engineers were constantly obliged to take their engines was dangerously weak. *Paulmier v. Erie R. Co.* (1870) 34 N.

intrinsic condition or relative arrangement of the instrumentalities by which the work was being done, or of the substances which the injured person or his coemployees were required to handle.³ More particu-

J. L. 151. Or where a machine was liable to spasmodic movements, *United Laundry Co. v. Schilling* (1900) 21 Ky. L. Rep. 1798, 56 S. W. 425. Or where a laborer is set to work under a bank which is so cracked and seamed as to be liable to fall at any amount, *Ellodge v. National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720. Or where a railway agent, believing that a station was about to be burglarized, secured others to guard the place, and during the night an engineer, on going to the station for the purpose of getting orders, was shot and killed by mistake, *Lipscomb v. Houston & T. C. R. Co.* (1901; Tex.) 55 L. R. A. 869, 61 S. W. 923. Modifying Judgment in (1901; Tex. Civ. App.) 62 S. W. 954. In a case where a carpenter hired to erect a fence on a lot was held not to assume the risk of being shot by a person in adverse possession, unless the employer had notified him beforehand that forcible resistance might be expected, the court said: "The general principle which forbids the employer to expose the employee to unusual risks in the course of his employment, and to conceal from him the fact of such danger, is not affected by the fact that the danger known to the employer arose from the tortious or felonious purposes or designs of third persons acting in hostility to the interests of the employer and through agencies beyond his control. The employee is as clearly entitled to information of such known danger of that character as of any other, the existence of which is known to the employer. The employer, if he knew or was informed of a threatened danger of that character, was bound to communicate the information to his employee about to be exposed to it in the course of his employment and in ignorance of its existence. The nature or character of the agency or means through which the danger of injury to the employee is to be apprehended can make no difference in the rule, for the employee is entitled in all cases to such information upon the subject as the employer may possess, and this with a view to enable him to determine for himself if at the proffered compensation he be willing to assume the risk and incur the hazards of the business; and if the employer have such information or

knowledge and withhold it from the employee, and the latter afterwards be injured in consequence thereof, the employer is liable to him in damages therefor." *Barter v. Roberts* (1872) 44 Cal. 188, 13 Am. Rep. 160.

In *O'Connor v. Adams* (1876) 120 Mass. 427, it was laid down that the case is for the jury where there is evidence tending to show that the defendant's agents put the plaintiff in a place of peculiar danger, of which he had no knowledge or experience, without informing him of the risks or instructing him how to avoid them. This principle was applied in a later case, where a servant, while engaged in taking down an old building, was injured by the collapse of a wall which the defendant knew to be unsafe owing to a fissure in it, *Ryan v. Tarbox* (1883) 135 Mass. 207. The same conception is apparent in the rulings which, without any specific reference to the duty of warning, declare that it is negligence to allow servant to use a defective instrumentality the condition of which is known to the master, and not known to the servant, *Indianapolis & C. R. Co. v. Love* (1858) 10 Ind. 554.

³*Northwestern Fuel Co. v. Danielson* (1893) 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915 (where the employer began to tear down a trestle under which the plaintiff was at work). It is the duty of the master to notify the servant of any change in the condition of his apparatus by which the dangers of handling it are augmented, unless the circumstances themselves constitute a sufficient notification, *Craver v. Christian* (1887) 36 Minn. 413, 31 N. W. 457. The duty of instruction was held to exist under the following circumstances: Where a servant was set to work under a bank into which wedges had been driven the evening before without his knowledge, the danger being also increased by a fall of rain during the night (*Thomas v. Ross* [1896] 21 C. C. A. 444, 41 U. S. App. 574, 75 Fed. 552); where a miner was injured by the caving of a shaft at a place where there had been a fissure in the earth before the accident (*Strahlendorf v. Rosenthal* [1872] 39 Wis. 674); where a wall became ruinous and dangerous while a servant was working near it (*Vaughan*

larly is a jury warranted in finding that the omission to warn was a culpable neglect of duty, where the servant was thrown off his guard

v. Cork & Y. R. Co. [1860] 12 Ir. C. L. Rep. 297, per Pigot, C. B., *arguendo*); where a plaintiff was injured owing to the existence of a crack in the wall of a pit in which he was working (*Colorado City v. Lafe* [1901; Colo.] 65 Pac. 630); where the day crew of an undercutting machine were allowed to go to work without any warning as to the dangerous condition of the face of the coal where they were to work (*Consolidated Coal Co. v. Gruber* [1900] 188 Ill. 584, 59 N. E. 254, 91 Ill. App. 15); where the form of a dump pile was changed by removals so that the slope became much steeper during the daytime, and one of the night shift was consequently injured (*Iroquois Furnace Co. v. McCrean* [1900] 91 Ill. App. 337); where all the ballast between the ties at a certain switch is removed, thus causing a brakeman to lose his footing (*Louisville & N. R. Co. v. Burcock* [1899] 21 Ky. L. Rep. 383, 51 S. W. 580, Rehearing Denied in 21 Ky. L. Rep. 896, 53 S. W. 262); where a railway switch was reopened for use after a long abandonment (*Town v. Michigan C. R. Co.* [1890] 84 Mich. 214, 47 N. W. 665); where a master of the steamer caused a spare-wheel, which in its ordinary condition rested loosely and unfastened upon the drum of the steamwheel, to be lashed so that it would necessarily rotate with the drum, thereby rendering the apparatus dangerous to anyone engaged in cleaning it (*Witkefsky v. Wier* [1887] 32 Fed. 301); where the condition of a machine was changed (*Harkins v. Johnson* [1886] 105 Ind. 29, 55 Am. Rep. 169, 4 N. E. 172); where a member of one of several shifts went to work in a shaft in a mine where another shift had previously discharged several blasts and left one missed hole (*Shannon v. Consolidated Tiger & Pomman Min. Co.* [1901] 24 Wash. 119, 64 Pac. 169); where a piece of machinery had been disconnected and left in such a position that it was liable to fall (*Aitken v. Newport Co.* Q. B. D. [1887] 3 Times L. R. 527); where a machine became so clogged by the materials upon which it operated that it was dangerous to a new employee; accumulation of notes in a "linter" caused breast-board to jump up and press the servant's hands against the saws (*Hillsboro Oil Co. v. White* [1899; Tex. Civ. App.] 54 S. W. 432); where spikes had been removed from a ladder since the servant had last used it, and it had thus been made more liable to slip on the floor when he climbed it (*O'Donnell v. Sargent* [1897] 69 Conn. 476, 38 Atl. 216); where there was a change in a dangerous machine amounting to more than an "ordinary adaptation" such as a skilled mechanic should anticipate (*Ryan v. Chelsea Paper Mfg. Co.* [1897] 69 Conn. 454, 37 Atl. 1062); where an elevator was out of repair, (*Derrin v. Herrman* [1890] 26 Jones & S. 193, 9 N. Y. Supp. 722); where pipe which conveyed oil from tank had been broken (*Pullman Palace Car Co. v. Lauck* [1892] 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285); where new and unusual machinery the use of which involves an unexpected and unanticipated danger is adopted (*O'Neil v. St. Louis, I. M. & S. R. Co.* [1881] 3 McCrary, 423, 9 Fed. 337); where a new switch was reasonably safe and properly constructed, but was operated in a different manner (*Cincinnati, N. O. & T. P. R. Co. v. Gray* [1900] 50 L. R. A. 47, 41 C. C. A. 535, 101 Fed. 623). In the last cited case it was laid down that the considerations which demand that the master shall furnish for his employees reasonably safe appliances necessarily extend to the requirement that when appliances wholly or partially new, and, so far as they differ and the particular work is concerned, unknown and untried, are substituted for old ones, he shall give full and plain instructions to employees as to the parts of such appliances which are new in operation, in order that they may have a fair opportunity to understand the nature of any differences which might, if they were unknown, produce danger.

There is also an obligation to instruct a servant where unfit fellow servants are unavoidably employed. *Chicago, St. L. & P. R. Co. v. Champion* (1894) 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21.

See also, as recognizing the general rule—*Walsh v. Chicago* (1901) 94 Ill. App. 311; *Clark v. Liston* (1894) 54 Ill. App. 578 (said with reference to a building which was being torn down); *McDougall v. Ashland Sublime Fibre Co.* (1897) 97 Wis. 382, 73 N. W. 327.

by the assurance of the employer that there were no abnormally unsafe conditions.⁴ See chapter XXIV., *post*.

So far as the essential fact of an increase of danger is concerned, it is obvious that this situation may be brought about by the transfer of the servant to a new environment, or by the imposition of new duties in the old environment, no less than by a change in the inherent quality or in the arrangement of the instrumentalities themselves, or of the materials handled. It follows, therefore, that, when the servant is thus required to work amidst new surroundings or to undertake new duties, the master becomes at once chargeable with the obligation of giving him instructions in any case where there is a real augmentation of the risks, owing to the fact that the servant has not sufficient experience or intelligence to enable him to safeguard himself.⁵ Where the injury was received by the servant while doing

⁴ *Gowen v. Push* (1896) 22 C. C. A. 196, 40 U. S. App. 349, 76 Fed. 349.
⁵ *Brennan v. Gordon* (1890) 118 N. Y. 489, 8 L. R. A. 818, 23 N. E. 810 (master bound to instruct common laborer before he is put in charge of dangerous machinery—here an elevator—with which he is not acquainted); *James v. Rapides Lumber Co.* (1898) 50 La. Ann. 717, 44 L. R. A. 33, 23 So. 469 (minor nineteen years of age suddenly called on to work with a trimmer in a sawmill); *Camp v. Hall* (1897) 39 Fla. 535, 22 So. 792 (boy fourteen years of age was employed to put together vegetable crates, and transferred to the work of pushing cars on a side track); *Terarkana & Ft. S. R. Co. v. Precher* (1900) Tex. Civ. App. 59 S. W. 593 (minor employed as a messenger in a railway office, directed to couple cars); *Felton v. Givard* (1900) 43 C. C. A. 439, 104 Fed. 127 (helper in repair shop of railway company was directed to go into the fire box of a locomotive which had steam up, and tighten the plug in a leaking flue of the boiler, and, not knowing that the plug was screwed in, hammered it so the threads broke and thus allowed the steam to escape); *Michael v. Roanoke Mach. Works* (1894) 90 Va. 492, 19 S. E. 261 (helper in boiler shop assigned to duties where he was exposed to danger from a crane used to move machinery); *Lofano v. New York & Mt. V. Water Co.* (1890) 55 Hun. 452, 8 N. Y. Supp. 717 (servant not employed to perform that particular service was ordered to warm a quantity of dynamite, and was injured by its explosion); *Banks v. Eflingham* (1896) 63 Ill. App. 223 (ladener transferred to place in a ditch where there were deposits of quicksand). See also, as affirming explicitly or recognizing the duty of instruction under these circumstances, the following cases: *Newbury v. Gatchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743; *Palmer v. Michigan C. R. Co.* (1891) 87 Mich. 281, 49 N. W. 613; *Hamilton Bridge Co. v. O'Connor* (1895) 24 Can. S. C. 598; *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739; *Garrison v. Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 67 N. W. 1097; *Walker v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 606, 62 N. W. 1032; *Camp v. Hall* (1897) 39 Fla. 535, 22 So. 792; *Mary Lee Coal & R. Co. v. Chambliss* (1893) 97 Ala. 171, 11 So. 897; *Gulf, C. & S. F. R. Co. v. Norman* (1901) Tex. Civ. App. 64 S. W. 790; *Quinn v. Johnson Forge Co.* (1892) 9 Houst. (Del.) 338, 32 Atl. 858. In *Mann v. Oriental Print Works* (1875) 11 R. I. 152, the following instruction was affirmed: "If the fireman, although employed only for a fireman, was placed under the orders of the engineer, and was by him suddenly called upon to assist in throwing on a belt, out of his own sphere, but within the sphere of duty of the engineer, and was thus subjected to a risk with which he was not acquainted, or to a peculiar and greater risk at that time and of which he was not informed or cautioned, then the defendants would be liable." "If the en-

work outside the scope of his employment, it often becomes a material question whether he was acting under proper authority, for it is clear, upon general principles, that negligence cannot be predicated of the master's omission to instruct a servant as to what he was neither expected nor ordered to do.⁶ The absence of any specific order from

the master, and the nature and magnitude of the master's work, whether it be that of construction or otherwise, and the number of men engaged in its execution, are such that the exercise of ordinary care for the safety and protection of the workmen from unusual and unnecessary dangers requires that they be given reasonable orders, and that they be not ordered from one part of the work to another, without warning, into places of unusual danger and risks, which are not obvious to the senses and known to them, but which might be ascertained by the master by a proper inspection, the absolute duty rests upon the master to give such reasonable orders. . . . A workman, when ordered from one part of the work to another, cannot be allowed to stop, examine, and experiment for himself, in order to ascertain if the place assigned to him is a safe one; and therefore, in obeying the order, while he assumes obvious and ordinary risks, he has a right to rely upon a faithful discharge of the master's duty to use ordinary care to warn and protect him against unusual dangers." *Carlson v. Northwestern Teleph. Exch. Co.* (1896) 63 Minn. 433, 65 N. W. 914. A charge to the effect that a foundry superintendent, when about to order an extra-hazardous piece of work to be done, is under no obligation to warn workmen not then present, but whose duties may call them to the place at any moment, is rightly refused. *Girard v. St. Louis Car-Wheel Co.* (1891) 46 Mo. App. 79.

The situation which results when the servant is ordered by the master to perform temporary service beyond and without the scope of that which he has engaged to do, is thus discussed in a recent case: "The master may not lawfully expose his servant to greater risks than those pertaining to the particular service for which he has engaged, and against which the servant, through want of skill, or by reason of tender age or physical inability, could not presumably defend himself if unapprised of the danger. He is bound to warn the servant of the danger if it be not obvious, and to instruct him how it may be avoided. If, however, the servant be of mature

years and of ordinary intelligence and experience, he is presumed to know and comprehend obvious dangers. In such case the master is not liable for injury happening to the servant in the performance of dangerous work without the scope of his engagement for service, merely because he has been directed by the master to perform such work. If the servant is possessed of knowledge and experience sufficient to comprehend the danger, and without objection undertakes the service, the master is not liable for injury received by the servant in such new and more dangerous employment. . . . The liability upon the master in cases of injury to the servant received in a dangerous employment outside of that for which he had engaged arises, therefore, not from the direction of the master to the servant to depart from the one service and to engage in the other and more dangerous work, but from failure to give proper warning of the attendant danger in cases where the danger is not obvious, or where the servant is of immature years, or unable to comprehend the danger." *Reed v. Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186. See, generally, as to such situations, chapter XXV., *post*.

⁶ *Leistritz v. American Zylonite Co.* (1891) 154 Mass. 382, 28 N. E. 294; *Gillen v. Rowley* (1890) 134 Pa. 269, 19 Atl. 504; *Blackley v. Horazdewsky* (1890) 133 Ill. 359, 8 L. R. A. 490, 24 N. E. 421; *Stewart v. Patrick* (1892) 5 Ind. App. 50, 30 N. E. 814; *McCue v. National Starch Mfg. Co.* (1894) 142 N. Y. 106, 36 N. E. 809 (no liability where servant undertook *proprio motu* to repair machinery, when it was his duty merely to report to a machinist when the necessity for repairs arose).

Where the foreman told the plaintiff, who was employed to load cars, to fix up the dump cars as a mill temporarily, as well as he could, this order cannot be construed into a direction to incur any danger, or to go to any part of the mill, or to saw a piece of scantling or any saw he might select. The rights of the parties must, in such a case, be determined by the rule that the master

the master does not, however, operate as a conclusive bar to the servant's action under such circumstances. He may still rely on the duty of the master to instruct him, if the employer knew that he had engaged, or was likely to engage, in the work from which his injury resulted.⁷ For a further discussion of the right of a servant to recover for injuries received in doing work outside the scope of his employment, see chapter xxv., *post*. Compare also the cases cited in § 395, *post*.

240a. Servant's comprehension of the risk, and not merely of the conditions, is the material point to be determined.— In considering whether the servant's action is barred on the ground of knowledge, the material question is not whether he was aware of the conditions which produced the danger, but whether he understood the danger itself.¹ But in a large number of instances the conclusion that knowledge of the conditions cannot be imputed without also imputing knowledge of the attendant risks is so clearly unavoidable that, for practical purposes, the investigation is concerned only with the question whether the servant possessed the former kind of knowledge.²

is under no duty of specially guarding dangerous machinery, or of giving special warning as to the dangers arising therefrom, as respects persons who, without authority, go into places where such machinery is in operation. *Lindstrand v. Delta Lumber Co.* (1887) 65 Mich. 254, 32 N. W. 427.

Leistritz v. American Zuluete Co. (1891) 154 Mass. 382, 28 N. E. 294. In *Dunahoe v. Old Colony R. Co.* (1891) 153 Mass. 356, 26 N. E. 868, the defendant contended that a conductor who left his train before the accident happened was not negligent in omitting to tell the plaintiff of a broken drawbar, because the movements of the train and the coupling and uncoupling of cars were wholly under his direction, and a brakeman was not expected to uncouple cars without his orders. The court, however, said that, when the conductor permitted it to proceed without him, it might properly be inferred by the jury that he expected and permitted such things to be done as were necessary in the management of the train until he should rejoin it, without a specific order from himself for each particular act; and, if so, that it might properly be found to have been negligence on his part to omit to tell the plaintiff of the broken drawbar.

McDonald v. Chicago, St. P. M. & O. R. Co. (1889) 41 Minn. 439, 43 N. W.

380; *Coombs v. New Bedford Cardage Co.* (1869) 102 Mass. 573, 3 Am. Rep. 506 (machinery which caused the injury was open to view, and probably it was seen by the party injured; but the danger of the position was not explained, as was necessary for the protection of one who had no knowledge of it); *McGowan v. LaPlata Win. & Snodgrass Co.* (1882) 3 McCrary, 393, 9 Fed. 861; *George Matthews Co. v. Bonchaud* (1897) 8 Rap. Jud. Quebec B. R. 550.

A conductor of a train on an inclined railway, with seventeen years' experience, who knows that, under certain conditions of weather, the several sections are stopped at a certain shed near the head of the incline, and coupled together for the purpose of proceeding to points beyond, cannot hold the owners of the railway liable for the failure of its superintendent to warn him, while he is in control of the rear section, that he must guard himself against the danger of a collision with the preceding sections. *Moulton v. Delaware & H. Canal Co.* (1891) 141 Pa. 632, 21 Atl. 733. Where a servant knows the general danger of being caught by a revolving shaft, a master is not bound to proceed on the assumption that the servant in stepping over it will avoid it by so narrow a margin as to encounter the special danger of a slightly projecting spline-key, a danger which, if not comprehended

For other cases in which the distinction between the servant's knowledge of the conditions and his knowledge of the attendant dangers is recognized, see §§ 279a, 296, 319, 372, 395, 398, 399, *post*. That an appreciation of the risk is frequently, if not usually, inferred when a knowledge of the conditions is established, is indicated by the authorities collected in §§ 279b, 297, 320, *post*, and a large number of those the effect of which is stated in chapter XXI., *post*.

241. Master's knowledge of the servant's ignorance of the danger; necessity for showing.—The third prerequisite to recovery by the servant results from a particular application of the principle which makes knowledge an essential element of negligence, to a case in which the special question to be resolved is whether, in view of the material conditions which produced the injury, and the personal characteristics of a certain servant, the master should have seen that such servant was probably incapable of understanding the perils of the situation. An investigation under this head ranges over much the same area of facts as that which is explored in ascertaining whether the third prerequisite to the maintenance of the action exists. (See *infra*.) The only difference is that the problem for the solution of which the data are used is propounded in another form determined by the theory on which the plaintiff relies, and that the testimony which, in one case, is directed to the establishment of a breach of a positive duty, is directed in the other case to the support of a plea which is virtually one of confession and avoidance.

within the general danger, is at least so closely connected therewith as not to demand particular consideration. *Andersen v. Berlin Mills Co.* (1888) 32 C. C. A. 143, 50 U. S. App. 413, 88 Fed. 944. There is no duty to warn a servant of full age as to the dangers arising from a revolving shaft which extends across a doorway, 4 feet above the floor. *Lemoine v. Aldrich* (1900) 177 Mass. 89, 59 N. E. 178. There is no duty to instruct an experienced lineman as to the danger of handling live electric wires without gloves made of some non-conducting material. *Junior v. Missouri Electric Light & P. Co.* (1895) 127 Mo. 79, 29 S. W. 988. See also the following cases: *Baylor v. Delaware, L. & W. R. Co.* (1878) 40 N. J. L. 24, 29 Am. Rep. 208 (low overhead bridge on a railway); *Boland v. Louisville & N. R. Co.* (1894) 106 Ala. 641, 18 So. 99 (car couplers of different patterns); *Demers v. Marshall* (1901) 178 Mass. 9, 59 N. E. 454 (set screw on shaft);

Wilson v. Massachusetts Cotton Mills (1897) 169 Mass. 67, 47 N. E. 506 (exposed cogwheels); *Cunningham v. Bart Iron Works* (1899) 92 Me. 501, 43 A. 106 (exposed cogwheels); *Buttl v. George C. Page Box Co.* (1900) 175 Mass. 318, 56 N. E. 583 (moving saw); *Cushman v. Cushman* (1901) 179 Mass. 601, 61 N. E. 262 (position of collar and set screw on shaft known to servant who was injured by a belt catching on the collar as he was removing it from the fixed pulley); *Owings v. Moneynick Oil Mill* (1899) 55 S. C. 483, 33 S. E. 511 (servant knew that certain wires conveyed electricity to a mill, and that this was running at the time when he was injured); *Omilewski v. Mollenhauer Sugar Ref. Co.* (1896) 11 App. Div. 111, 42 N. Y. Supp. 936 (no duty to instruct as to the danger of stepping on a grating underneath which there is moving machinery, where the servant knows the openings are large enough to let his feet through).

The general principle to be extracted from the decisions in which this aspect of the duty of instruction is adverted to would seem to be this: That, on the one hand, the master may properly be found guilty of negligence whenever instruction was not given under circumstances which were of such a nature that he was not justified in acting on the assumption that the servant appreciated the risk involved; and that, on the other hand, culpability cannot be predicated of the omission to give instruction if the master had good grounds for supposing that the servant understood that risk.¹ Before an employer can be held liable for a failure to warn, there must be something to suggest to him that a warning is necessary.² Unless this necessity was or ought to have been known to him, he is considered to be justified in acting upon the assumption that the servant understood the dangers to which he was exposed, and would take appropriate precautions to safeguard himself.

The mere statement of this principle indicates that there can be very few, if any, situations in which the existence or absence of a

See the following cases: *Stuart v. West End Street R. Co.* (1895) 163 Mass. 391, 40 N. E. 180; *Cinick v. Merchants' Wooden Co.* (1890) 151 Mass. 152, 6 L. R. A. 733, 23 N. E. 829; *Pratt v. Prouty* (1891) 153 Mass. 333, 26 N. E. 1002; *Robinska v. Mills* (1899) 174 Mass. 432, 54 N. E. 873; *Boque v. Hooper* (1897) 160 Mass. 541, 48 N. E. 38; *Yeager v. Burlington, C. R. & N. R. Co.* (1894) 93 Iowa, 1, 61 N. W. 215; *Mahon v. Minneapolis Paint Co.* (1899) 76 Minn. 169, 78 N. W. 1050; *May v. Smith* (1893) 92 Ga. 95, 18 S. E. 360; *King v. Morgan* (1901) 48 C. C. A. 507, 109 Fed. 446; *Crowley v. Pacific Mills* (1889) 148 Mass. 228, 19 N. E. 344; *Mannion v. Hagan* (1896) 9 App. Div. 98, 41 N. Y. Supp. 86; *Arizona Lumber & Timber Co. v. Mooney* (1893, Ariz.) 33 Pac. 590; *Wisconsin P. R. Co. v. King* (1893) 2 Tex. Civ. App. 122, 20 S. W. 1014, 23 S. W. 917; *Wisconsin P. R. Co. v. Sasse* (1893) Tex. Civ. App. 22 S. W. 187; *Et. Smith Oil Co. v. Shover* (1893) 58 Ark. 168, 24 S. W. 106; *Connor v. Saunders* (1894) 9 Tex. Civ. App. 56, 29 S. W. 1140. In *Ingersoll v. Moore* (1891) 90 Cal. 410, 27 Pac. 306, a case where the plaintiff was caught upon a set screw in a revolving shaft, it was remarked that, in passing upon the question of defendant's alleged negligence, it was necessary for the jury to determine: (1) Was plaintiff in fact inexperienced in the work in which he was engaged? and, if so (2), were de-

fendants informed of this fact? (3) If defendants were so informed, did they neglect to give him notice of the location of the set screw, and to instruct him in the manner of running the machine, so as to guard him against the injury which he received?

In *Washington & G. R. Co. v. McChade* (1890) 135 U. S. 569, 34 L. ed. 235, 10 Sup. Ct. Rep. 1014, the court approved an instruction to the effect that, if the servant's course of conduct in relation to the duty undertaken by him was such as to induce the defendant or its officers to believe that he had the requisite skill for the performance of that duty, or that he had willingly assumed that duty, the defendant was not in default for not having instructed him as to any danger incident to the operation. In a Delaware case the jury was charged that the servant is not entitled to rely on the want of proper instruction, "unless the defendant was not justified in believing that he had done his duty by him. If he did all that most other men, under like circumstances, would have done, that is enough." *Foster v. Pusey* (1888) 8 Houst. (Del.) 168, 14 Atl. 515.

² *Georgia R. & Bkg. Co. v. Miller* (1892) 90 Ga. 571, 16 S. E. 931; *Shedden v. Manhattan L. & C. Co.* (1900) 167 Wis. 250, 83 N. W. 514 (arguing, in discussing a case which did not find the servant to have been ignorant).

duty to instruct, as affirmed or denied on this ground, would not depend upon virtually the same considerations as are controlling when the issue to be decided is whether the servant was chargeable with the possession of sufficient knowledge to enable him to avoid being injured. Hence, we find that judgments which refer to the fact that the dangers were, or were not, such as the servant might fairly be supposed to understand always associate the language in which that conception is embodied with expressions which show that the dangers contemplated were such as the servant was or was not bound to comprehend.¹

The cases in which the principle is most commonly adverted to as a test of liability or nonliability are those in which the distinction between adults and minors, and between experienced and inexperienced workmen, is the material element. For the purpose of applying that distinction the courts start with the fundamental hypothesis that, by entering an employment in any capacity, an adult holds himself out as being competent to perform the duties of the position; or, as the rule is also expressed, that the acceptance of any given employment is a representation that the servant understands the nature of the service.² In the absence of notice to the contrary, therefore, the master may assume that such a servant has the knowledge, discretion, and experience of the average servant of his age and intelligence,³ and that he possesses the knowledge which is acquired by common experience.⁴ More generally still, it is laid down that, unless

¹ See, for example, *Stuart v. West End Street R. Co.* (1895) 163 Mass. 391, 40 N. E. 180; *Lemoine v. Aldrich* (1900) 177 Mass. 89, 58 N. E. 178; *Ciriack v. Merchants' Woolen Co.* (1890) 151 Mass. 152, 6 L. R. A. 733, 23 N. E. 829; *Darling v. Allen* (1878) 6 Mo. App. 195; *Wardley v. Minneapolis Paint Co.* (1899) 76 Minn. 169, 78 N. W. 1050.

² *McDermott v. Atchison, T. & S. F. R. Co.* (1896) 56 Kan. 319, 43 Pac. 248; *International & G. N. R. Co. v. Hester* (1885) 64 Tex. 401.

³ *Wisnari P. R. Co. v. Watts* (1885) 63 Tex. 549. In *Guinard v. Knapp-Stout & Co. Co.* (1895) 90 Wis. 123, 62 N. W. 625, however, the court declined to hold that, because the plaintiff, some time after he was employed as an oiler, applied to be retained in that capacity, he thereby represented himself as competent for the position and assumed all the risks, the special ground assigned being that there was no evidence or finding that he was retained in his position

on account of his request, or that his request had anything to do with the defendant's action in the premises.

⁴ *Chickinsky v. Hoopes & T. Co.* (1894) 1 Marv. (Del.) 273, 10 Atl. 1127; *Adams v. Clymer* (1893) 1 Mo. (Del.) 80, 30 Atl. 1104. "If the plaintiff's own or known inexperience of the employer is such as to put the master upon notice that the employee may not realize the risk he is called upon to encounter, the master must, of course, see to it that he is properly warned; but we do not understand it to be the law that in the case of an adult employee, about to undertake work which he is subject to the line of his duty to be called on to do, the master must assume that he is ignorant of ordinary dangers that he may attend the work." *Georgia R. & B. Co. v. Miller* (1892) 90 Ga. 571, 16 S. E. 939. Compare § 239, *infra*.

⁵ *Richinsky v. French* (1897) 172 Mass. 68, 46 N. E. 417.

he has actual knowledge to the contrary, the master may assume, without a critical examination, that a person who seeks employment in a particular capacity is possessed of sufficient ability and experience, and is of such an age as qualifies him to discharge the duties incident to the service applied for, and that he is competent to apprehend and avoid all the apparent and obvious hazards of the service.⁸

In cases where there is specific evidence tending to show that the master, having knowledge of the servant's inexperience, employed him in hazardous work which required the exercise of peculiar skill, the failure to give him adequate instructions may properly be found to be negligent.⁹ On the other hand, unless the defendant knew, or ought to have known, of some occasion for instruction, his omission to give it cannot be regarded as the proximate cause of an injury which

⁸Where plaintiff had testified before the jury, there was no impropriety in permitting a witness to testify as to plaintiff's appearance as to age at the time of the trial, as compared with his appearance in that respect immediately before he was hurt; or that in appearance the plaintiff was not older than he really was at the time he entered the defendant's service. *Louisville, N. A. & C. R. Co. v. Frauley* (1886) 110 Ind. 18, 9 N. E. 594, referring to *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187. In order to lay a foundation for imputing fault to an employer merely by reason of the servant's minority, the latter must adduce evidence showing that the employer had knowledge of the minority, or, because of his appearance, was put upon inquiry as to his age. This rule is important in cases where the servant is approaching his majority, and has the stature and appearance of an adult. See *Youll v. Stone City & P. R. Co.* (1885) 66 Iowa, 346, 23 N. W. 736. Thus, it has been laid down that, if a servant was believed to be twenty-one years old when he was hired, the master is not liable by reason of his minority, even if the employment was without the consent of his parents. *Goff v. Norfolk & W. R. Co.* (1888) 36 Fed. 299. That the master is not bound to examine an adult applicant for a position as to his fitness or knowledge of its dangers is also laid down in *O'Neal v. Chicago & I. Coal R. Co.* (1892) 132 Ind. 110, 31 N. E. 669. *Remondis v. Boston & M. R. Co.* (1891) 64 Vt. 66, 24 Atl. 134. *Louisville & N. R. Co. v. Miller* (1900) 43 C. C. A. 436, 104 Fed. 124; *St. Louis &*

S. F. R. Co. v. Valerius (1877) 56 Ind. 511.

In *Harris v. C. R. Co. v. Price* (1895) 72 Miss. 862, 18 So. 115, the court remarked: "Every servant undertakes to assume the known and obvious and ordinary risks incident to his employment; but if the employer requires the servant to undertake the performance of a dangerous or extra hazardous work demanding caution and more than usual skill, the employer must give the servant proper instruction as to the method of executing the service required, and notice of the danger to which he will be exposed, if he knows of the inexperience or ignorance of his servant in and about the service to be performed." An employer has no right to an instruction to the effect that, "unless the jury find that the plaintiff was a man of manifest imbecility, their verdict must be for the defendant, because the defendant had a right to assume that the plaintiff would protect himself by whatever precautions were necessary." The duty of instruction exists in all cases where it is reasonably required by the youth, or inexperience, or want of capacity of the servant, and is not confined to cases where the servant is "a man of manifest imbecility." *Atkins v. Merrick Thread Co.* (1886) 142 Mass. 431, 8 N. E. 241. The instruction here asked for was an attempted generalization from the remarks made by Judge Holmes in denying the servant the right of recovery under the special circumstances in *Russell v. Tillotson* (1885) 140 Mass. 201, 4 N. E. 231.

See also §§ 245, 246, *infra*.

the plaintiff received owing to the want of such instruction. The mere fact that he was injured because he was inexperienced and ignorant of the danger and hazard will not suffice to charge the defendant.¹⁰ The question whether the master at the time of engaging the servant, or afterwards, ought to have inquired whether he was experienced or not, or should have taken notice, under all the facts, of the probability that he was not, nothing being said on the subject by either party, is a question for the jury.¹¹

The decisions with respect to the effect of declarations by the servant himself, which tend to mislead the master as to his fitness for the position sought by him, are conflicting. In one it is laid down that the express statement of an employee, at the time of the contract of employment, that he is accustomed to the work, will excuse the employer from explaining to him peculiar dangers ordinarily incident to such work.¹² In another, recovery was denied where the servant deliberately made a false representation as to his familiarity with the work, in order that he might obtain employment.¹³ Similarly, it has been held that no action lies where a master was misled by an employee to believe he was of age when he was in fact a minor, and his age contributed to the injury.¹⁴ On the other hand, the position has lately been taken that the fact that an inexperienced servant, when he solicited the employment, represented himself to be competent, will not charge him with an assumption even of the ordinary risks of that

¹⁰ *Klochinski v. Shores Lumber Co.* (1896) 93 Wis. 417, 67 N. W. 934 (holding that a special verdict was defective because there was no finding of the employer's knowledge of the need of instruction). "It is not negligence to employ one who is physically and mentally qualified for the business, merely because he has not yet had experience. It is only by instructing the inexperienced that the necessary supply of experienced help can be secured." *Gorman v. Minneapolis & St. L. R. Co.* (1889) 78 Iowa, 509, 43 N. W. 303 (man twenty-two years of age hired as brakeman). Where a father hires out his son for the purpose of piling lumber, with which business the son is somewhat familiar, having assisted his father frequently in such work, the employer may assume that the father has given his son all instructions necessary to enable him to do the work in safety to himself, and is under no obligations to warn him of danger, where no danger is apparent, and the work is not extraordinarily hazardous and dangerous. *East*

& *West R. Co. v. Sims* (1888) 80 Ga. 807, 6 S. E. 595.

¹¹ *May v. Smith* (1893) 92 Ga. 95, 18 S. E. 369.

¹² *Steen v. St. Paul & D. R. Co.* (1887) 37 Minn. 310, 34 N. W. 113. A similar consideration was relied on in another case, where it was denied that a railway company was negligent in failing to warn a brakeman of danger in coupling cars having double deadwoods, the evidence being that on seeking employment from such company he had represented himself as having had twenty-seven days' experience in such work. *Fenton v. Duluth, S. S. & A. R. Co.* (1896) 108 Mich. 284, 66 N. W. 51. But here the danger was of the obvious class,—a fact which, under the doctrine of the Michigan court, was enough of itself to preclude recovery. See § 238, *supra*.

¹³ *Stanley v. Chicago & W. M. R. Co.* (1894) 101 Mich. 202, 59 N. W. 393.

¹⁴ *McDermott v. Iowa Falls & S. C. R. Co.* (1891; Iowa) 47 N. W. 1037.

employment, with regard to which he has not been instructed, unless they are so obvious that an inexperienced man would escape them by the exercise of ordinary care.¹⁵ In line with this decision is another to the effect that the representation of the servant that he has had experience in the work for which he was hired does not operate as an estoppel, but is only a circumstance to be considered as bearing upon the question of negligence *vel non*.¹⁶ The point is a nice one; but the view adopted in the two cases last cited seems to the present writer to be preferable to the other. There are manifest and cogent objections to the theory that, because the servant has made false statements which it is advantageous for the master to believe, the latter is entitled to shut his eyes deliberately to obvious facts which indicate that the former is not telling the truth. It seems impossible to argue, with any show of reason, that the master is absolved altogether, by anything which the servant may say, from the duty of using proper care; and this is virtually the effect of the decisions in which it is laid down that the inability to maintain the action is deducible, as a conclusion of law, whenever it appears that the servant had made express representations as to his competency.

In cases where the question is whether the master should or should not have seen the necessity for instruction the servant is supposed to be a person in complete control of his mental faculties. No duty to warn him can be predicated, when in fact he was in no danger except from unanticipated possible consequences of sudden fright.¹⁷

The fact that an employee asked for no instruction, and gave no sign that he was not familiar with the method by which an order could properly be obeyed, will sometimes strengthen the inference that there was no culpability on the master's part in omitting instructions.¹⁸ But it seems clear that the omission of the servant to request information cannot be, of itself, a differentiating factor in any case where the circumstances otherwise indicate that he ought to have been instructed.¹⁹

¹⁵ *Louisville & N. R. Co. v. Miller* (1900) 43 C. C. A. 436, 104 Fed. 124. *Co. v. Watts* (1885) 63 Tex. 549. In the same case, in (1885) 64 Tex. 568, however, an instruction was approved which made the master liable if he knew that the servant was inexperienced and uninformed as to the rules,—a very different proposition. The servant's duty to seek for information was denied. More recently the court of appeals has laid down that the knowledge of a railroad company that one employed as a switchman is inexperienced requires it to give him warning as to

¹⁶ *Ellen v. Girard* (1900) 43 C. C. A. 439, 104 Fed. 127.

¹⁷ *Girard v. Girard* (1900) 177 Mass. 57, 58 N. E. 179.

¹⁸ *Crown v. Orr* (1893) 140 N. Y. 450, 35 N. E. 648.

¹⁹ In Texas it has been held not to be the duty of the master to instruct a servant respecting the rules, regulations, and usages by which the service is governed, unless he is asked for such information, or unless he knew the serv-

Many of the statements of the circumstances under which a master is held liable on the ground of a failure to instruct do not take account of the necessary element of his knowledge of the need of instruction, and to this extent are imperfect as formal enunciations of the rule. But the omission is evidently merely accidental, due to the fact that the court was emphasizing one particular aspect of the duty.²⁰

242. Relation of the duty of instruction to the defenses of assumption of risks and contributory negligence.— The third of the facts enumerated in § 235, *ante*, as representing the evidential prerequisites to the maintenance of the servant's action, indicates what is, for practical purposes, the most important point to be remembered in connection with these actions, *viz.*, that any case which is submitted on the theory of a breach of the duty to instruct must involve an examination into the legal effect of evidence which is equally competent upon the question whether the servant shall, as a result of his knowing the conditions under which he is working, be charged with the legal consequences of an assumption of the risks, or of contributory negligence. In one point of view it may be said that the object of imparting information to the servant is to put him on the same

the particular dangers of his employ- *Co. v. Johnson* (1893) 38 Neb. 244, 56 ment, though he does not seek it. *Gel-* N. W. 967. In the opinion in *Consoli-*
veston, H. & S. A. R. Co. v. Hughes dated *Consolidated Coal Co. v. Haenni* (1893) 146 (1899) 22 Tex. Civ. App. 134, 54 S. W. Ill. 614, 35 N. E. 162, one of these defective statements is found; but by the

²⁰ As examples of this logical incompleteness, such statements as the following may be referred to: If the master knows of danger which the servant does not, it is clearly the duty of the master to communicate his knowledge of the danger to the servant. *Griffiths v. London & St. K. Docks Co.* (1884) L. R. 12 Q. B. Div. 495. A work man must know the dangers of his employment by actual experience in the employment, or by the instructions of his employer, before he can be held to have assumed them. *Rummel v. Dilworth* (1890) 131 Pa. 509, 19 Atl. 345, 346. A master is bound to inform his servant of facts within his knowledge affecting the safety of the servant in the service to be performed, when the latter is ignorant of such facts. *McGowan v. La Plata Min. & Smelting Co.* (1882) 3 McCrary, 393, 9 Fed. 861. A master who withholds from his servant such information as is necessary to enable him to provide for his own safety does so at his own peril. *George H. Hammond*

charge of the trial judge the master's knowledge of the servant's inexperience was made a prerequisite of recovery. In *Mather v. Rylston* (1895) 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464, the ignorance of the plaintiff was established, but nothing is said as to the employer's knowledge of his ignorance. The implication apparently is that the danger that dynamite may explode from the jarring of machinery or from the overheating of a room is one which the employer is bound to know not to be within the comprehension of a man hired merely to run machinery, unless he has been specially instructed. But the rule is quite broadly laid down that, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers or laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained.

footing as a servant who, in consequence of his possessing certain knowledge, is held to have undertaken the responsibility of protecting himself against the risks to which such knowledge relates. It would manifestly be unjust to charge the servant with an assumption of a risk which the master's own breach of duty kept him from having an opportunity to assume or escape from.¹ The servant takes the hazard

¹ *Northwestern Fuel Co. v. Danielson* (1893) 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915. A similar conception is apparent in the following statements:

Where an employee engages in work "new to him he should be instructed in it, and if he is not acquainted with the latent dangers incident to it they should be explained to him, that he may, so far as is consistent with a proper performance of it, avoid them. In such case he is not presumed to know whether his employer has furnished appliances which are reasonably safe and in ordinary use, and he is not chargeable with an assumption of the risks involved in the failure to provide them." *Bannon v. Lutz* (1893) 158 Pa. 166, 27 Atl. 890. "He [the servant] does not assume latent dangers known to the master that are actually unknown to him, and that one of his capacity and experience would not have known by the use of ordinary care. It is the duty of the master to notify the servant of such dangers." *Bohn Mfg. Co. v. Erickson* (1893) 5 C. C. A. 12 U. S. App. 260, 55 Fed. 9. The question, indeed, on this branch of the case, is not of due care on the part of the plaintiff, but whether the cause of the injury was one of which he knowingly assumed the risk, or one of which, by reason of his incapacity to understand and appreciate its dangerous character, or the neglect of the defendants to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences." *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506. The rule that the master is required to inform his servant of dangers pertaining to his duties is true as to dangers which are obvious, and which the servant would necessarily see. . . . It is also true of the ordinary dangers pertaining to a particular service, and which all persons who engage in it are presumed to know. But the statement is far from being universally true. The true rule on this subject is well stated in Wharton on Negligence, § 206. It is there said that

a 'servant generally assumes only those risks of which he has expressed or implied notice. Some risks are so obvious that notice of them will be presumed. Where there are special risks in an employment, of which the employee is not, from the nature of the employment, cognizant, or which are not patent in the work, it is the duty of the employer to notify him of such risks, and on failure of such notice, if he is hurt by exposure to such risks, he is entitled to recover from the employer.' " *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92. A superior is bound to know whatever may endanger the person or life of an employee in the discharge of the duties of his employment, and is bound specially to warn him of the nature of the danger, unless said employee well knows of the existence of the hazard or risk, and willingly exposes himself to it. *Stucke v. Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342. The rule that the employee impliedly assumes the risks of the service, and of such dangers as are obvious and open to ordinary observation, does not embrace such risks as the employer knows, or which, by the exercise of reasonable care, he might know, beforehand, that the employee, by reason of his immaturity and inexperience, is ignorant of, or such as the employer knows the employee, without experience, cannot appreciate or avoid without instruction or warning. *Louisville, N. A. & C. R. Co. v. Frachon* (1886) 110 Ind. 18, 9 N. E. 594. The master is only bound to give such instructions as are reasonably necessary in order to enable the servant to understand the perils to which he is exposed by reason of his employment. A servant is held to take the risk of such dangers as are known and understood. *Ciriac v. Merchants' Wooden Co.* (1888) 146 Mass. 182, 15 N. E. 579. The master's duty to provide a suitable place for work may be modified by a sufficient warning of danger, so that, after it, an employee will be held to assume the risks of which he knows and to which his attention has

of the employment. But if the employer creates, without notice to the employee, some new and unusual conditions involving an unexpected or unanticipated danger, and the servant, while using proper care and diligence, meets with an accident as a result of the changed conditions, it is only reasonable that he should be indemnified.² "The employer in such a case is in this dilemma: Either it was reasonably practicable for him to use appliances by which the accident would have been avoided,—in which case he should have done so; or, if it was not, sufficient warning should have been given to those endangered to enable them to escape the danger."³

The evidential correlation between the duty of instruction and the defenses based on the servant's knowledge of the risk is so intimate that, in many of the reported cases, it seems to have been a mere matter of accident that they were tried on the theory of a breach of the duty, rather than on the theory that the defenses were available. Ordinarily it makes no difference which of these theories is relied upon, but to this rule there are some exceptions.

In the first place, a servant who seeks to recover damages under a

been directed. *Honohan v. New American File Co.* (1890) 17 R. I. 141, 20 Atl. 268. In *Rummel v. Dilworth* (1890) 131 Pa. 520, 19 Atl. 345, 346, the defendant's counsel had questioned the correctness of the following passage from the opinion on the former appeal of the case (1886) 111 Pa. 343, 2 Atl. 375: "The plaintiff cannot be supposed to have assumed to have accepted in advance a peril which he could not estimate, and the extent of which, for lack of experience, he could not have known." The court explained its meaning: "It was not meant to assert that the dangerous character of a piece of machinery, a bridge, or an effort to cross a railroad track in front of a moving train, should be determined by the result of an experiment in each case, but that a workman must know the dangers of his employment by actual experience in the employment, or by the instructions of his employer, before he can be held to have assumed them. In other words, it is not just to the employee to hold him to have assumed dangers of which he has no knowledge by experience in the business, or by the warning and instruction of his employer. Such risks cannot be estimated, because they are not known to exist, or because their real character and extent can only be known by familiarity with the business, or information from one who has such familiarity." The

fact that a servant upon entering the employment received from the master a specific promise that instructions would be given is sufficient to negative the inference of an assumption of the risk. *McCormick Harvesting Mach. Co. v. Burandt* (1891) 136 Ill. 170, 26 N. E. 588.

²*O'Neil v. St. Louis, I. M. & S. R. Co.* (1881) 3 McCrary, 423.

³*Smith v. Baker* [1891] 8 A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 167, 55 J. P. 660, 40 Week. Rep. 32. "If the master knew, or under the circumstances ought to have known, that a machine in use was out of repair, and dangerous, it was his duty to see that it was put in proper repair, or to warn those using it of the danger, if they were ignorant of it." *Rice v. King Philip Mills* (1887) 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101. For other cases in which the courts have recognized a similar conception of the existence of two alternative duties, one or other of which the master is bound to discharge, see—*Vaughan v. Cork & Y. R. Co.* (1860) 12 Ir. C. L. Rep. 297; *George H. Hammond & Co. v. Schermerhorn* (1887) 112 Ind. 246, 13 N. E. 866; *Louisville, N. A. & C. R. Co. v. Bates* (1897) 108 Ind. 564, 45 N. E. 108; *Louisville & N. R. Co. v. McGee* (1894) 107 Ala. 645, 18 So. 75; *Atlantic Lime & Cement Co. v. Calvey* (1893) 45

complaint of which the gravamen is a breach of the duty to communicate certain facts will often place himself in a less advantageous position than if he had relied generally upon the existence of the conditions indicated by these facts as charging the master with a want of care in the furnishing or maintenance of the instrumentalities. Manifestly, the breach of a duty to instruct is at once negatived by proof of the servant's knowledge, actual or constructive, of the risk; while if the master has elected to rely upon the defense of contributory negligence, such proof will not necessarily and under all circumstances preclude the servant from recovering in the action.

In the second place it is to be observed that proof of the nonperformance of the duty of instruction may sometimes cut short the case, in the servant's favor, at a stage which will preclude the master from relying on the defense of common employment, which involves an irrebuttable presumption as to the acceptance of a risk. (See chapters XXVI., XXVII., *post.*) Such a case arises where the injury was caused by the negligence of a co-servant, but the plaintiff was in an unfamiliar environment, where he did not understand the character of the risks to which he would be exposed by such negligence.⁴

243. Relation of the duty of instruction to the duty of employing competent servants.—In most cases the injury which is inflicted by breach of the duty to instruct was received by the servant who ought to have been instructed. But it is clear that, if the injury was due to the fact that a fellow servant was not fit for his position, owing to the want of proper instruction, the master may be held responsible.¹ See chapter XIII., *ante*. On the other hand, a servant cannot maintain an action for an injury caused by the negligence of a coemployee who has received sufficient instruction to qualify him for his duties.²

B. DUTY OF INSTRUCTION CONSIDERED WITH REFERENCE TO THE EXPERIENCE OR INEXPERIENCE OF THE SERVANT.

244. Generally.—In many cases the only question to be considered

III. App. 343; *Dorrer, T. & Ft. W. R. Co. v. Smock* (1897) 23 Colo. 456, 48 Pac. 681; *Cutler v. Oregon Short Line & C. N. R. Co.* (1892) 21 Or. 450, 28 Pac. 497.

¹ See *Stucke v. Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342, where a servant ordered on the spur of the moment to repair a car was injured by another which ran through an open switch.

² Recovery has been allowed where a servant was injured by the unskillful

manner in which a machine was operated by an inexperienced co-servant who was put to work without receiving any instruction as to the proper manner of handling it. *Lebbeling v. Struthers* (1893) 157 Pa. 312, 27 Atl. 720.

³ The owner of a freight elevator is not negligent, so as to be liable for an injury to an elevator boy over fifteen years of age who "knew all there was to do with the elevator," where he was injured while he was leaning against a

is the existence or nonexistence of culpability, as determined with reference to the broad principle that a legal obligation to instruct a servant respecting a danger is predicable or not according as a man of full age and ordinary intelligence, in the exercise of ordinary care, was or was not capable of seeing and comprehending it.¹ But it frequently happens that the evidence indicates either that the servant was not a person of the normal capacity contemplated by this principle, or that the risk to be encountered was of such a nature that even the possession of a normal capacity would not enable him to appreciate it without special training for, or a practical acquaintance with, the work to which it was incident. The presence of one or both of these elements will frequently render it impossible to say, as a matter of law, that the duty of instruction was not owed to the servant, when, if they were abstracted from the case, the plaintiff would not be allowed to retain a verdict in his favor rendered on the theory that such a duty existed. The qualifying effect of these elements, when considered with reference to the general principle adverted to above, is indicated by the statement that the duty of instruction "does not extend to dangers open to ordinary observation, except in cases of youth, inexperience, ignorance, or want of capacity of the servant."² The same elements, when considered as giving rise to a positive obligation, suggest such language as that used in the following extract from a Massachusetts decision:

"Where an employer knows the danger to which his servant will be exposed in the performance of any labor to which he assigns him, and does not give him sufficient and reasonable notice thereof, its dangers not being obvious, and the servant, without negligence on his own part, through inexperience, or through reliance on the directions given, fails to perceive or understand the risk, and is injured, the employer is responsible. The dangers of a particular position or mode of doing work are often apparent to a person of capacity or knowledge of the subject, while others, from youth, inexperience, or want of capacity, may fail to appreciate them; and a servant, even with his own consent, is not to be exposed to such dangers, unless with a struc-

beam of the elevator tying his shoe, in consequence of the sudden starting of the car by a new employee whom he had previously instructed as to the manner of starting and stopping the elevator. *Sullivan v. Lally* (1896) 166 Mass. 265, 44 N. E. 221.

of the statement in the text, see *Johnson v. Ashland Water Co.* (1890) 77 Wis. 51, 45 N. W. 807; *Collins v. Laconia Car Co.* (1894) 68 N. H. 196, 38 Atl. 1047. See, generally, cases cited in § 394, *post*.

² *Collins v. Laconia Car Co.* (1894) 68 N. H. 196, 38 Atl. 1047.

¹ For examples of language suggestive

tions and cautions sufficient to enable him to comprehend them, and to do his work safely with proper care on his own part."³

Immature age is apt to be accompanied by inexperience, and these two factors often appear in the same case; but as they involve distinct conceptions, it will be necessary to consider them separately.

245. Servant's experience; deductions from.—(See also § 250, *infra*.)

—An obvious corollary of the general principle stated in § 238, *supra*, is that a master is not bound to give instructions to a servant who has acquired sufficient special knowledge to enable him to appreciate the perils of the employment which he has undertaken. Such knowledge may be the product either of a technical education, or of actual participation in practical work; but, for reasons which are obvious, it is usually derived from the latter source by those subordinate servants who constitute the majority of the sufferers in employers' liability cases. In this point of view, therefore, the investigation is almost invariably concerned with the question whether the period during which the injured person had been engaged in duties similar to those which he was discharging at the time of the accident was of such a length that he ought to have comprehended the risks to which he was exposed. How long a period must have thus elapsed before this obligatory comprehension will be attributed to him, as a matter of law, depends upon the nature of the employment and the other circumstances involved. Where the appliance which caused the injury was a simple one, and the phenomena indicative of danger are readily intelligible, it will be presumed that the very briefest acquaintance with the conditions should have conveyed the necessary information to the servant. But in the case of most industrial occupations, that information, and the capacity for self-protection which accompanies it, can

¹ *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115. See also the following passages: "It may frequently happen that the dangers of a particular position for, or mode of doing, work, are great, and apparent to persons of capacity and knowledge of the subject, and yet a party, from youth, inexperience, ignorance, or general want of capacity, may fail to appreciate them. It would be a breach of duty on the part of a master to expose a servant of this character, even with his own consent, to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them, and to do his work safely, with proper care on his own part." *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396. "If they [employees] are young, or without expe-

rience in the use of the tools or machinery they are to handle, it is his duty to see that they are instructed in these particulars and warned of such dangers as are peculiar to the use and care of the machinery with which their labor brings them into contact." *Ross v. Walker* (1891) 139 Pa. 48, 21 Atl. 157, 159. Cited in *Lebbering v. Struthers* (1893) 157 Pa. 312, 27 Atl. 720. Similar phraseology is found in *Hughes v. Chicago, M. & St. P. R. Co.* (1891) 79 Wis. 264, 48 N. W. 259; *Rooney v. Sewall & D. Cordage Co.* (1894) 161 Mass. 153, 36 N. E. 789; *Ciriack v. Merchants' Warehouse Co.* (1890) 151 Mass. 152, 6 L. R. A. 733, 23 N. E. 829; *Consolidated Coal Co. v. Haenni* (1893) 146 Ill. 614, 35 N. E. 162, Affirming (1891) 48 Ill. App. 115.

be acquired only by a more or less protracted experience in the daily routine of the business; and this fact receives due recognition when the existence or absence of the duty of instruction is being determined. As a general rule, it may be said that, if the case was one in which some experience at all events was requisite to enable the servant to understand the danger which caused the injury, a court will very seldom deem itself warranted in declaring the action not to be maintainable, where it appears that the servant had been engaged upon the work in question only for a few days before the accident. The particular circumstances under which a servant's right of recovery has been affirmed or denied on the ground of his experience or lack of experience are indicated by the cases cited in §§ 394-397, *post*.

246. Servant's inexperience; deductions from.—(See also § 245 *supra*.)—The mere fact that a servant was inexperienced does not entitle him to recover on the ground that he ought to have been instructed as to the dangers of his work.¹ But it is well known that a case in which an inexperienced servant is required to use a dangerous instrumentality stands on a different footing from one in which the same instrumentality is handled by a practised and skilful workman.² One deduction drawn from the difference thus recognized is that a complaint is not subject to demurrer if the substance of the averments is that the instrumentality that caused the injury was a dangerous one, and that the injured servant was inexperienced and had received no instruction as to its dangerous quality.³ Another is that the master cannot be pronounced, as a matter of law, free from negli-

¹ A charge is erroneous which in effect declares that, given an uninstructed, inexperienced employee, not comprehending the danger, but using ordinary care, and an injury to such an employee caused by that danger, a recovery must follow; for, under such an instruction, the employee would be able to recover even though the danger was one which he ought to have appreciated. *Craven v. Smith* (1894) 89 Wis. 119, 61 N. W. 317.

² *Wheeler v. Wason Mfg. Co.* (1883) 135 Mass. 294. "If the business is one with which he (the servant) is not familiar, he has a right to expect that its dangers will be pointed out to him, and that he will be instructed in those things necessary for him to know in order to his own safety." *Rummel v. Dilworth* (1890) 131 Pa. 519, 19 Atl. 345, 346. A master who has knowledge of the risks and dangers, not discernible, which are incident to the work to be

performed by a servant of whose inexperience the master is aware, cannot exonerate himself from liability for an injury to the servant without negligence on the latter's part, on the ground that the servant failed to exercise the same degree of skill to avoid injury as the more experienced workmen, where no information as to the precautions and care necessary for him to take was given. *Anderson v. Daly Min. Co.* (1897) 15 Utah, 22, 49 Pac. 126.

³ *Greenberg v. Whitcomb Lumber Co.* (1895) 90 Wis. 225, 28 L. R. A. 439, 63 N. W. 93 (saw alleged to be defectively and insecurely fastened to its shaft). A complaint is not demurrable which alleges that the servant—a common laborer in a factory—was not instructed as to the dangers incident to wiping the water from a moving belt with a gunny sack. *Norfolk Beet-Sugar Co. v. Right* (1898) 56 Neb. 162, 76 N. W. 566.

gence, where the testimony fairly warrants the inference that the work in question was abnormally dangerous to an inexperienced employee, and that he had received no instructions as to the particular perils to be avoided and the proper means of avoiding them.⁴ The essential import of this rule, in a purely logical point of view, is, manifestly, that the plaintiff is allowed to recover, on the ground of inexperience, in many states of the evidence which, if this element were absent, would be deemed to negative the existence of any obligation to instruct, for the reason that the servant would be conclusively presumed to have understood the dangers involved. Under such circumstances the fact that the person injured was of mature years is not decisive, but is merely a matter for the careful consideration of the jury in determining whether he fully understood and appreciated the dangers of his position.⁵

As the decisions in which it has been held warrantable for a jury to find that the servant ought to have been instructed because he was inexperienced, and the decisions in which it has been denied, for the same reason, that the action was barred by one or other of the defenses based upon the imputed knowledge of the injured person, are based upon grounds which are essentially identical, it has been deemed inadvisable to separate these two classes of cases. They are accordingly tabulated together in the chapter in which the servant's constructive knowledge of various risks is discussed at length. See § 394, *post*.

The rule which thus defines the respective provinces of the court and the jury in cases where the inexperience of the servant is a factor is deemed to be subject to two exceptions. In the first place, it is plain that the inexperience of the servant ceases to be material if the evidence shows directly and conclusively that he fully understood the danger in question.⁶ Secondly, it is held that if the danger

⁴ It has been laid down that where a servant testifies that he had no experience in the management of the machine by which he was injured, and received no instruction or warning as to the dangers incident to its use, it will not be held, as a matter of law, that he appreciated those dangers. *Thompson v. Edward P. Allis Co.* (1895) 89 Wis. 523, 62 N. W. 527.

⁵ *Ingerman v. Moore* (1891) 90 Cal. 110, 27 Pac. 306.

⁶ In *McGinnis v. Canada Southern Ry. Co.* (1882) 49 Mich. 466, 12 N. W. 819, where the plaintiff was injured by an unblocked frog, he attempted to

recover on this ground, among others: That he, being immature and inexperienced, was sent by defendant into danger the full extent of which he did not comprehend, and that this was culpable fault on the part of the defendant, which should render it liable for all injurious consequences. This theory the supreme court declared to be inapplicable under the circumstances, saying:

"The first ground was shown to be untenable by the plaintiff's own evidence. He was past twenty years of age, was not shown to be wanting in average intelligence of those of his age, and his duties were explained to him when he en-

is one which comes under the description of "obvious," "apparent," "manifest," etc., instruction is not obligatory merely because the work is new to the servant.⁷ This doctrine, that culpability cannot be predicated of the omission to instruct an inexperienced employee as to a danger observable by anyone of ordinary intelligence, has sometimes been referred to the consideration that the servant, knowing there was such a danger, may be expected to proceed with great caution until he becomes familiar by experience with the forces with which he has to deal.⁸ But such a conception, even if it be conceived to rest on a sound basis of logic and fact, which is by no means clear,-- seems to be quite supererogatory in this connection.

C. DUTY OF INSTRUCTION CONSIDERED WITH REFERENCE TO THE SERVANT'S MINORITY.

247. Generally.—The considerations which actually determine the nature and extent of the obligation to instruct a minor are sufficient in themselves to make the duty obvious. When a master takes such a person into his service, he is bound to take notice of the probability that both the natural and the acquired capacity of the employee for appreciating the dangers of the work and the proper means of avoiding them will be smaller than in the case of an adult.¹

tered upon the employment. He, besides, understood the very danger into which he fell, and had in mind the purpose to avoid it. It was thus made to appear by his own examination that he was not sent into unknown dangers, and that he was not exposed to risks which he, through immaturity, or for any other reason, failed to comprehend."

⁷*Newbury v. Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743. See, generally, cases cited in § 394, *post*.

⁸*Stuart v. West End Street R. Co.* (1895) 163 Mass. 391, 40 N. E. 180.

¹In some formal statements of the duty of instructing minors, both these elements of an inferiority of intelligence and a more limited experience are expressly adverted to. "If the youth, inexperience, and incapacity of a minor who is employed in a hazardous occupation are such that a master of ordinary intelligence and prudence would know that he is not aware of, or does not appreciate, the ordinary risks of his employment, it is his duty to notify him of them, and instruct him how to avoid them." *Bohn Mfg. Co. v. Erickson*

(1893) 5 C. C. A. 341, 12 U. S. App. 260, 55 Fed. 943. "It may be said to be laid down as a general rule, supported by authority, that persons who employ children to work with or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion, and care as are usual among children of the same age, under similar circumstances, and are bound to use due care, having regard to their age and inexperience, to protect them from the dangers incident to the situation in which they are placed; and as a reasonable precaution in the exercise of such care in that behalf, it is the duty of the employer to so instruct such employees concerning the dangers connected with their employment, which from their youth and inexperience they may not appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom." *Bohn Mfg. Co. v. Erickson* (1889) 46 Ohio St. 283, 3 L. R. A. 20 N. E. 466. There exception was taken by the defendant to the following in-

In view of this probability, it is clearly not an unreasonable inference that the master fails to fulfil the duty incumbent on him as a prudent man, if he allows the servant to commence the performance of his contract without examining into his actual qualifications. If this examination discloses, or would, if made with reasonable care, have disclosed, the fact that the servant did not comprehend the risks

struction: If the plaintiff was injured in consequence of the defendant's negligence, and he, "by reason of his youth and want of judgment as to the perils of his position, did some act in the discharge of his duty, as he understood it, which also contributed to his injury, but which he did not know to be likely to injure him, and he had not been properly advised and instructed in regard thereto," he cannot recover. But the supreme court said: "The instruction negatives any inference of negligence; for, according to it, to enable the plaintiff to recover, it was necessary for the jury to find that he did not know that the act which he did, that contributed to his injury, was likely to injure him, and that this want of knowledge was owing to his age and lack of judgment and the failure of the defendant to properly instruct him, and that the act so done by him was in the discharge of his duty as he understood it. If . . . it is the duty of persons employing children in dangerous situations, to properly instruct them concerning the dangers which on account of their youth and inexperience they may not understand, it would seem to follow, as a necessary conclusion, that such employee, who has not been so instructed, and who, while in the discharge of his duty as he understands it, suffers an injury in consequence of the employer's negligence, may maintain an action against his employer therefor, notwithstanding that, by reason of his youth and inexperience, and the failure of the employer to properly instruct him, he did some act, in the performance of his duty according to the judgment and knowledge he possessed, which contributed to the injury, but which he did not know and was not advised would be likely to injure him."

The duty to disclose latent dangers is said to be particularly incumbent on a master who "employs, for a hazardous and dangerous work, a child, young person, or other person without experience and of immature judgment." *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 165, 5 N. E. 187. See

also *Jones v. Fluorine Min. Co.* (1886) 66 Wis. 268, 57 Am. Rep. 269, 8 N. W. 207. In other cases, stress is laid on more limited natural capacity of young servants for appreciating the perils of their environment. *Rock v. Indiana Orchard Mills* (1886) 142 Miss. 72, 8 N. E. 401; *Sticher v. Hart* (1887) 65 Mich. 611, 32 N. W. 875.

A jury may properly be instructed that they may "consider the appreciation of the plaintiff (a minor employee) as he has been exhibited before them on the witness stand, in determining the question of his intelligence and capacity to apprehend and avoid the dangers incident to his employment." *Desell v. Henry Luther Co.* (1895) 90 Wis. 635, 64 N. W. 425.

The testimony of witnesses in an action by a minor employee against a railroad company for injuries, in speaking of him as a youth, in connection with a youthful appearance, is sufficient to show that the company knew that he was a minor at the time he was employed, and hence was negligent in failing to instruct him as to the dangers of the employment. *Tecumseh & Ft. S. R. Co. v. Preacher* (1900) Tex. Civ. App. 59 S. W. 593.

For other cases in which the duty of instructing minors is enumerated in general language, see § 244, *supra*.

In other cases the probable inexperience of such servants is the circumstance to which attention is chiefly directed. Youth is an evidence of inexperience, and greater strictness in the application of the rule as to the necessity of instruction should be required in the employment of minors than in the employment of servants of mature years, even when employed by and with the consent of the parent or guardian. *St. Louis & S. E. R. Co. v. . . .* (1877) 56 Ind. 511. "If, however, the servant, by reason of his youth and inexperience, is not aware of or does not appreciate the danger incident to the work he is employed to do, or to the place he is engaged to occupy, he does not assume the risks of his employment

to which he would be exposed, the obligation to enlighten him at once arises, as a result of the general principle adverted to in § 235, supra.

In a Wisconsin case it was considered that of the various reasons assigned by the courts for imposing on the master the duty of instructing a minor servant, the most satisfactory were these:

- "(1) That the master owes a duty towards an employee who directed to perform a hazardous and dangerous work, or to perform his work in a dangerous place, when the employee, from want of experience, or general capacity, does not comprehend the dangers, to point out to him the dangers incident to the employment, and to enable him to comprehend, and so avoid them, and that neglect to discharge such duty is gross negligence on the part of the employer.
- (2) that such an employee does not assume the risk of the danger incident to such hazardous employment, because he does not comprehend them, and the law will not, therefore, presume that he contracts

until the master apprises him of the dangers. It would be a breach of duty on the part of the master to employ a servant of this character, even with his consent, to such dangers, without first giving him such instructions and caution as would, in the judgment of men of ordinary minds, understanding and prudence, be sufficient to enable him to appreciate the dangers and the necessity for the exercise of due care and caution, and to do the work safely, with proper care on his part. *Emmet Cotton Seed Oil Co. v. Hale* (1892) 56 Ark. 232, 19 S. W. 600. "When a master engages an inexperienced servant, especially if of tender years and presumed ignorance, and places him in a place of latent or obscure danger, it is the duty of the master to instruct the servant how to do the work, and at the same time to be on his guard against the dangers;" and he is liable for injuries occasioned by failure to give such instructions. *Thell v. Carnie* (1889) 130 Conn. Ct. 101, 5 N. Y. Supp. 214, cited with approval in *New Albany Edge & Roll Mfg. Co. v. Cooper* (1892) 131 Ind. 363, 30 N. E. 294. Compare the language used in *Glover v. Dwight Mfg. Co.* (1888) 148 Mass. 22, 18 N. E. 597; *North v. P. R. Co. v. Blake* (1894) 11 C. C. A. 93, 27 U. S. App. 190, 63 Fed. 45; *Hanes v. Colchester Mills* (1894) 69 Vt. 1, 37 Atl. 269; *Dawling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298 (1890) 102 Mo. 213, 14 S. W. 751; *Lern v. Clark* (1899) 90 Md. 146, 44 Atl. 990; *James v. Rapides Lumber Co.* (1898) 50 La.

Ann. 717, 44 L. R. A. 33, 23 So. 469; *Witcher v. Memphis & C. R. Co.* (1886) 16 Lea. 394, 1 S. W. 37; *Conity v. Davidson Mfg. Co.* (1890) 180 Rap. Ind. Q. 100, 18 C. S. 2, 2.

In cases where the duty of instruction is discussed, the courts not only quietly revert to this elementary conception, and lay it down that a master is liable to an infant who has been injured in his service in consequence of being exposed to a danger which, on account of his youth and want of experience, he did not fully understand or appreciate. See, for example, *O'Neil v. Bellham Co. v. Thiller* (1899) 59 N. W. 257, 80 N. W. 821.

In *Cummins v. Gilbey* (1892) 153 Mass. 575, 30 N. E. 243, a girl seventeen years old was set to work, in the afternoon by her employer, without instructions, on a machine for skiving leather, and she endeavored to run it as another operator had done. It was not unusual for the machine to be stopped by the leather catching in it, and the rule was that a workman should then be called. She called this workman the next day, and he relieved the machine. A few minutes later she called him again, and upon his relieving the machine, he swung at her in her employer's hearing, and told her, "If this machine gets stuck again, fix it your-self." She was going to ask a few questions of her employer, but he shook his head and hands, and refused to listen, saying, "No, no, no, you do not work fast, I will send you home." This frightened her and she

to assume them."³ These reasons do not exhaust the gist of the matter; and, taking them for granted, they are worth, it is felt, no more comment to say that the second of these views is merely a logical result of the first. The proper standpoint, as already noted, is rather that which permits us to view the more extended duty of instruction which is predicated in regard to minors as a special application of the general principle that the degree of care which is obligatory upon a person who owes a duty to another varies with the circumstances to be provided for. A servant who possesses less than the average amount of intelligence is clearly more likely to be injured, in any given case, than one whose intelligence comes up to that standard. That the intelligence of a minor usually fails to come up to this standard is, as has been pointed out, a fact of which the master is bound to take notice. The knowledge thus imputed may properly be deemed a sufficient warning to him that a minor servant will be exposed to greater danger than an adult, unless he take some additional precautions with a view to diminishing the risks of injury. Clearly, the additional precaution which is most readily suggested by the situation is that the presumably inadequate and defective information of the young servant should be supplemented by imparting to him that amount of knowledge which will, as respects the work to be done, place him in the same position as a servant of mature years. Or, to put the same thought in a somewhat different form, it may be said that the essential basis of the rule is that the master is not justified in exposing a servant to any extraordinary risks, and that a servant who cannot, by the exercise of his own unaided intelligence, comprehend the dangers incident to his environment, must necessarily be exposed to such risks, relatively to servants who are capable of comprehending the same dangers. That the duty of instructing minors is really referable to this consideration is strongly indicated by the language used in the earliest cases in which the liability of a master to servants of tender years was discussed. The significance of these cases in the present connection is due to the fact that, when they were decided, the theory that there was a positive duty of instruction had not found a footing in the courts.⁴

worked faster, and when the machine was stuck again she tried to relieve it, as she had seen the others do, and was injured. In an action against the employer for such injuries, the evidence was that she was a very dull girl, and was slow in her work as compared with the other girls; and she was cross-examined at great length before the jury.

It was held that the questions whether the defendant was negligent in thus setting her to work, and whether she was in the exercise of due care, were properly submitted to the jury.

³*James v. Flannery Min. Co.* (1886) 66 Wis. 268, 57 Am. Rep. 269, 26 N. W. 267.

⁴In *Bartonshill Coal Co. v. McGuire*

The prerequisites to the establishment of a *prima facie* liability on the master's part are the same whether the action is brought by the minor himself or by the minor's father.⁵

248. No duty to instruct minors as to risks which they presumably comprehend.—The rule actually applied by the courts is merely this: The master is liable for failure to instruct a minor, "unless both the danger and the means of avoiding it are apparent and within the comprehension of the servant."¹

Ordinarily it is within the function of the jury to say whether a minor servant comprehended a work in such a sense as to absolve the employer from the obligation to instruct him. It is only when the proper inference from the testimony is so clear as to be free from doubt that it becomes a matter of law for the court.² But unquestionably the situations in which the inference of a breach of that obliga-

(1858) 3 Macq. H. L. Cas. 311, the Lord Chancellor, referring to the Scotch case of *O'Byrne v. Burn* (1854) 16 Sc. Sess. Cas. 2d Series, 1025, where a young girl was injured while attempting, in obedience to an order of the defendant's foreman, to remove some waste clay from the moving rollers in a clay-mill, said: "It was hardly possible to apply the principle of the servant having undertaken the service with a knowledge of the risks incident to it. She was an inexperienced girl employed in a hazardous manufactory, placed under the control, and, it may be added, the protection of an overseer, who was appointed by the defendant and intrusted with this duty. And it might well be considered that, by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed." Compare also the following Scotch cases founded on the increase of obligations which the minority of a servant entails upon the master, *Gemmills v. Gourcock Co.* (1861) 23 Sc. Sess. Cas. 2d Series, 425; *M'William v. M'William*, 23 Sc. Sess. Cas. 2d Series, 1082; *Triall v. Smith* (1873) 11 Macph. 888; *Darby v. Duncan* (1861) 23 Sc. Sess. Cas. 2d Series, 529. The same conclusion may be drawn from the remark made, *arguendo*, in *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739, that the plaintiff being a mere youth, without experience, and not familiar with machinery, could not be expected to know the peril of the new work which he was ordered to do, and might be supposed to have entered upon the execu-

tion of the order without apprehension of danger, owing to his having relied, as he was justified in doing, on the judgment of his superior.

⁵ A complaint in an action by the minor's father must show one of three things: (1) That the child was too young to be put to the service he was required to perform; or (2) that neither he nor the plaintiff had notice or knowledge of the augmented danger caused by the master's neglect; or (3) that the master, knowing the age and inexperience of the child, neglected to give him the necessary warning and instruction. *Brazil Block Coal Co. v. Young* (1889) 117 Ind. 520, 20 N. E. 423. Compare the statement of the master's obligations, in *Missouri, K. & T. R. Co. v. Evans* (1897) 16 Tex. Civ. App. 68, 41 S. W. 80.

¹ *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 165, 5 N. E. 187. For a similar form of exceptive statement, see *Coffey v. Phillips* (1897) 21 Misc. 663, 47 N. Y. Supp. 1105.

² *Wolski v. Knapp-Stout & Co. Co.* (1895) 90 Wis. 178, 63 N. W. 87. The finding of the jury is of course conclusive, whenever there is a conflict of evidence as to whether a minor has received proper instructions, or has, by experience or in any other way, acquired knowledge of the danger incident to the appliances he is handling. *Taag v. Le George* (1893) 155 Pa. 368, 25 Atl. 671. As to the provinces of court and jury in regard to the determination of questions of constructive knowledge, see generally, § 390, *post*.

tion would be deemed unwarrantable in the case of a minor servant are much less numerous than those in which a similar inference would be regarded as improper if recovery was sought solely upon the ground of the servant's inexperience. The precise extent of this enlargement of the master's responsibility virtually depends, in the last analysis, upon a court's opinion as to justifiability of allowing the jury to determine the question of the servant's constructive knowledge of the given risk. As might be expected, the result of referring the existence or nonexistence of the duty of instruction to this extremely nebulous standard has been the rendition of not a few antagonistic judgments in respect to essentially similar facts. See, generally, § 399, note 1, *post*.

In some cases the doctrine seems to be affirmed that whenever the work assigned to a young servant is in its nature hazardous an absolute duty immediately arises to give him such instructions as will enable him to comprehend the perils which it involves.³ The differentiating test thus suggested is manifestly inconsistent with the general principle stated in § 238, *supra*, which indicates that, from a logical standpoint, the comparative safety or unusually hazardous nature of the work is a wholly immaterial element, and that, in cases where a breach of the duty to instruct is relied upon as the ground of action, the only essential question is whether the injured person appreciated, or ought to have appreciated, the risk to which his injury was traceable. That principle involves the corollary that, with respect to risks which a young and inexperienced employee is competent to appreciate, he stands upon the same footing as an experienced adult.⁴

³ *Smith v. Irwin* (1889) 51 N. J. L. 507, 18 Atl. 852, approving of a charge to that effect. Compare the language used in *Jones v. Florence Min. Co.* (1886) 66 Wis. 268, 57 Am. Rep. 269, 28 N. W. 207, § 247, *supra*.

⁴ *Couillard v. Tecumseh Mills* (1890) 151 Mass. 85, 23 N. E. 731; *Goff v. Vortolk & W. R. Co.* (1888) 36 Fed. 299; *De Graff v. New York C. & H. R. R. Co.* (1879) 76 N. Y. 125; *Crown v. Orr* (1893) 140 N. Y. 450, 35 N. E. 648; *Jones v. Roberts* (1894) 57 Ill. App. 56; *White v. Wittmann Lithographic Co.* (1892) 131 N. Y. 631, 30 N. E. 236; *Henden v. Smithville Mfg. Co.* (1861) 29 Conn. 548; *Herdman-Harrison Mill Co. v. Spahr* (1893) 145 Ill. 329, 33 N. E. 994; *Probert v. Phipps* (1889) 149 Mass. 258, 21 N. E. 370; *Gilbert v. Gould* (1887) 144 Mass. 601, 12 N. E. 308; *Lucke v. Berlin Mach. Works* (1871) 88 Wis. 412, 60 N. W. 711; *Sau-*

born v. Atchison, T. & S. F. R. Co. (1886) 35 Kan. 292, 10 Pac. 860; *Lever v. Bielow* (1893) 6 Ind. App. 677, 34 N. E. 128.

"No duty rests upon a master to notify even a minor of the ordinary risks and dangers of his occupation, which the latter actually knows and appreciates, or which are so open and apparent that one of his age and capacity would, under like circumstances, by the exercise of ordinary care, know and appreciate." *Treatle v. North Star Wooden-Mill Co.* (1894) 57 Minn. 52, 58 N. W. 832.

It has been held, under the Alabama employers' liability act (see Volume II., chapter XXXVII.), that a boy sixteen years old, employed at work which does not ordinarily endanger a person, who was sent by his employer to perform dangerous work which he was able and knew perfectly well how to do, and with the dangers of which he was acquainted,

The question whether a minor is chargeable with that complete comprehension of his environment which is sufficient to relieve the master of the duty of explaining to him the peril of the work must obviously be resolved by considering (1) the presumable extent of his intelligence and capacity, as inferable simply from his age; (2) the actual extent, observed or observable, of his individual intelligence and capacity, exceeding or falling short of the average; (3) the extent of his opportunities for ascertaining by experience the nature of the hazard incurred by him in entering and continuing in the employment. Of these three factors in the problem, the first and the third are much the most important. But the second has, though rarely, been taken into account, in connection with the others, as corroborating the conclusion that the master should or should not have instructed an infant. Possibly it may be said that a court will be more disposed to lay stress upon this factor when the evidence tends to show the possession of a measure of intelligence less than the average, and the inference will therefore be rather in the plaintiff's favor, than when it would have the effect of prejudicing him by making the superiority of his faculties ground for ascribing to him a knowledge disabling him from maintaining an action.⁵

Under appropriate circumstances, presumptions as to the intelligence of a minor may be allowed to run backwards.⁶

may not recover for injuries caused in its performance on the ground that he received no instruction from his employer. *Worthington v. Goforth* (1899) 124 Ala. 656, 26 So. 531.

That it is immaterial, for the purposes of this rule, from what source the servant's knowledge is derived, see the cases cited in § 238, *infra*, some of which, as there noted, relate to minors.

⁵ See *Connors v. Grilley* (1892) 155 Mass. 575, 30 N. E. 218, § 247, note 2, *infra*. In *Leistritz v. American Zylonite Co.* (1891) 154 Mass. 382, 28 N. E. 294, two witnesses were asked whether the plaintiff—a boy eighteen years and eight months old—was above or below the average intelligence of a boy of his age. The questions were held to have been properly excluded. The court said they did not go to the extent of showing that he was manifestly incapable of understanding the risk without instruction, so that the defendant knew, or from his appearance ought to have known, that cautions and instructions were necessary. *Ciriac v. Merchants' Woolen Co.* (1899) 151 Mass. 152, 6 L. R. A. 733, 23 N. E. 829. It

added that the case did not call for any nice consideration of what might be shown in the case of a young child, or under other circumstances. It was enough to say that under the circumstances of the case, in view of the plaintiff's age, and of his long examination as a witness in the presence of the jury, the questions were of no material significance. In the case cited, the facts of which are given in § 249, note 6, the right to maintain the action was held to be for the jury, as there was evidence tending to show that the boy was less than the average intelligence of persons of his age.

⁶ A boy who is dull at fifteen was probably dull at fourteen. Hence, where an action for personal injuries received by a boy fourteen years old is brought upon the theory that he was put to work in a dangerous place without proper instruction, evidence that the plaintiff, who was a foreigner and was examined through an interpreter, had no memory, was not a bright boy, and had to be told once or twice what he understood, and that, if he was asked a question he would answer "something

249. Instruction of minors, considered with reference to their age merely.—In Pennsylvania the position has been taken that the age when an infant shall be presumed to have the capacity for appreciating danger is for the court, not for the jury.¹ That age has been fixed, upon the analogy of the familiar doctrine of criminal law, at fourteen years. In this state, therefore, it is always a question for the jury when a minor under that age should have been instructed.² The employer is held not to be liable if the young person had experience from which knowledge of the danger might reasonably be presumed.³ Nor is the fact that an employee was young, and that a possible injury might arise from unexpected causes, without negligence established, deemed to be a sufficient ground for holding the master responsible for the injury received.⁴ An infant more than fourteen years old is presumed to have sufficient capacity to be sensible of danger and to have the power to avoid it; and this presumption will stand until overthrown by clear proof of the absence of such discretion as is usual with infants of that age.⁵

But the theory that, at the age of fourteen years, the stage reached in the development of the child's faculties is so definite that the burden of proving his nonappreciation of the risks of the service is shifted, is contradicted by the weight of authority, and does not seem to rest upon any adequate logical basis.⁶

else," is admissible, although the witnesses only knew him after the accident. *Laplante v. Warren Cotton Mills* (1896) 165 Mass. 487, 43 N. E. 294.

¹ *Nagle v. Allegheny Valley R. Co.* (1879) 88 Pa. 35, 32 Am. Rep. 413.

² See *Strawbridge v. Bradford* (1889) 128 Pa. 200, 18 Atl. 346; *Neilson v. Hillside Coal & I. Co.* (1895) 168 Pa. 256, 31 Atl. 1091.

³ *Tagg v. McGee* (1893) 155 Pa. 368, 26 Atl. 671, where the case was held to be for the jury, the evidence being conflicting as to whether the child had been instructed, or had gained, by experience or otherwise, knowledge of the danger.

⁴ *Ash v. Verlenden Bros.* (1893) 154 Pa. 246, 26 Atl. 374 (machine started from some unexplained cause while child of thirteen was cleaning it).

⁵ *Nagle v. Allegheny Valley R. Co.* (1879) 88 Pa. 35, 32 Am. Rep. 413.

⁶ In *Ciriack v. Merchants' Woolen Co.* (1888) 146 Mass. 182, 15 N. E. 579; second appeal (1890) 151 Mass. 152, 6 L. R. A. 733, 23 N. E. 829, recovery was denied for an injury received by a boy of twelve whose person came into con-

tact with exposed gearing. The position taken was that, in the absence of anything to show the contrary, the boy must be assumed to have the intelligence and understanding usual with boys of that age, and that this assumption involved the further one that he was well aware of the danger which caused the injury, and that no instruction could have been given him which would have imparted larger measure of knowledge than that with which he was chargeable. In *Buckley v. Gutta Percha & Rubber Mfg. Co.* (1898) 113 N. Y. 540, 21 N. E. 717, it was held that a child of twelve who, after helping to operate a machine for only three days, slipped while attempting to put a cylinder in place, and in throwing out his hand to save himself brought it into contact with a cogwheel, could not recover on the ground that he had received no instruction as to the danger. In *White v. Wittemann Lithographic Co.* (1892) 131 N. Y. 631, 30 N. E. 236, it was assumed that a boy of thirteen understood the danger of getting his hand caught in cogs. In *Ludwig v. Pillsbury* (1886) 35 Minn. 256, 28 N. W. 505, it was held that a boy of

That part of the Pennsylvania doctrine which relates to the constructive knowledge of minor servants over fourteen years of age is identical with that of all the other courts; that is to say, there is no presumption of law that a minor more than fourteen years of age who applies for a position involving dangerous service is aware of the danger and needs no instruction.⁷

As regards the earlier portion of the period between the fourteenth and the twenty-first years, there is no disposition on the part of the courts to formulate any definite rule of law upon the basis merely of the servant's age.⁸ But there is some authority for the proposition that, in respect to his presumed comprehension of risks, a person who is very near his majority should be placed upon the same footing as an adult.⁹ See, however, § 291, *post*.

The above summary indicates that, whatever view is taken of the obligation of a master to instruct an infant, that duty is not an absolute one as regards the entire period of minority.¹⁰ Passages like those quoted in the note below would, if taken literally, point to a different conclusion. But they are to be construed with reference to the facts under discussion.¹¹

thirteen must have understood the danger of allowing any part of his person to extend outside the railing of an elevator. That a child of twelve who voluntarily goes about a factory and exposes himself to dangerous machinery cannot recover for injuries thus received, if he has sufficient knowledge of the machinery to be able to appreciate its character, was laid down in the charge to the jury in *Evans v. American Iron & Tube Co.* (1890) 42 Fed. 519. In *Hickley v. Horawdowsky* (1890) 133 Ill. 359, 8 L. R. A. 490, 24 N. E. 421, the court uses some rather sweeping language about the inability of a child of twelve years to comprehend the dangers created by revolving wheels, belts, and pulleys. But the effect of what was said is to be estimated with due reference to the fact that the question to be determined was merely the justifiability of a verdict against the master.

⁷ *Atlanta & W. P. R. Co. v. Smith* (1894) 94 Ga. 107, 20 S. E. 763, and cases cited in § 291, *post*.

⁸ "That the plaintiff was not a child, but was seventeen years of age, would not deprive him of the right to be warned, if, as a question of fact, the employers, or the man representing them, ought under all the circumstances to have inquired of him as to his experi-

ence, or taken notice of the probability that he was so inexperienced as to render it proper to give him warning." *Man v. Smith* (1893) 92 Ga. 95, 18 S. E. 360.

⁹ In Indiana it has been held that a servant of the age of twenty years and four months is not so young as to be within the rule that minors must be warned of the danger of the service into which they are taken and properly instructed as to the duties required of them. *Vineennes v. Gasblatt Co.* (1892) 132 Ind. 1, 31 A. 485, 31 N. E. 573.

¹⁰ An instruction which, in effect, requires the master to caution a minor as to all dangers reasonably to be anticipated, is incorrect. *Fones v. Phillips* (1882) 39 Ark. 17, 43 Am. Rep. 264.

¹¹ "In the case of young persons, it is the duty of the employer to take notice of their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate and to which they should not be exposed. The duty in such cases to warn and instruct grows naturally out of the ignorance or inexperience of the employee, and it does not extend to those who are of mature years, and who are familiar with the employment and its risks." *Rummel v. Dilworth* (1890)

250. Instruction of minors. considered with reference to their experience.—As minority is in itself an independent element which tends to negative the existence of constructive knowledge, it is clear that an action in which a minor seeks to recover damages on the ground that he was not instructed is not necessarily barred by proof that he was experienced in the work in which he was engaged.¹ The evidential significance of that fact is simply this: A minor will sometimes be declared chargeable with knowledge, on the ground of his having had a considerable amount of experience, although the circumstances may have been such that, if the same servant had had a shorter experience, or none at all, the court could not have drawn that inference, as a matter of law. A good many decisions which may perhaps be regarded as exemplifying this situation are cited in § 399, *post*. But it is seldom possible to gather with exactitude, from the language used in the opinions, whether the servant's experience was viewed as a specific differentiating element, which tended to rebut the conclusion indicated by his minority, or as a corroborative circumstance which furnished an additional reason for holding that he ought to have comprehended the risk in question.

Testimony to the effect that a minor was inexperienced introduces a second element which, like the fact of minority itself, points to the conclusion that his ignorance of the risk was excusable. Theoretically, therefore, such testimony should often turn the scale in the plaintiff's favor. But its precise weight in the cases into which it may be supposed to enter as a determinative factor (see § 399, *post*) is as difficult to estimate as that of evidence showing that a minor was experienced.

251. Position of minor servants after being properly instructed.—

The duty of instructing minors being predicated from the fact that, without such instruction, they would be exposed to avoidable dangers

131 Pa. 509, 19 Atl. 345, 346. In *Fisher v. Cooper* (1892) 131 Ind. 363, 30 N. E. 294; *Delaware & H. Canal Co.* (1893) 153 Pa. 379, 26 Atl. 18, the following instructions of the trial judge were affirmed: "There is another duty which the employer owes to a child or infant, and that is to inform him of the dangers connected with the services in which he is employed." It has also been laid down that "the law imposes upon the master, when he takes an infant into his service, the duty of explaining to him fully the hazard and dangers connected with the business, and of instructing him how to avoid them." *Reisert v. Williams* (1892) 51 Mo. App. 13.

¹ A charge is erroneous which would relieve a master of liability for injury to his apprentice by reason of hidden dangers, on the sole ground that the apprentice has been in the shop long enough to make him acquainted with the dangers complained of, even if he has never instructed him as to such dangers.

of which they are presumably ignorant, it follows that, after they have been properly instructed, their minority will usually cease to be a material factor in estimating the extent of the employer's liability. In other words, the defenses of assumption of risks and contributory negligence will then be available against them, if, under the same circumstances, these defenses would have been available against adults.¹ Compare §§ 291, 292, 348, *infra*. That the business might have been carried on in a less dangerous manner is a circumstance which is quite immaterial, where the servant has been sufficiently instructed.²

This rule, however, is subject to one important limitation which has been thus formulated: "If a person is so young that, even after full instructions, he wholly fails to understand them, and does not appreciate the dangers arising from a want of care, then he is too young for such employment, and the employer puts or keeps him at such work at his own risk."³ This principle will enure to the advan-

¹ In the following cases the defense of assumption of risks was allowed on the ground that instructions had previously been given: *Chicago Anderson Pressed Brick Co. v. Reinmeiger* (1892) 140 Ill. 334, 29 N. E. 1106; *Tinkham v. Sawyer* (1891) 153 Mass. 485, 27 N. E. 6 (warning followed by minor's own opportunities for observation); *Jones v. Florence Min. Co.* (1886) 66 Wis. 268, 57 Am. Rep. 269, 28 N. W. 207; *Zurn v. Tetlow* (1890) 134 Pa. 213, 19 Atl. 504; *Kaufhold v. Arnold* (1894) 163 Pa. 269, 29 Atl. 883; *Beckham v. Hillier* (1884) 47 N. J. L. 12; *Prentiss v. Kent Furniture Mfg. Co.* (1886) 63 Mich. 478, 30 N. W. 109; *Emma Cotton Seed Oil Co. v. Hale* (1892) 56 Ark. 232, 19 S. W. 600; *Fisk v. Central P. R. Co.* (1887) 72 Cal. 38, 13 Pac. 144; *Daester v. Mechanics' Planing Mill Co.* (1882) 11 Mo. App. 593. "There is no rule of law that a minor may not be employed about a dangerous machine; and the simple fact that a machine is dangerous does not make an employer liable for an injury received by a minor employed upon such machine. All the law requires is that the minor should be properly instructed as to the danger to which he is exposed; and if he is injured because he has not received such instruction, then, as a general rule, the employer may be held responsible. But where the minor is familiar with the machine, and its character and operation are obvious, and he is aware of and fully appreciates the danger to be apprehended from

working the machine, the fact that he is a minor does not alter the general rule that the employee takes upon himself the risks which are patent and incident to the employment." *Buckley v. Gutta Percha & Rubber Mfg. Co.* (1889) 113 N. Y. 540, 21 N. E. 717.

A case in which a minor's action was held to be barred, after instructions on the ground of contributory negligence, is *Probert v. Phipps* (1889) 149 Mass. 258, 21 N. E. 370, where a boy fifteen years old was denied recovery for an injury received while walking between the gears of two machines which just gave room to pass, the court taking the ground that, as he had been cautioned as to the danger, he was negligent in not avoiding a danger which he understood perfectly well how to avoid.

² *Rock v. Indian Orchard Mills* (1886) 142 Mass. 522, 8 N. E. 401.

³ *Hickey v. Taaffe* (1887) 105 N. Y. 26, 12 N. E. 236. Other forms in which the same principle has been stated are these: "The giving of proper instructions [at the commencement of the employment] will not relieve an employer from liability to a child, if the work required of him [at the time of the injury] was not within the scope of his employment, and not such as ought to have been required of a person of his capacity." *Hayes v. Colchester Mills* (1894) 69 Vt. 1, 37 Atl. 269. The person employed may be so young, inexperienced, and immature in judgment that no kind of warning and instruction

tage of the servant, even though the danger in question was one which, in the case of older persons, would be regarded as obvious.⁴

In determining the question whether an employee understood an instruction and comprehended the danger to which it related, it is proper and necessary to take into consideration, not only his youth and inexperience, but also the nature of the service, and the degree to which his attention while at work would need to be devoted to its performance.⁵

D. SUFFICIENCY OF THE INSTRUCTION.

252. Generally.—Stated in the most general terms, the extent of the master's obligation in regard to imparting information to a servant is to give him "such instruction as will enable him to avoid injury."¹ If the master relies on the fact that he admonished the servant of the danger which caused the injury, he must show that the warning was timely and explicit.² Merely going through the form of giving instructions is not sufficient.³ But the master's duty will be held to have been fully performed if the information which he imparted was sufficient, when supplemented by the servant's own personal observation, to enable the latter to appreciate the risks of the employment.⁴

would relieve the master from responsibility for injuries resulting from putting him at a hazardous and dangerous work. *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187. An employer remains liable for injuries received by an inexperienced boy seventeen years old, to whom work is assigned which can be performed safely only by skillful and careful mechanics, even though such boy has been duly warned and instructed as to the dangers of the work. *Missouri P. R. Co. v. Peregon* (1887) 36 Kan. 424, 14 Pac. 7. If it appears that the minor was too young to understand, even with instructions, the dangerous character of a machine, or appreciate the peril of operating it, the master is not shielded from liability merely by the fact that the minor was properly instructed in the use of the machine. *Steiler v. Hart* (1887) 65 Mich. 644, 32 N. W. 875. In *Taylor v. Wootan* (1891) 1 Ind. App. 188, 27 N. E. 502, the following statement of the rule in *Shearman & Redfield on Negligence* was adopted: "And if he (the master) knows, or, in the exercise of ordinary care and sagacity would have known, that the servant has not capacity enough to understand the warning and appre-

ciate the danger, he will be liable for any injury which such servant may suffer in consequence, if continued at such work."

¹*Willamson v. Sheldon Marble Co.* (1893) 66 Vt. 427, 29 Atl. 669.

²*King v. Ford River Lumber Co.* (1892) 93 Mich. 172, 53 N. W. 10. A boy sixteen years old is presumed to have sufficient intelligence to comprehend instructions as to the danger of crossing a railroad yard by creeping under cars which may be moved at any moment. *Chicago, B. & Q. R. Co. v. Eggman* (1895) 59 Ill. App. 680.

³*Atlas Engine Works v. Randall* (1885) 100 Ind. 293, 50 Am. Rep. 798.

⁴*Powers v. Calcasieu Sugar Co.* (1896) 48 La. Ann. 483, 19 So. 455.

⁵*Hickey v. Taaffe* (1887) 105 N. Y. 26, 12 N. E. 286.

⁶*Fisher v. Delaware & H. Canal Co.* (1893) 153 Pa. 379, 26 Atl. 18. One ordered to paint a machine, and told that it is being tested, but not that others are still working upon it, where he can see them still at work, must use ordinary care not to be injured by their starting it. *Willhams v. Henster* (1890) 38 Ill. App. 584. See also cases cited in the next section.

In the case of minors the above principles stated are equally applicable in all essential respects, the sole distinction of importance being that, owing to the more restricted capacity of young persons for understanding the perils of their employment, the law implies an obligation to give them detailed and special instructions in many instances in which a general notification would have been an adequate warning to an adult. See next section. It has been said to be impossible to lay down any inflexible rule applicable alike to all cases where minors are employed, as to what warning will be requisite. Much depends upon the nature of the machinery, the age, capacity, intelligence, and experience of the employee, as well as the surrounding facts and circumstances.⁵ As in the case of adults, the notice given must be such as to enable a person of the servant's youth and inexperience in the business to appreciate intelligently the nature of the danger attending the performance of the work.⁶ Notice of danger is not enough. The child must have sufficient instruction to enable him to avoid danger.⁷ See next section.

It is merely necessary that notice of danger should be given before the service involving it is required, not that it should be given at the time of the contract of employment; but where no notice was given

⁵ *Davis v. Augusta Factory* (1893) 92 Ga. 712, 18 S. E. 974.

⁶ *Cooaba v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506. Almost the same language is used in *King v. Ford River Lumber Co.* (1892) 93 Mich. 172, 53 N. W. 10. In *New Albany Forge & Rolling Mill v. Cooper* (1892) 131 Ind. 363, 30 N. E. 294, the following statement of the rule by Judge Thompson, in his work on Negligence, vol. 2, pp. 977, 978, was adopted: "The master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him, and to place him, with reference to it, in substantially the same situation as if he were an adult." Quoted also in *Taylor v. Wootan* (1890) 1 Ind. App. 188, 27 N. E. 502, 504; *Smith v. Irwin* (1889) 51 N. J. L. 507, 18 Atl. 852. A youthful employee must be instructed so fully that, as a matter of fact, he actually understands and appreciates the danger. *Chicago Anderson Pressed Brick Co. v. Reininger* (1892) 140 Ill. 334, 29 N. E. 1106, holding that the last clause was properly added to a charge.

In *Houlahan v. New American File Co.* (1890) 17 R. I. 141, 20 Atl. 268, the defendant requested the trial judge to instruct the jury that, if the boss told the plaintiff to put his files on a steam pipe to be dried, at another place, and not to get on the tank into which he fell, and the boy disobeyed the order, by reason of which the accident happened, the jury should find a verdict for the defendant. The judge allowed this request, with the qualification that the warning or direction must have been such as to give notice of the danger. The defendant excepted to the qualification, but the supreme court held that the instruction as given was correct.

⁷ Wharton, Neg. § 216, quoted in *Brazzil Block Coal Co. v. Young* (1889) 117 Ind. 520, 20 N. E. 423; *Hinckley v. Horzidorsky* (1890) 133 Ill. 359, 8 L. R. A. 490, 24 N. E. 421. Where a person of immature years is set to work at machinery which in some respects may be termed dangerous, mere formal instructions are not sufficient. The person employed must be brought to an actual understanding of the dangers, and be made to appreciate them and the consequences of want of care. *Ogley v. Miles* (1889) 28 N. Y. S. R. 893, 8 N. Y. Supp. 270.

at any time, a charge declaring that instruction fixing it should have been given at the time of employment is not prejudicial.⁸

Culpability may be inferred from the giving of erroneous instructions, as well as from the entire omission to give any instruction.⁹ But if the instruction given was, so far as the evidence shows, perfectly proper, there can, of course, be no recovery.¹⁰

Whether the servant has been adequately instructed is primarily a question for the jury.¹¹ Their findings cannot be controlled or set aside where the evidence is such as to permit different inferences to be drawn from it.¹² Nor where the evidence is conflicting as to the amount of instruction necessary to enable the servant to do his work safely;¹³ nor where the testimony offered by the defendant is of an inconclusive character.¹⁴

253. What particularity in the instruction is obligatory.—In numerous cases the servant has been allowed to recover for the reason that the court felt itself unable to say, as a matter of law, that the master's culpability might not reasonably be inferred from evidence which indicated that the servant, although he had been warned in general terms as to the danger of the work, had received no special warning in regard to the particular danger to which the injury was due, or no explicit instruction as to the proper manner of avoiding it, and that, under the circumstances, the information which the master had thus failed to communicate was necessary to enable the servant to obtain an intelligent comprehension of the danger.¹ For ob-

⁸ *Salem Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141, 38 N. E. 411.

⁹ *Our us v. Ernst* (1892) 1 Misc. 388, 21 N. Y. Supp. 426.

¹⁰ Evidence that the proprietor of a quarry to whom an employee had applied for instructions as to what to do with a misspent charge of dynamite referred him to another workman of large experience in such matters, who told him to throw the dynamite with hot water, and that after doing so the employee, without direction, removed the charge, when it exploded and he was killed,—is insufficient to show negligence on the part of the employer. *Welch v. Grove* (1897) 167 Mass. 590, 46 N. E. 387.

¹¹ *McDougall v. Ashland Sulphite Fibre Co.* (1897) 97 Wis. 382, 73 N. W. 327 (method of shifting a belt by means of a stick); *Reynolds v. Boston & M. R. Co.* (1891) 64 Vt. 66, 24 Atl. 134. This principle, is, of course, assumed to be the correct rule of procedure in all the

cases cited under this subtitle, in which the instruction given was held, as a matter of law, to be adequate.

¹² *Kochmann v. Chase* (1898) 32 App. Div. 630, 52 N. Y. Supp. 740.

¹³ *Nitzmann v. Germania L. Ins. Co.* (1901) 82 Minn. 116, 84 N. W. 730; First Appeal (1900) 78 Minn. 504, 81 N. W. 518.

¹⁴ *Wolski v. Knapp-Stout & Co. Co.* (1895) 90 Wis. 178, 63 N. W. 87.

¹ It is not sufficient merely to notify a servant that Paris green is a poison. He should also be informed of the precise effects which it may produce in persons engaged in its manufacture, and also of the precautions necessary to be taken for obviating these effects. It is denied, however, that the master is bound to inform the servant of the particular ingredients of the formula used in its manufacture. *For v. Peninsular White Lead & Color Works* (1891) 84 Mich. 676, 48 N. W. 203. A brakeman placed on a freight train on a road with

vious reasons the courts are less disposed to interfere with a verdict for a minor based upon this ground than where the injured person was an adult.² Even the courts which override most freely the verdict of juries would doubtless refuse, under any conceivable state of facts, to declare the master's nonliability, as a matter of law, where the servant was not only a minor, but was of less than the average intelligence.³ The doctrine that a general warning may properly be found

which he is not familiar must be given sufficient notice of the danger of low highway bridges over the road to enable him, by proper attention and diligence, to learn where the points of danger are. *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710, 6 So. 277. Considering the common use of telltales, it cannot be held, as a matter of law, that giving a brakeman a printed book of rules, when he is first employed, which advises him that it is dangerous to stand erect on the top of cars, and especially on high cars, when passing under a certain bridge, and that there are no telltales on the bridge, is a sufficient warning. *Gulf, C. & S. F. R. Co. v. Knox* (1901; Tex. Civ. App.) 61 S. W. 969. In *American Strawboard Co. v. Foust* (1895) 12 Ind. App. 421, 39 N. E. 891, the court rejected the contention of the defendant that a general verdict for the plaintiff was inconsistent with a special finding to the effect that the servant—an adult—had been warned, just prior to the injury, to be careful, to look out for his hand, and that he had been frequently warned of the dangers of passing the pole up between the dryers by which he was crushed. *McQuillan v. W. Atlantic Electric Light Co.* (1898) 70 Conn. 715, 40 Atl. 928, held that where a man employed to trim and clean electric lamps used the crossbar as a means of support, and it gave way because of the rotten condition of the top of the pole, the result being that he fell to the ground and was seriously injured, the fact that the coemployee who instructed him as to the performance of his duties did not so support himself did not prevent his recovering, if he was not warned against doing this.

² "In determining this question [i. e., whether the servant understood the risk], it is proper and necessary to take into consideration, not only the plaintiff's youth and inexperience, but also the nature of the service which he was to perform, and the degree to which his attention, while at work, would need to

be devoted to its performance. The obligation of the defendants would not necessarily be discharged by merely informing the boy that the employment itself, or a particular place or machine in the building or room in which he was set to work, was dangerous. More information in advance that the service generally, or a particular thing connected with it, was dangerous, might give him no adequate notice or understanding of the kind and degree of the danger which would necessarily attend the actual performance of his work." *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506.

In *Jurris v. Coes Wrench Co.* (1900) 177 Mass. 170, 58 N. E. 587, a boy of fifteen was held entitled to go to the jury on evidence showing that he had been told how to do the work, but had not been cautioned as to the danger that one of the blocks which he was ordered to saw by means of a circular saw without a gauge or saw-rest, might bound back and force his hand under the saw if the block was not pushed squarely against the saw.

In *Taylor v. Wootan* (1891) 1 Ind. App. 188, 27 N. E. 502, 504, where the proof was that the servant was but twelve years of age at the time he was injured by coming in contact with a planer in connection with which he had been hired to work, and that he had worked but two days and a half for the appellant, and was wholly inexperienced in the operation and running of the machinery, the court held that, under these circumstances, it could not be declared, as a matter of law, that the employers absolved themselves from responsibility by simply telling the employee of the dangerous character of the machinery, and warning him to keep away from it while it was in motion.

³ Whether an employer had reasonable cause to believe that a boy fifteen years old needed more than ordinary instruction, and whether he had been misled in this respect by the boy's father, were held to be questions for the jury in *La-*

to be inadequate is not applied where the warning given was one sufficient to put the servant on inquiry and observation, and the danger was one which could readily be comprehended by anyone whose attention was directed to it.⁴ Another exception to the operation of the doctrine is admitted where the dangers to which the general warning related arose from conditions which were constantly changing, and for this reason no previous warning could be conveyed as to the particular danger to be avoided on any given occasion when the duty was to be performed.⁵ Compare the similar limitation of the duty of making rules, as explained in § 211, *ante*. It should also be observed that the doctrine is merely a rule of procedure which defines the limits of the power of a court to draw inferences of fact. It will not justify a trial judge in charging a jury that merely notifying the servant through a coemployee that the instrumentality in question was dangerous would not be sufficient to absolve the defendant unless that coemployee pointed out in what the danger consisted.⁶

Several cases proceed upon the theory that it is not obligatory to give any special caution where there is no peculiar or secret source of danger, and it is apparent that the servant has derived from the information imparted by the master as complete a knowledge of the risks as is requisite to secure his safety. This theory is deemed to be

plante v. Warren Cotton Mills (1896) upon the weight of the evidence. *The* 165 Mass. 487, 43 N. E. 294. Compare *Connors v. Grille* (1892) 155 Mass. 575, 30 N. E. 218, § 247, note 2, *supra*.

⁴ A person employed as a brakeman on a section of 4 miles of railroad, and notified that there were stone piles beside the road, and so near to it that a person on the side of a car passing them would be struck, is to be deemed to have assumed the risk from that cause, although the precise location of the danger was not stated to him. *Smith v. Winona & St. P. R. Co.* (1889) 42 Minn. 87, 43 N. W. 968. Compare § 404, *post*, *Hathaway v. Michigan C. R. Co.* (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634 (coupling cars).

⁵ In *Robt Mfg. Co. v. Taylor* (1894) 95 Ga. 615, 23 S. E. 188, the court, in commenting on a charge to this effect, where there was evidence of the fact that the plaintiff, a boy eight years of age, had been repeatedly advised that the machinery on which he was at work, consisting in part of rapidly revolving cog wheels, was dangerous, and that he himself knew it, said: "The vice of this instruction consists in the expression by the court to the jury of an opinion

question of negligence is one for the jury exclusively, and the law does not undertake to point out how, nor in what manner, a master shall instruct a minor servant in the handling of dangerous machinery. If, as in this case, the danger be manifest and obvious, the jury might have found, had they been free so to do under the charge of the court, that no instruction at all was necessary, and, if necessary, that the precautionary words of a coemployee were sufficient to apprise the boy of the danger to which he was then exposing himself, and in consequence of which he ultimately suffered injury. Whether such instruction would suffice, would depend to a very great degree upon the character of the machinery. If it were exceedingly intricate, invested with many latent dangers, a jury would probably find that a more detailed instruction was necessary than was given by the master to the servant in this case. But if it were a simple contrivance, easily understood, more general instructions might suffice to satisfy them. At all events, whenever the jury find that the master, with reference to this particu-

applicable to minors as well as to adults.¹ But the extreme vagueness of the standard thus invoked has naturally produced some inconsistent decisions.² It seems preferable, therefore, to say that the extent to which the master should enter into details in giving the instructions depends wholly upon the presumed capacity of the servant to utilize

the information and caution that was needed was given to him by the defendants, and his own evidence shows that he knew and understood the danger. He says that the defendants told him that, if he got his fingers in, he would get hurt; that he must look out also of his fingers, and, what testimony was not needed to prove, that he knew that if he put his fingers where the leather went, they would get caught as soon as the leather would. He said, indeed, that he did not realize the danger that it would draw his whole hand in. He may not have realized all the possible consequences of the danger, but that he knew and appreciated the danger of being hurt by having his fingers caught between the cylinders is obvious. That he was inattentive to his work, and, regardless, is not evidence that he did not know the danger. He was told, and knew, that if he was inattentive and careless he was liable to be hurt; and there is no evidence that the injury was not the result of his own want of care. There is no evidence of negligence on the part of the defendants, and no evidence that the plaintiff did not know and appreciate the danger." For other cases in which a general warning of the same kind was held to be sufficient, see *Tinkham v. Sawyer* (1891) 153 Mass. 485, 27 N. E. 6 (boy of sixteen stumbled on a slippery floor, and fell against the toothed cylinder of a carding machine), and *Burke v. Thomson Mfg. Co.* (1892) 45 N. Y. S. R. 272, 18 N. Y. Supp. 436 (minor of seventeen injured while attempting to adjust a piece of rubber in a vise without moving it back from a saw).

lar matter, has exercised ordinary and reasonable care, he is entitled to an acquittal."³

¹ Notice to a brakeman or switchman that a car received by a railroad company from another company, and directed to be returned as out of order, is out of order, is sufficient, unless the defects are most obvious, and involve more than the usual danger to those employed in returning the car. *Atchison, T. & S. P. R. Co. v. Meyers* (1896) 22 C. C. A. 268, 46 U. S. App. 226, 76 Fed. 443. In *Henry v. King Philip Mills* (1892) 155 Mass. 361, 29 N. E. 581, it was held that the plaintiff could not recover where he testified that he knew the danger of cleaning running machinery, but asserted a right to recover for the reason that he had not been cautioned about the particular spot where his hand was caught. In *Cirack v. Merchants' Woolen Co.* (1888) 146 Mass. 182, 15 N. E. 579, where a boy was injured while passing moving machinery, the court said: "Anybody seeing the machine in motion must soon become aware of the danger which would arise from coming in contact with it. The duty of the defendant would be sufficiently discharged by pointing out to the plaintiff the situation of the machine, and the rapid revolution of the wheels when in operation, and explaining the probable effect of touching them under these circumstances." In *Pratt v. Prouty* (1891) 153 Mass. 333, 26 N. E. 1002, the danger to be guarded against was that the fingers of the servant (a boy of sixteen), who was serving pieces of leather to the cylinders of a "skiving machine," would be caught between them and drawn through against the knife. The court said: "This was an open and apparent, and not a hidden, danger. Not only were the cylinders and their movements plain to see, but their operation and effect, in drawing in against the knife whatever came between them, were obvious and were constantly demonstrated in their use. That the plaintiff was a boy of at least ordinary intelligence is manifest, and is not denied; and if he could fail to see and appreciate the danger, all

the information and caution that was needed was given to him by the defendants, and his own evidence shows that he knew and understood the danger. He says that the defendants told him that, if he got his fingers in, he would get hurt; that he must look out also of his fingers, and, what testimony was not needed to prove, that he knew that if he put his fingers where the leather went, they would get caught as soon as the leather would. He said, indeed, that he did not realize the danger that it would draw his whole hand in. He may not have realized all the possible consequences of the danger, but that he knew and appreciated the danger of being hurt by having his fingers caught between the cylinders is obvious. That he was inattentive to his work, and, regardless, is not evidence that he did not know the danger. He was told, and knew, that if he was inattentive and careless he was liable to be hurt; and there is no evidence that the injury was not the result of his own want of care. There is no evidence of negligence on the part of the defendants, and no evidence that the plaintiff did not know and appreciate the danger." For other cases in which a general warning of the same kind was held to be sufficient, see *Tinkham v. Sawyer* (1891) 153 Mass. 485, 27 N. E. 6 (boy of sixteen stumbled on a slippery floor, and fell against the toothed cylinder of a carding machine), and *Burke v. Thomson Mfg. Co.* (1892) 45 N. Y. S. R. 272, 18 N. Y. Supp. 436 (minor of seventeen injured while attempting to adjust a piece of rubber in a vise without moving it back from a saw).

*The decisions cited above as to injuries caused by moving machinery are not easy to reconcile with the conclusion that an owner of a paper mill who employs an inexperienced girl fourteen years old to take paper from a machine consisting of a large roller heated by steam and three smaller rollers, between which and the larger roller the paper passes, without giving her any more caution than not to get her hands into the rollers, is not, as matter of law, free from negligence, where the girl's hand

the information which he receives, intelligently and effectively for the purpose of securing his own safety. On the one hand, the obligation of the defendant is not discharged "by informing the servant generally that the service engaged in is dangerous; especially where the servant is a person who neither by experience nor education has, or would be likely to have, any knowledge of the perils of the business, either latent or patent, but . . . in such case the servant should be informed, not only that the service is dangerous, and of the peril of a particular place, but, where extraordinary risks are or may be encountered, if known to the master, or should be known by him, the servant should be warned of them, their character and extent, so far as possible."⁹ On the other hand, it is not necessary that a servant should be warned of every possible manner in which injury may

be caught and seriously injured while she is attempting, as she has seen other employees do, to insert a sheet of paper which has come out between such rollers. *Allen v. Jakes* (1898) 115 Mich. 484, 73 N. W. 555. The court took the ground that, while it was obvious that there was danger in using the machine, the proper way of doing the work was not manifest.

Two courts have reached diametrically opposite conclusions as to such a simple matter as the extent of the duty to instruct a brakeman with respect to the danger of coupling foreign cars with double deadwoods. On the one hand, it has been held that a brakeman twenty-six years of age and of average intelligence, who had never seen double deadwoods before he was injured, was sufficiently warned of the increased danger in coupling cars with such deadwoods,

which sometimes passed over the road by a caution that railroading was dangerous, and coupling cars specially requiring very great care, where he was further notified that cars with different coupling apparatus were hauled over the line. *Louisville & N. R. Co. v. Boland* (1893) 96 Ala. 626, 18 L. R. A. 269, 11 So. 667. The court said: "As to latent risks, the duty of the master is not discharged when he simply instructs the servant in a general way that the service engaged in is dangerous, and especially is this true where the servant is a person who from inexperience or want of education would not likely have knowledge of such latent risks. In such cases he should not only be informed that the service is dangerous, but, where extraordinary risks are to be encountered,

he should be warned by the master, as far as possible, of their character and extent, if known to the master, or should be known to him. But, as we have said, this duty is required only as to latent dangers or risks, and we know of no rule or principle of law that requires the master to give any express or particular instructions to guard against such dangers as are manifestly obvious." On the other hand, we find it laid down, in a case involving similar facts, that a railroad company which merely warns a brakeman who is just entering on his duties that the business is highly dangerous does not fully discharge its duty as to instructing him. He should be told in what the hidden dangers consist, and how to avoid them. *Renolds v. Boston & M. R. Co.* (1891) 64 Vt. 66, 24 Atl. 131.

Smith v. Peninsular Car Wash (1886) 30 Mich. 501, 27 N. W. 66. The degree and instruction should be graduated to the age, intelligence, and experience of the servant. They should be such as a master of ordinary prudence and sagacity would give under like circumstances, for the purpose of enabling the minor, not only to know the dangerous nature of his work, but also to understand and appreciate its risks and to avoid its dangers. They should be governed, after all, more by the experience and capacity of the servant than by his age, because the intelligence and experience of men measure their knowledge and appreciation of the dangers about them far more accurately than their years. *Bohn Mfg. Co. v. Erickson* (1893) 5 C. C. A. 341, 12 U. S. App. 260, 55 Fed. 943.

cur. He must examine his surroundings and take notice of obvious dangers and operations of familiar laws.¹⁰

According to one case, if the danger to which the servant was exposed in performing the work to which the warning in question related was a serious one and not apparent, it cannot be said, as a matter of law, that the master fully discharged his duty by directing the servant to abstain from a certain course of conduct, although, if the direction had been obeyed, the injury would not have been received.¹¹ But a doctrine less favorable to the servant has also been applied.¹²

¹⁰ *Mississippi River Logging Co. v. Schneider* (1896) 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. 195. See also § 238, *supra*. An employer is "not required to exercise the highest possible diligence to instruct the plaintiff in every conceivable particular of the circumstances in which he might be placed, or in every possible detail of his conduct in the performance of his duties. The requirement in this respect is only that the master exercise ordinary and reasonable care to see that the servant possesses a competent knowledge of the peculiar dangers to which he is exposed in doing his work, and of the precautions necessary to be taken to guard himself against those dangers; and in the exercise of that care the master has the right to assume that the servant brings to the work ordinary intelligence and powers of observation, and the capacity to learn something from observation and experience. . . . Moreover, the duty to instruct against dangers incident to the work extends only to such dangers as are known to the master himself, or which are reasonably to be apprehended from the nature of the employment." *Benfield v. Vacuum Oil Co.* (1894) 75 Hun, 209, 27 N. Y. Supp. 16. An employer who gives such general instructions and cautions as will enable the employee by the use of his intelligence to comprehend the dangers which threaten him in his work must be held to have discharged his duty, although he does not anticipate in advance every possible risk or accident. *Thompson v. Edward P. Allis Co.* (1895) 89 Wis. 523, 62 N. W. 527. In *Chicago, R. I. & P. R. Co. v. Clark* (1883) 103 Ill. 113, the trial judge gave an instruction to the effect that it was the duty of the master to inform his servants of all danger in and about the premises where they are required, by his authority, to perform labor. The court said: "This

was manifestly wrong. Railroad employees, as all the books lay down the doctrine, assume the ordinary risks and hazards of the employment. The presumption is that the employee understands the nature and dangers of the employment when he engages in the service, and, if not, that he will inform himself. It would be wholly impracticable for railroads and manufacturers to employ men of experience to inform each of the hands that any particular act he is required to perform is dangerous. It would be ruinous to such bodies to hire a person to accompany every brakeman and other employees, to inform them of danger in the performance of every act of duty, or of the danger in the manner of its performance. It is impossible that the law can ever impose such requirements, and that is what this instruction in substance asserts as a legal requirement."

¹¹ A verdict for the plaintiff is warranted where a trestle on to which an engineer was required to push a train of cars frequently was too weak to support the engine, and the only caution he had received was that he was not to run it beyond the edge of the fast land, but nothing was said which indicated the greatness of the danger. *Paulmier v. Erie R. Co.* (1870) 34 N. J. L. 151.

¹² Where a servant has to handle molten metal in the neighborhood of water, all that is necessary is to instruct him how to handle it in such a manner as to avoid explosion, and to inform him that there is danger of explosion if he does not handle it as instructed. Accordingly, an instruction that it was the duty of the master to warn plaintiff that an explosion might result from the contact with water, and of the "noise, force, and probable effect" of such an explosion, is erroneous as imposing on the master the duty of foretelling the precise result of any possible explosion.

The duty of instruction is not adequately performed unless the information respecting the dangerous qualities of the appliances is imparted in words devoid of ambiguity.¹³

The warning given must be couched in such plain language as to insure the servant's understanding and appreciating it.¹⁴ Compare § 216, *ante*.

As the age of a minor approaches twenty-one years the sufficiency of the instruction is gauged more and more nearly by the same considerations as are controlling in the case of an adult.¹⁵

254. Adequacy of the means by which instruction is conveyed to the servant.— (Compare §§ 213*a* and 237, note 5, *ante*.)—A warning which the master or his representative does not take proper steps to have conveyed to the servants whom it concerns is, for juridical purposes, no more effective than if it had not been given at all.¹ As in industrial concerns are usually carried on, the most common method of giving a servant the necessary instruction is by word of mouth. But, both on principle and authority, it is clear that the precise method by which instruction is imparted is immaterial, provided it was actually received by him, or the form in which it was given such that, if he had exercised reasonable care, he would have obtained a sufficient comprehension of the facts which it was intended to communicate to him.²

Ribich v. Lake Superior Smelting Co. (1900) 123 Mich. 401, 48 L. R. A. 649, 82 N. W. 279.

¹³ Warning that a horse is vicious is not conveyed by the statement that it is "high-lived," since that expression is frequently applied to horses of the very opposite character. *Wilson v. Sioux Consol. Min. Co.* (1898) 16 Utah, 392, 52 Pac. 626. Telling an inexperienced workman hired to work near a high gravel bank that he was "to keep two eyes on the bank and one on the foreman" is not an adequate warning, as a matter of law. *Daly v. Kiel* (1901) 106 La. 170, 30 So. 254.

¹⁴ *Adricks v. Cristoph* (1899) 62 N. J. L. 786, 43 Atl. 196. In *Costello v. Judson* (1880) 21 Hun, 396, where a boy of fourteen years possessing the average amount of intelligence was injured through allowing his foot to project beyond the platform of an ascending elevator, it was held that it was for the jury to say whether an instruction by the defendant's foreman to the effect that, if the plaintiff went on the elevator, "he must be careful and not fool with it," was sufficiently explicit.

¹⁵ An employer may put an employee

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nearly twenty-one years old at work on a circular saw, without other instruction than running through one or two sticks, where the employee states that he has run a circular saw a very little, though he is not an experienced hand, but makes no direct request for further instructions. *Wilson v. Steel Edge Stamping & Retinning Co.* (1895) 163 Mass. 315, 39 N. E. 1039 (verdict held to have been rightly directed for defendant). Compare § 249, note 9, *supra*.

¹ A roadmaster who is informed that a part of the track is defective and cannot be put in repair soon enough to permit the next train on the schedule to pass safely may properly be found culpably negligent by a jury if he fails to ascertain that a warning telegram which he has delivered to an operator at a way station to be forwarded to the train dispatcher has reached its destination. *Atchison, T. & S. F. R. Co. v. Moore* (1884) 31 Kan. 197, 1 Pac. 644.

² Bulletin boards and placards, printed or posted, are proper methods of giving notice of danger to railroad employees, but not the only methods; and where a party has been expressly notified, he cannot complain that no placard

And it would seem that if a servant who is unable to read enters an employment, knowing that it is customary to convey notice of certain specific dangers through the medium of writing, he must take the consequences if he is injured by reason of his inability to understand an announcement so given.³

or bulletin board was posted. *Louisville & N. R. Co. v. Hall* (1890) 91 Ala. 112, 8 So. 371. A railroad company having had transient cars of other companies in its use or employment regularly inspected, condemned, and ordered to be sent to the shops for repair and regularly tagged so as to warn employees of that fact, has not fully discharged its obligation of due care towards one engaged in the performance of night service as a car coupler, unless the tags are of such size and character as to bring the condemnation of the cars to his attention, or he is otherwise informed of the fact. *Meyers v. Illinois C. R. Co.* (1897) 49 La. Ann. 21, 21 So. 120. Whether a railroad company is under the duty of providing means for warning trainmen as to the proximity of low overhead bridges, such as "whipping straps" or cautionary lights, is a question to be determined by utility and the custom of well-regulated railroads. *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710, 6 So. 277. See chapter vi., *ante*. A statement by a yard master to a newly employed brakeman, that a certain bridge was too low to clear a man standing on a low car, and to look out for it, and by the conductor and a brakeman of the train upon which he was employed, that it would not clear a man on a high box car, is not such warning as will prevent a recovery from the railway company for causing the death of the brakeman, who came into collision with the bridge in the ordinary discharge of his duty, standing on a car of ordinary height, when no cords were suspended overhead to give warning of the bridge, as was the general custom of railroads having low bridges. *Ft. Worth & R. G. R. Co. v. Kime* (1899) 21 Tex. Civ. App. 271, 51 S. W. 558, Affirmed in (1899: Tex.) 54 S. W. 240. A railroad company owes no duty to a brakeman in its employ to build a fence from a cattle guard to the line fence in order to give him notice of its existence.

Fences are not supposed to be built in such places for this purpose, and a brakeman has no right to expect to receive information in such a manner. *Fuller v. Lake Shore & M. S. R. Co.* (1896) 108 Mich. 690, 66 N. W. 593. The operator of a mine, who, in accordance with a custom in his business, places a danger signal in a room of a mine where there is standing gas, is not required in addition to place a man on duty to watch and warn against entrance into such room with a naked light. *Cerrillos Coal R. Co. v. Descant* (1897) 9 N. M. 49, 49 Pac. 807. An instruction in an action for injury to an employee, that a card notifying employees to keep their eyes on a certain machine while operating, as it is dangerous, did not inform the plaintiff of the increased and extraordinary danger of operating the machine when a certain guard was broken, is not improper, as such a notice conveys no information as to anything except the danger to be apprehended from the machine while it is in good condition. *Blumenthal v. Crug* (1897) 26 C. C. A. 427, 55 U. S. App. 8, 81 Fed. 320.

³ *Watson v. Houston & T. C. R. Co.* (1883) 58 Tex. 434, where notice of the defective character of a car was given in the usual way by chalking upon it the words, "out of order," and placing it upon a side track for removal. The court held that the servant could only secure exemption from such usage or custom by contracting against it; that his incapacity to understand the nature and extent of the business he engaged to perform was not chargeable to the fault of the company; and that it was immaterial whether such incapacity arose from a want of sufficient education to read and understand the purport of the usual "out of order," or from want of skill in the performance of other duties pertaining to the employment. In § 83, note 3, *ante*, another case relating to the tagging of condemned cars is cited.

CHAPTER XVII.

ASSUMPTION OF RISKS BY THE SERVANT.

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 - 267. Risks incident to construction work.
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- C. ASSUMPTION OF EXTRAORDINARY RISKS.
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 - a. Minors.
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 - 290. Complaint, objection, or protest omitted or made.
 - a. No complaint, objection, or protest established by the evidence.
 - b. Complaint, objection, or protest established by the evidence.
- D. ASSUMPTION OF RISKS BY MINOR SERVANTS.
- 291. Ordinary risks.
 - 292. Extraordinary risks.

The defense of assumption of risks is treated, in chapters XXI, XXIV., *post*, with relation to the four special elements indicated by the titles.

The obligation of a servant to quit an employment in which he finds himself exposed to an abnormal risk is discussed in § 302, *post*.

The obligation of a servant to report to his superiors any abnormal risks which may come to his knowledge is treated in § 303, *post*.

As to the validity and effect of agreements not to hold a master responsible for his negligence, see the chapter in volume III., which deals with agreements accessory to the contract of hiring.

255. Introductory.—The foregoing chapters contain a statement of the conclusions at which the various courts have arrived in the process of determining the nature and extent of those obligations which a mas-

ter is impliedly deemed to undertake in respect to the persons whom he receives into his employment. Unless a breach of one of these obligations is established, the primary prerequisite to the maintenance of the servant's action is obviously lacking. See chapter XLIII. B, *post*. The decisions which deal with the circumstances under which recovery is disallowed although the master is proved to have been in fault will now be reviewed.

Four separate defenses are open to the master, *viz.*:

- (1) That the risk in question had been assumed by the servant.
- (2) That the servant had been guilty of contributory negligence in remaining in the employment which exposed him to the risk in question.
- (3) That the servant had been guilty of contributory negligence in respect to the particular act which was the immediate cause of his injury.
- (4) That the servant had so conducted himself that the action was barred by the operation of the principle embodied in the maxim, *Volenti non fit injuria*.

Of these defenses, only the first can properly be regarded as dependent upon or arising out of the contract of employment. In its relation to the other three defenses, the contract is material merely for the reason that its existence renders possible the events which constitute the cause of action in each particular instance.

All these defenses presuppose the same essential state of facts, *viz.*, that certain dangerous conditions incident to the work were or ought to have been comprehended by the servant; that, having this comprehension, actual or imputed, he did or refrained from doing something; and that, as a consequence of the conduct thus pursued, he suffered the injury for which indemnity is asked. The result of this identity of elements is that, in a large number of instances, the juridical effect of any specific evidence which justifies the inference that one of the defenses was available under the given circumstances may, merely by a change in the logical point of view and in the terminology employed, be so stated as to show that one or more of the other defenses is also available. The precise extent of this theoretical interchangeability of the defenses has never been investigated, and, as the inquiry is one of merely scholastic interest, it is not worth pursuing. The choice of a defense will always depend upon the view which is entertained as to its superior expediency, regard being had, not only to the conclusions most obviously suggested by the testimony upon which the employer mainly relies, but also to a question which, in view of the chronic antagonism which exists between judges and juries in

employers' liability cases, is of no small practical importance—viz., Under which theory of the evidence is there the strongest probability that the right of recovery will ultimately be treated as a matter for the court to determine? There is no doubt that this advantage is most likely to be obtained by putting forward the first of the defenses enumerated above, and for this reason it should always be selected in any case in which the evidence sustains it, even though the practitioner should deem it advisable to rely upon one or more of the other defenses as well.

In this and the three ensuing chapters all these defenses will be considered under their more general aspects (chapters xvii.—xx.). The circumstances which warrant the inference that the servant had that comprehension of the risk without which none of the defenses can take effect will then be discussed (chapter xxi.). The remaining chapters of the present volume will be devoted to a discussion of certain special elements by which the general rules which determine the applicability of the defenses are more or less qualified (chapters xxii.—xxv.).

256. Proper classification of assumed risks considered.—In some cases the risks assumed are spoken of as being divisible into those which are ordinary, and those which are known to and understood by the servant.¹ But the analysis thus suggested is plainly inaccurate, inasmuch as it ignores the fact that an essential and characteristic attribute of an ordinary risk is that it is appreciated by the servant. See § 257, *infra*. In fact, it is evident that what is really meant by the courts which have used this language is that the category of obvious or apparent risks includes both those which are generally designated as ordinary, and also those which are extraordinary, provided they are appreciated by the servant.²

¹ In *Davidson v. Cornell* (1892) 132 N. Y. 234, 30 N. E. 573, it was remarked that "a servant entering into employment which is hazardous assumes the usual risks of the service, and those which are apparent to ordinary observation." Compare the statements that "obvious," as well as "ordinary," risks are assumed (*Huda v. American Glucose Co.* [1897] 154 N. Y. 474, 40 L. R. A. 411, 48 N. E. 897); that a servant assumes "ordinary and apparent" risks (*Frye v. Bath Gas & Electric Co.* [1900] 91 Me. 17, 46 Atl. 804; *Dysinger v. Cincinnati, S. & M. R. Co.* [1892] 93 Mich. 646, 53 N. W. 825); and "ordinary and known" risks (*Louisville & N. R. Co. v. Orr* [1890] 91 Ala. 548, 8 So. 369); and "ordinary and obvious" risks (*Reese v. Wheeling & E. G. R. Co.* [1896] 42 W. Va. 333, 26 S. E. 204); that an employee assumes only the risks ordinarily incidental to his employer's business and to the employer's known manner of having it performed (*Colson v. Craker* [1898] 80 Ill. App. 99); that "an employee does not assume all the risks of a service in which he may be engaged, but he assumes only ordinary, obvious, or known risks" (statement in *Wood, Master & Servant*, adopted in *Illinois Steel Co. v. Bauman* [1899] 178 Ill. 351, 53 N. E. 107); that a servant assumes all the ordinary and apparent risks of his employment (*Craker v. P. Sey & J. Co.* [1900] 3 Penn. [Del.] 1, 50 Atl. 61; *Struttner v. Wilmington & Electric Co.* [1901] 3 Penn. [Del.] 245, 50 Atl. 57).

² In a recent case, the court, after lay-

It has also been laid down that a servant assumes the risk of all dangers, however they may arise, against which he may protect himself by the exercise of ordinary observation and care.³ But this form of expression is merely one mode of enunciating the rule that it is not negligence to expose a servant to dangers against which he can protect himself by the exercise of due care. See chapter iv., *ante*. So far, therefore, as the conception thus conveyed bears upon the question of the proper classification of assumed risks, it simply throws us back upon the fundamental principle stated in § 3, *ante*, and amounts to nothing more than a denial of the servant's right to recover where culpability, as measured by the particular standard which it indicates, cannot be imputed to the master. For this reason it is unsuitable as a basis for a generic division of risks with reference to their assumption or non-assumption.

For this purpose there are two broad schemes of classification available. In one of these the central fact which supplies the foundation upon which the structure of the rules developed by the courts is built up is the servant's knowledge or ignorance of the risk in question. In the other that foundation is supplied by the master's negligence or freedom from fault. For the purposes of the commentator the latter scheme appears to be the more convenient, and it has therefore been adopted, in the present treatise, as a basis for stating the effect of the cases. But before entering upon that statement, it will be advisable to indicate in a general way the results of applying the test contemplated by the alternative scheme.

A. ASSUMPTION OF RISKS CONSIDERED WITH REFERENCE TO THE SERVANT'S KNOWLEDGE OR IGNORANCE THEREOF.

257. General principle stated.— In several recent decisions which, although they do not actually determine anything more than the

ing down that risks which are incident to the business must not be confounded with those that are "obvious," proceeded to remark that the latter term "includes such as are manifest to the sense of observation, open and readily discernible, whether they arise from the nature of the business, the particular manner in which it is conducted, or the use of defective or unsafe appliances." *Stanger v. Troy Laundry Co.* (1901) 38 Or. 480, 53 L. R. A. 459, 63 Pac. 645.

³ *Pittsburgh & C. R. Co. v. Sentmeyer* (1879) 92 Pa. 276, 37 Am. Rep. 684. In a still more recent decision the same court approved an instruction to the

effect that an employee assumes all the risks of his employment against which he may protect himself by ordinary observation and care. *Frieker v. Penn Bridge Co.* (1900) 197 Pa. 442, 47 Atl. 354. The same language has also been used in New Jersey (*Durand v. New York & L. B. R. Co.* [1901] 65 N. J. L. 656, 48 Atl. 1013), and in West Virginia (*Oliver v. Ohio River R. Co.* [1896] 42 W. Va. 703, 26 S. E. 444).

"If the employees can see the danger they have the means of avoiding it." *Oregon Short Line & U. N. R. Co. v. Tracy* (1895) 14 C. C. A. 199, 25 U. S. App. 529, 66 Fed. 931.

meaning of the maxim, *Volenti non fit injuria*, seem to involve logically a similar conclusion, in respect to the availability of the defense of an assumption of risks, to that deduced from an implied contract. The English judges have held that a servant's knowledge of a risk caused by the master's negligence will not necessarily, and as a matter of law, require the inference that, by accepting or continuing in the employment to which that risk was incident, he renounces his right to sue for any injury which he may receive in consequence of its existence. See § 280, *infra*. But if we set aside these decisions, which have never been explicitly declared to affect the doctrine of a contractual assumption of risks, there is no question that the servant's knowledge or ignorance of a risk is regarded by all common-law courts as a differentiating factor, which of itself and without reference to the quality of the master's conduct supplies an adequate test for the determination of the servant's right of action. This conception is frequently recognized under both its positive and its negative aspect, in the language and the rulings of the courts. On the one hand, the inability of the servant to recover is asserted, in the broadest terms, as to all cases in which he knew of the risk which caused his injury.¹ On the other hand, it is well settled that no action can

¹For example: "An employee assumes risks which are patent and latent risks of which he is informed." *Trainor v. Philadelphia & R. R. Co.* (1890) 137 Pa. 148, 20 Atl. 632. A servant "assumes the perils incident to his service, of which he is informed, or which ordinary care would disclose to him." *Allen v. Boston & M. R. Co.* (1898) 69 N. H. 271, 39 Atl. 978. "Recovery cannot be had when one voluntarily exposes himself to danger of which he knows, or might have known by the exercise of ordinary care." *Coules v. Chicago, R. I. & P. R. Co.* (1897) 102 Iowa, 567, 71 N. W. 580. "When an employee, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if he is subsequently injured by such exposure." Wharton, Neg. § 214, adopted in *St. Louis & S. E. R. Co. v. Britz* (1874) 72 Ill. 256. "If a servant goes on to work in manifestly dangerous circumstances, he does so at his own risk." *Crichton v. Keir* (1863) 1 Sc. Sess. Cas. 3rd Series, 407. "All these rules affecting the relation of master and servant, in respect to their duties and obligations toward one another, are founded upon presumptions; and if the servant becomes aware that any of them are

contrary to the fact, he cannot justify himself in shutting his eyes to the truth. In short, he cannot be heard to say that he relied upon that which he did not believe." *Chicago & I. R. Co. v. Merriman* (1900) 95 Ill. App. 628. "Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk." *Narramore v. Cleveland, C. C. & St. L. R. Co.* (1899) 48 L. R. A. 68, 37 C. C. A. 499, 96 Fed. 298.

In a leading case where he was discussing the right of a servant to recover damages from a stranger, Willes, J., made the following remarks with reference to certain employers' liability cases which had been cited by defendant's counsel: "The cases referred to, as to the liability for accidents to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, . . . also have their special reasons. The servant or other person so employed is supposed to undertake, not only all the ordinary risks of the employment into which he enters,

be maintained unless it is proved that the servant was ignorant of the risk which caused his injury.²

This theory, it will be noticed, fixes the boundary line between the cases in which the master is or is not liable, with reference to precisely the same factors as the theory that it is negligence to expose a servant to any danger, whatever its character, of which he is ignorant, and not negligence to expose him to any danger which he understands. See chapter vii., *ante*. The practical results of both theories are obviously identical. It is merely the logical standpoint which is different.

If the servant's knowledge or ignorance were made the essential and primary basis of classification, the arrangement of the cases in the ensuing subtitles would not be altered in any material degree. Normal and abnormal risks would still have to be segregated, for the

but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow servants; not, however, including those which can be traced to mere breach of duty on the part of the master." *Indemnity v. Jones* (1866) L. R. 1 C. P. 274, 35 L. J. C. P. N. S. 184, 12 Jur. N. S. 432, 14 L. T. N. S. 484, 14 Week. Rep. 586, 1 Harr. & R. 243. The rule that the employer is bound to use reasonable care to provide safe machinery and a competent engineer is not applicable to the case of one engaging to work in the construction of a ditch, with the distinct understanding that a certain boat with its engines and boilers is to be used in the excavation, and that a certain engineer is to have charge and control, and that such employee is to work under such engineer's direction. *Lebkuecher v. Bolonsen* (1896) 69 Ill. App. 297.

"It is necessary to allege that the servant does not know of the danger, because if the servant knows of the danger, and does the act which may and does cause injury to him, he has nothing to complain of, and cannot bring an action for the damage sustained." *Griffiths v. London & St. K. Docks Co.* (1884) 1 L. R. 12 Q. B. 193, per Day, J. This case was cited with approval in *Williams v. Birmingham Railway & Metal Co.* [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918, where Smith, L. J., remarked that, when proper appliances have been furnished, they may well become unsafe to the knowledge of the master, and without the knowledge of the servant, and that each issue must,

therefore, be established by the servant when he sues the master. That the servant's ignorance of the conditions is a condition precedent to his recovery is assumed in all the decisions cited in the present chapter and in chapter xxi., and is explicitly affirmed in the following, among many other cases: *Toledo, W. & W. R. Co. v. Fredericks* (1874) 71 Ill. 294; *Evans v. Meredith Shook & Lumber Co.* (1897) 69 N. H. 664, 33 Atl. 1099; *Strattner v. Wilmington City Electric Co.* (1901) 3 Penn. (Del.) 245, 50 Atl. 57. To render a master liable for injuries to his servant from defective machinery, he must have known or have been chargeable with knowledge of the defect, and the servant must have been ignorant thereof, and without equal means with the master of learning thereof. *Mellott v. Louisville & N. R. Co.* (1897) 101 Ky. 212, 40 S. W. 696. A servant does not assume risks which he neither knows, suspects, nor has reason to look for, but only those apparently incidental to an employment intelligently undertaken. *Stucke v. Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342. A danger which is not obvious, and of which one was ignorant when entering the employ of a railway company, is not one assumed by him as incident to the employment. *Ft. Worth & R. R. Co. v. Kime* (1899) 21 Tex. Civ. App. 271, 51 S. W. 558, Affirmed in (1899; Tex.) 54 S. W. 240.

See also chapter xiv., *infra*, where the effect of this doctrine in its relation to the sufficiency of the servant's complaint is discussed.

reason that, as explained hereafter (§§ 260a, 273, *infra*), the former are usually presumed to be comprehended, while there is no such presumption as to the latter.

258. Servant assumes risks resulting from conditions for which he himself is responsible.— But there is one class of cases which, although it is possible to find a place for them under the alternative scheme of classification, would seem to be preferably controlled entirely by the element of the servant's knowledge. The class of cases referred to is that in which recovery is denied on the broad ground that the servant himself deliberately selected the course of action which led to his receiving the injury complained of. Under such circumstances, he must obviously be regarded as having taken upon himself the responsibility for any personal harm which he may suffer as a proximate result of the selection thus made. In these, as in most other cases where the intentional adoption of a certain line of action is proved, the facts will also be suggestive of contributory negligence. But it is both unnecessary and disadvantageous to rely upon a conception which raises a disputable question, if a decisive element is supplied by the clear evidence of a deliberate choice on the servant's part, or the exercise of his own judgment in creating the conditions which occasioned the accident.¹

¹ In *Mellor v. Merchants' Mfg. Co.* (1890) 150 Mass. 362, 5 L. R. A. 792, 23 N. E. 100, it was recognized that there "might be cases where the plaintiff would be held to have taken the risk, irrespective of any implied term in his contract of service, even if he could not properly be said to have been negligent." Upon this principle a verdict for the plaintiff was there set aside, the evidence showing that when he was injured he had undertaken to make repairs which it was no part of his regular duty to make, and started to do so of his own free will, upon the suggestion of a fellow workman, after asking and obtaining the mere consent of his own immediate superior. Under such circumstances he was only a volunteer, and could stand on no better footing than a stranger would have done who should have offered, and should have been permitted, to make the same repairs. Even if it was not negligent of him to approach the dangerous spot, he took the risk of the danger which he necessarily contemplated as existing when he undertook to remove it.

An action which the servant of a contractor who is erecting a building might

otherwise have maintained against one who has furnished his employer with a defective derrick for hoisting heavy stone, on the theory that it is an instrument dangerous to human life if not properly constructed, is barred by evidence showing that, being placed in full control of the apparatus, he removed, upon his own responsibility, the rope which had been supplied with the derrick, and procured from the owner one of another kind which was a quarter of an inch thicker than he thought sufficient. *Darwin v. Pelham Rod Elevation Co.* (1892) 65 Hun. 573, 20 N. Y. Supp. 523, affirmed, without opinion, in (1895) 146 N. Y. 363, 41 N. E. 88. A seaman who constructs for himself a "boat-swain's chair" (an appliance to support him while painting a mast) cannot recover for injuries caused by defects therein. *Johnson v. Johansen* (1898) 30 C. C. A. 675, 58 U. S. App. 104, 96 Fed. 886. A servant may undertake the construction of the place in which, or provide the tools with which, he works, and if he does so his master is relieved from that duty and liability for injuries to him caused by defects therein (charge to jury). *Donovan v.*

Horlan & H. Co. (1899) 2 Penn. (Del.) 190, 44 Atl. 619. A miner who props the roof of his working place until he regards it as safe, and is injured by some or other materials falling from the roof, in consequence of his mistake in judgment as to its safety, cannot maintain an action against the employer for such injury. *Pittsburgh & W. Coal Co. v. Esterwood* (1895) 53 Ohio St. 43, 10 N. E. 725. One employed to take down a wooden building, who, after knocking out a stud, was injured by falling timbers, cannot recover, where he exercised his own judgment, with full knowledge of the facts. *Nauic v. The Ohio* (1896) 68 N. H. 564, 41 Atl. 182. A yardmaster who is thrown off the front footboard of an engine by striking against a pile of coal which he has himself permitted the consignee to unload at that particular place cannot maintain an action. *Highland Ave. & L. R. Co. v. Walters* (1890) 91 Ala. 435, 8 So. 357. Proof that the employer's superintendent asked the employee if he wanted the couplings covered, and that the employee declined the precaution, conclusively proves that the employee assumed the risk of the omission and freed the employer from responsibility. The trial judge was held to have wrongly charged that this was merely one of the circumstances to be considered in determining whether the servant had assumed the risk. *Shaw v. Sheldon* (1886) 103 N. Y. 667, 9 N. E. 183. A servant of full age and ordinary intelligence cannot recover for an injury received through his slipping and falling, while attempting to hang a bag being filled with cotton taken from a dryer, over spikes driven into a beam so high above the dryer that he could only reach it with his finger. *Wilson v. Trevelock & S. Mills* (1893) 159 Mass. 154, 34 N. E. 90. A railroad company is not liable for the death of an engineer, caused by his engine running into a standing train while he was asleep at his post, and the failure of the flagman of the train to perform his duty, although such engineer had been in such continuous service that he could no longer endure it without sleep, where he was privileged to refuse to go upon the trip, but went for the sake of extra pay. *Anttress v. Philadelphia & R. R. Co.* (1892) 150 Pa. 527, 24 Atl. 753. No recovery can be had for injuries sustained in a sawmill, where it appears that the servant was not standing in the place intended for workmen to stand in

while doing that work, that the position of the machinery and appliances plainly indicated such fact to a person of ordinary intelligence, and that if the place was, as he asserted, dangerous, he might have refused to work there. *Decker v. Deering* (1899) 91 Me. 272, 44 Atl. 922. A laborer of ordinary intelligence, familiar with the work, who deliberately chose a position where he believed himself to be secure under an overhanging bank which his foreman had been trying unsuccessfully to pry down, could not recover where the bank fell on him. *Siegel v. Burlington, C. R. & N. R. Co.* (1889) 5 Dak. 517, 41 N. W. 755. A subcontractor's employee who voluntarily and without the command of his foreman undertook to work about a terra cotta cornice not secured by the customary anchors assumed the consequent risk. *Winkle Terra Cotta Co. v. Homersky* (1897) 77 Ill. App. 42. Affirmed in (1899) 178 Ill. 562, 53 N. E. 346. An engineer at whose suggestion cleats are nailed on to a chute to facilitate his performance of his duties cannot recover for an injury which he receives in consequence of his suggestion being followed. *Hart v. Frick Coke Co.* (1890) 131 Pa. 125, 18 Atl. 1011. An engineer who directs a repairer of his locomotive not to apply the water test assumes the risk of injury if the boiler explodes in consequence of the repairs, leaving an undiscovered defect. *Kramer v. Willy* (1901) 109 Wis. 602, 85 N. W. 499. An employee on a baling machine, who seizes a joist for use in connection therewith from a pile lying before him assumes the risk of an injury from the breaking of such joist. *Maloney v. United States Rubber Co.* (1897) 169 Mass. 347, 47 N. E. 1012. A yardman assumes the risk of using a piece of timber found by him in the vicinity as a "push stick," where no push stick is on the engine, and there is no emergency calling for the moving of the car in such manner. *Garrison v. McCullough* (1898) 28 App. Div. 467, 51 N. Y. Supp. 128. A switchman whose duty it is to supply himself with proper coupling pins for different drawheads on cars, which he is to couple, from the pins scattered about in the yard, assumes the risk of using a pin too large for the drawhead of a car, which he finds lying thereon when he attempts to make a coupling. *Missouri, K. & T. R. Co. v. Hauer* (Tex. Civ. App.; 1896), 33 S. W. 1010. It is not improper to instruct a jury that an employee as-

B. ASSUMPTION OF ORDINARY RISKS.

259. Ordinary risks presumed to have been undertaken by a servant.

In 1837 it was laid down in the leading case of *Priestly v. Miller* that a servant assumes all the ordinary risks which are incident to his employment; and this doctrine has ever since been applied by the courts of all the countries in which the common law is the prevailing system of jurisprudence.² The inability to maintain an action is a peremptory conclusion of law, if it is apparent that the injury resulted from a risk of this description, unless the plaintiff can adduce evidence which fairly tends to show that the injured person, by reason of his want of experience or his tender years, was not charged with that comprehension of the risk which, in the absence of such evidence, he is presumed to have possessed. See § 260, *infra*.

The resulting situation, when considered from the standpoint of the master's duty, is that he is under no obligation to provide against the ordinary risks incident to the performance of the contract of service³ (compare § 239, *ante*), the rule under this form also being applied in the case of inexperienced persons and minors (compare §§ 220, 20, and 244-251, *ante*). Accordingly, if the risk to which the injury was due was an ordinary one, the employer is not liable even if the employee did use ordinary care.⁴ The obligation of the servant to

assume the danger incident to a machine of which he has the optional use. *International & G. V. R. Co. v. McCarthy* (1885) 64 Tex. 632.

The servant's inability to maintain an action for injuries caused by a co-employee's selection of an appliance is discussed in chapter XXXII., *post*.

³ *Moss, & W. I. Murph. & H.* 305, 1 Jur. 987.

⁴ "The servant, when he undertakes to perform any particular service, assumes, as a part of his conventional obligations, the ordinary perils which in the nature of things are incident to such service." *Harrison v. Central R. Co.* (1865) 31 N. J. L. 293. See also the cases cited *passim* in the notes to the present subtitle. In an early Irish case it was somewhat inaccurately observed that a servant "is supposed to undertake the duty for which he is paid, subject to all the risks which may occur during its continuance." *Potts v. Plunkett* (1859) 9 Ir. C. L. Rep. 290. The context, however, shows that it was not intended to charge the servant with an assumption of "all the risks" in the literal sense of

the phrase, risks created by the negligence being excepted from the undertaking. Compare §§ 1, 2, *ante*. *McCarthy v. Greeley* (1888) 146 Mass. 196, 15 N. E. 654.

⁵ *Northern C. R. Co. v. Hanson* (1882) 101 Pa. 1, 47 Am. Rep. 690; *H. & O. S. W. R. Co. v. Amor* (1898) 2 Ind. App. 378, 49 N. E. 854; *Met. v. Missouri P. R. Co.* (1894) 58 Mo. App. 281. A jury is properly instructed that a servant who uses an implement, knowing of defects therein, assumes the risks thereof, although the defects may be such that a man of ordinary prudence might take the risks. *M. & K. & T. R. Co. v. Wood* (1896) Tex. Civ. App. 35 S. W. 879. The principle stated in the text is singularly inconsistent with the statement in a later decision by the same court which formulated that principle. In *Bond v. Harris* (1896) 176 Pa. 484, 35 Atl. 222 it was remarked: "Employees, when they take service upon a railroad know that it is a service which exposes them to many dangers necessarily incident to the employment. The risk of the dangers they assume when they accept the

use proper care is obviously quite immaterial when the applicability of the doctrine as to assumption of risks is in question.¹

260 Rationale of the doctrine of the assumption of ordinary risks.—

The doctrine stated in the preceding section may be regarded as one which rests upon two presumptions: First, that, under normal circumstances, a person who enters any given employment appreciates all the risks which are normally incident to that employment; and, secondly, that the fact of his accepting the employment with this appreciation of the risks which it normally involves warrants the inference that he agrees by implication to relieve the master of all responsibility for such injuries as he may receive as a result of their existence, the consideration for this implied agreement being the stipulated compensation, which is supposed to be sufficient to indemnify him for the ever present possibility that one or the other of the risks thus undertaken may eventuate in some disaster.

a. Presumption that ordinary risks are comprehended by a servant.

In support of the first branch of the above statement some explicit language of the courts may be cited.² More frequently, however, the

employment. As between themselves and their employer, they undertake to exercise the measure of attention and care necessary to protect themselves from such dangers, and if they fail in this respect, and suffer injury in consequence, they are powerless."

¹ This consideration seems to have also escaped the notice of the court in *Slough v. Duluth & W. R. Co.* (1891) 40 Minn. 384, 49 N. W. 187, where it was held that, where an employee in charge of a hand car on a railway track, whose duty it was to return with it before night, stopped by the way, and spent the evening in social pleasure at neighboring saloons, and wrongfully delayed his train till it became too dark to observe freight cars which had in the meantime been left by the railway company standing on the track, he voluntarily took the risk of running his car in the darkness. The reasoning of the court is as follows: "It is true, these persons in charge of the hand car were bound to return with the hand car, and in so doing must use the track; but they cannot complain of obstructions or cars on the track, placed there in the ordinary course of the business of the company, which they did not discover because of the darkness, if, through their own folly and breach of duty to the defendant, their return was delayed till after it became too dark to proceed with safety,

whereby they disabled themselves from discovering any obstructions they might otherwise have avoided. Having thus placed themselves in the wrong, they took the risk of the darkness, and were bound to proceed with such caution as might be necessary to secure their safety. They had only a little over a mile to run; but, charge they even that it was too dark to see the freight cars on the track, they were bound to the rate of at least 7 miles an hour when the collision occurred, and the nature of the accident and of the consequences show that they were not exercising a proper caution under the circumstances." It is submitted that the arguments on the evidence here stated establish the duty whatever to protect the plaintiff from the obstructions in question, and that the action should have been dismissed on this ground, the existence or absence of due care on the plaintiff's part being wholly immaterial under the circumstances. As to the confusion between the defenses of assumption of risks and contributory negligence, see the discussion in chapter XVIII, B, *post*.

² The servant "must be held to have understood the ordinary hazards attending his employment, and therefore to have voluntarily taken upon himself the hazard when he entered into the defendant's service." *Holden v. Smith & Hfg. Co.* (1861) 29 Conn. 548. "An

doctrine involved is left as an indirect, but none the less certain, deduction from the fact that, in passages affirming or discussing the servant's acceptance of ordinary risks, judges employ a phraseology which shows that an ordinary risk is always viewed by them as being one which is comprehended by the servant, and that a risk which is ordinary and at the same time not appreciated by the servant involves a logical impossibility and a contradiction in terms.²

employee of mature years and of ordinary mental capacity and intelligence is presumed to know, appreciate, and assume the ordinary and apparent risks of injury from the machinery and appliances with or about which he is working." *Jones v. Manufacturing & Trust Co.* (1899) 92 Me. 565, 43 Atl. 512. "The rule is that the servant is held by his contract of hiring to assume the risk of injury from the ordinary dangers of the employment; that is to say, from such dangers as are known to him, or discernible by the exercise of ordinary care on his part." *Johnson v. Devoe Snuff Co.* (1898) 62 N. J. L. 417, 41 Atl. 936. According to a distinguished English judge, the nonliability of master to servant in cases where a stranger would be liable appears to be founded on the servant's undertaking or subjecting himself to the "ordinary" risk of his service, the dangers of which "he is just as likely to be acquainted with as the master." Grove, J., in *Fowler v. Lock* (1872) L. R. 7 C. P. 272. The risks "ordinarily incident to the service" include "all of which the servant has notice;" that is, all that are "patent and obvious to him." *Taylor v. Wootan* (1891) 1 Ind. App. 188, 27 N. E. 502.

"A workman or servant, on entering upon any employment, is supposed to know and to assume the risks naturally incident thereto. If he is to work in conjunction with others, he must know that the carelessness or negligence of one of his fellow servants may be productive of injury to himself; and, besides this, what is more material as affecting his right to look to his employer for damages for such injuries, he knows or ought to know that no amount of care or diligence by his master or employer can by possibility prevent the want of due care and caution in his fellow servants, although they may have been reasonably fit for the service in which they are engaged. It is certainly not just and reasonable that consequences which the servant or workman must have foreseen on entering into an employment,

and which due care on the part of the employer or master could in no way prevent, should not be visited on the latter." *Stone v. Housatonic R. Co.* (1887) 8 Allen, 441, 85 Am. Dec. 720. "When the plaintiff entered the defendant's service, he impliedly agreed to assume all the obvious risks of the business, including the risk of injury from the use of machinery then openly used. It is not material whether he examined the machinery before making his contract or not. He could look at it if he chose or he could say, 'I do not care to examine it; I will agree to work in this mill and I am willing to take my risk in regard to that.' In either case, he would be held to contract in reference to the arrangement and kind of machinery then regularly in use by his employer, so that as these things were open and obvious, so that they could readily be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage." *Roman v. Sevier & D. Co.* (1894) 161 Mass. 153, 36 N. E. 180. "One entering the employment of another assumes the obvious risks arising from the nature of the employment, from the manner in which the business is carried on, and from the condition of the ways, works, and machinery, if he is of sufficient capacity to understand and appreciate them." *Gooden v. Boston & A. R. Co.* (1894) 162 Mass. 288, 38 N. E. 500. "Parties entering into a contract for service by one of them make their engagements in reference to the subject-matter to which the contract relates; their rights and liabilities depend on the contract as applied to the subject with which they are dealing. The employee impliedly agrees to assume the obvious risks of the business in which he contracts to work." *Thomas Wilson's Sons & Co.* (1887) 118 Mass. 408, 47 N. E. 111. "In entering an employment the latter [servant] is assumed to have notice of all the risks incident thereto, of which he is

The considerations which have induced the courts to entertain the presumption of the servant's knowledge of all ordinary risks are well set forth in the following passage:

"An employee will be deemed to have assumed all the risks naturally and reasonably incident to his employment, and to have notice of all risks which, to a person of his experience and understanding, are, or ought to be, open and obvious. This is a reasonable rule, for, when a man seeks employment in any particular department, of either industrial or intellectual activity, he thereby represents himself to be qualified by the necessary experience or learning, as the case may be,

informed, or of which it is his duty to inform himself." *Sykes v. Packer* (1882) 99 Pa. 465, citing Whart. Neg. § 206. "When a servant knows the dangers he has to encounter, and still engages in the service, he has no ground for complaint if he receive injuries from such dangers." *Winkler v. St. Louis Basket & Box Co.* (1897) 137 Mo. 394, 38 S. W. 922. A servant who engages to do a particular duty in a particular manner, and has full knowledge of the dangers incident to the performance of the duty, cannot complain that the thing he undertakes to do is dangerous. *Kuhns v. Wisconsin, I. & N. R. Co.* (1887) 70 Iowa, 561, 31 N. W. 868. An employee of mature age is presumed, on taking employment in any service, to possess knowledge and skill fitting him therefor, and to be acquainted with the dangers attending such service. *Petersen v. New Pittsburg Coal & Coke Co.* (1898) 149 Ind. 260, 49 N. E. 8. "A servant is understood to assume the ordinary risks incident to the particular service in which he voluntarily engages to the extent those risks are known to him at the time of his employment, or should be readily discernible to a person of his age and capacity in the exercise of ordinary care and prudence." *Stager v. Troy Laundry Co.* (1901) 38 Or. 480, 53 L. R. A. 459, 63 Pac. 645.

In the leading case of *Priestley v. Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, Lord Abinger, during the argument, distinguished between the case of a passenger on a stagecoach who had no means of knowing how the coach was constructed or loaded, and the case of the regular driver of a van, who was on his master's premises and had the means of knowledge.

Compare also the following statements: The servant assumes "the ordinary risks and perils incident to the

employment which the servant can foresee, or shun, or avoid, or guard against by prudence, skill, and forecast" (*Cooper v. Pittsburgh, C. & St. L. R. Co.* [1884] 24 W. Va. 37); all risks naturally and reasonably incident to the service in which he embarks, so far as the hazards of the service are obvious and within the apprehension of a person of his experience and understanding (*Jennett Electric Light & P. Co. v. Murphy* [1888] 115 Ind. 560, 18 N. E. 30); the risk of injury from all the ordinary dangers incident to the employment, of which he had notice before voluntarily exposing himself (*Paland v. Chicago, St. L. & V. O. R. Co.* [1892] 44 La. Ann. 1003, 11 So. 707); "all the usual, known dangers incident to the employment" (*Herdman-Harrison Milling Co. v. Spehr* [1893] 145 Ill. 329, 33 N. E. 911); the dangers which naturally arise from the nature of the work to be performed, whether visible or invisible, known or unknown (*Linton Coal & Min. Co. v. Persons* [1895] 15 Ind. App. 69, 43 N. E. 651); "all the open and visible risks incident to the employment in which he engages" (*Hall v. Chicago, B. & V. R. Co.* [1891] 46 Minn. 439, 49 N. W. 239); "ordinary and apparent" risks (*Coalbrook v. Maine C. R. Co.* [1885] 77 Me. 165).

The possibility of a fellow servant's being negligent was spoken of as a hazard well known to the plaintiff in *International & G. N. R. Co. v. Turner* (1888) 72 Tex. 308, 11 S. W. 1043.

Other cases in which language is used which brings out the constant logical association between the notions of the ordinary quality of risks and the servant's comprehension thereof are the following: *Day v. Toledo, C. & D. R. Co.* (1880) 42 Mich. 523, 4 N. W. 203; *Hathaway v. Michigan C. R. Co.* (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634; *Kuhns v. Wisconsin, I. & N. R. Co.*

for the performance of the duties which he proposes to assume; and such experience or learning necessarily brings a knowledge of the ordinary risks of the employment."³

b. Presumption that a servant agrees to undertake ordinary risks.—It has frequently been declared that the consideration of the servant's implied contract to assume the ordinary risks of his employment is the stipulated compensation for his services, and that the amount of that compensation is adjusted with reference to the character of the risks.⁴ Obviously, however, this theory is borne out only to a

(1887) 70 Iowa, 561, 31 N. W. 868; *Doyle v. St. Paul, M. & M. R. Co.* (1889) 42 Minn. 79, 43 N. W. 783; *Northern C. R. Co. v. Husson* (1882) 101 Pa. 1, 47 Am. Rep. 690; *Texas & P. R. Co. v. Winick* (1894) 10 C. C. A. 1, 23 U. S. App. 310, 61 Fed. 635; *Coalbrook v. Maine C. R. Co.* (1885) 17 Me. 165; *Foster v. Kansas Salt Co.* (1899) 60 Kan. 859, 57 Pac. 961; *Gibson v. Oregon Short Line R. Co.* (1893) 23 Or. 493, 32 Pac. 295. See also the cases cited in § 266, *infra*, as to the assumption of the risks of unusually dangerous employments. The rationale of these rulings is in part that such risks are an obvious incident of the work to be done. In *Louisville, N. A. & C. R. Co. v. Francey* (1886) 110 Ind. 18, 9 N. E. 594, it was remarked that the rule by which a servant assumes the usual risks of the service is "especially" applicable to all those risks which require only the exercise of ordinary observation to make them apparent. So also in *Steinhäuser v. Spraul* (1895) 127 Mo. 541, 27 L. R. A. 441, 28 S. W. 620, 30 S. W. 102, it was said that a servant "assumes the risks incident to such employment, and this is especially true of seen dangers and patent defects." But the implied qualification, if it was really intended as such, which is indicated by the latter clauses in these statements, is inconsistent with the cases already cited.

³ *Waggoner v. H. W. Jayne Chemical Co.* (1892) 147 Pa. 475, 23 Atl. 772. So, also, it has been said that a servant who enters a certain employment implicitly stipulates that he has the experience to perform properly the duties of his position, and that he knows at least the obvious dangers attending the employment in which he engages. *Hapner v. Chicago, R. I. & P. R. Co.* (1884) 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680. Similar statements are found in *Gulf, C. & S. F. R. Co. v. Williams* (1888) 72 Tex. 159, 12 S. W. 172, and *Brown v. Oregon I. & N. R. Co.* (1893) 24 Or. 315, 33 Pac. 17.

It has been held, however, that a employee in a sawmill who applies to be retained as an oiler some time after he has been employed as such does not thereby represent himself as competent for the position and assume all its risks, where his request has no influence on the employer's action. *Gutierrez v. Knapp-Stout & Co. Co.* (1895) 90 Wis. 123, 62 N. W. 625.

"The presumption of law is that the risks are considered in adjusting the amount of compensation for the services to be rendered." *Cumberland & P. R. Co. v. State* (1875) 44 Md. 283. "The relation of master and servant, . . . as between himself and his master, is supposed to have contracted on those terms." *Vogel v. Smith* (1856) 28 Vt. 59. Ordinary risks "are supposed to enter into the compensation to be received by him for his services." *Cooper v. Pittsburgh, C. & St. L. R. Co.* (1884) 24 W. Va. 37. "A servant has the means of knowing as well as his employer, the usual perils of the business, and can exact a rate of compensation in reference to them." *Sherman v. Rochester & N. R. Co.* (1878) 17 N. Y. 156. The servant is paid for the exact position and hazard he assumes, and so he may terminate his employment when, from unforeseen causes, he finds his reward inadequate or unsatisfactory. . . . The employee, having knowledge of the circumstances and entering his (i. e. the master's) service for the stipulated reward, cannot complain of the peculiar tactics or habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service." *Hawley v. Smithville Mfg. Co.* (1861) 29 Vt. 548. Compensation is supposed to be adjusted with reference to the hazardous nature of the service. *Stager v. Laundry Co.* (1901) 38 Or. 480, 71 L.

limited extent by the actual facts of everyday life, and for this reason it cannot be regarded as anything more than a convenient juristic fiction propounded for the purpose of obtaining a rational foundation for a doctrine already formulated.²

R. A. 459, 63 Pac. 645. In *Chicago, M. & St. P. R. Co. v. Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 181, Mr. Justice Field, after referring to the rule defining the liability of a master for injuries caused by his servants to third persons, proceeded thus: "Where injuries befall a servant in its employ, a different principle applies. Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer. The obvious reason for this exemption is that he has, or in law is supposed to have, them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid." The following passage from the recent decision in *Bethlehem Iron Co. v. Weiss* (1900) 40 C. C. A. 270, 274, 100 Fed. 45, may also be advantageously quoted in this connection: "It is the duty of the master, whether that duty rests upon the terms of the contract of service, expressed or implied, or upon the rules of law governing the situation, to see to it that the servant is exposed to no extraordinary risks which he could not reasonably anticipate. In other words, that there are no risks attending the business other than such as usually attend business of that general nature, or, if there are such extraordinary risks, that they should be explained to the servant, or be known by or be entirely obvious to him. The servant also has the right to expect from the master that his fellow servants have been selected with due regard to their competency and carefulness, and that they are under such proper supervision as the case may require. In this sense, it is the duty of the master to provide for the servant a reasonably safe place to work in, and it is in this sense alone that the duty thus stated is to be understood; otherwise, it would be inconsistent with the well-established rule of law that a servant, upon entering the service of his master, assumes all the

ordinary risks incident to the service, so far as those risks at the time of entering upon the service are known to him, or should be readily discernible to a person of his age and capacity in the exercise of ordinary care, and whether the business is dangerous or not. The law governing the relation of master and servant assumes freedom of contract between them. Much of the world's work is dangerous, and it could hardly be carried on successfully unless those who were employed in it should be held to assume the dangers that were incident to it, or which were known, or so obvious that they ought to be known, by one entering the employment." Before the abolition of slavery in the United States, the accepted rule was that a person hiring the services of a slave was not liable for an injury resulting to such slave from any of the usual hazards incident to the employment, the reason assigned being that such hazards were presumed to be known to the owner of the slave and taken into account when the rate of compensation was fixed. *Heathcock v. Pennington* (1850) 33 N. C. (11 Fred. L.) 640; *McDaniel v. Egan* (1846) 2 Rich. L. 455; *Kelly v. Wallace* (1856) 6 Fla. 690; *Pensacola & G. R. Co. v. Vach* (1868) 12 Fla. 497. As the English employers' liability act of 1880 and the American statutes modeled upon it (see chapter XXXVII, *post*) have put servants upon the same footing as strangers in actions for negligence, and no contract to assume the risks of a given situation can be implied in the case of any person other than a servant, the effect of those statutes is to take from the master the defense that all ordinary risks incident to an employment are assumed by the servant, unless they are concealed, or are known to the master, and not to the servant. *Thomas v. Quartermaine* (1887) 1 L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, per Lord Esher.

²The following passage puts the case for the theory much too strongly: "The ordinary risks of the service in which one is engaged are usually, in fact, considered in making the engagement and adjusting the wages. And this may,

An attempt has also been made to justify the doctrine that the servant implicitly agrees to assume the ordinary risks of his employment by the considerations "that he is as well able to guard against them as his employer; and that it is equally just and reasonable to both, and strongly calculated to secure fidelity and prudence on the part of the servant, that he should rely solely on the skill and prudence of himself and his fellow servants in the business for protection from injury."⁶ But the common sense of the matter is rather that which is expressed in the following passage of the opinion in an oft-cited case:

"It is assumed that the exemption operates as a stimulant to diligence and caution on the part of the servant for his own safety as well as that of his master. Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of servants constitute the chief protection against accidents. But it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant."⁷

261. What risks are deemed ordinary; generally.—An examination of the language and reasoning of the courts shows that the question whether a risk is or is not an ordinary one may be determined with reference to either one of two conceptions which are logically distinct.

According to one of these, the differentiating test is furnished by the principle already adverted to in § 3, *ante*, viz., that every risk which is not caused by a negligent act or omission on the master's part is assumed by the servant. An investigation conducted along the line thus indicated obviously throws us back upon the doctrines examined in the preceding chapters. The passages quoted in the subjoined note will serve as sufficient illustration of the phraseology used by the

with great propriety, he held to be always so in legal contemplation." *Chicago & G. E. R. Co. v. Horney* (1867) 28 Ind. 28, 92 Am. Dec. 282.

⁶ *Sherman v. Rochester & S. R. Co.* (1858) 17 N. Y. 156. In one case the doctrine as to the assumption of ordinary risks is spoken of as being founded either on an implied agreement or upon considerations of public policy. *De Graff v. New York C. & H. R. R. Co.* (1879) 76 N. Y. 132. But the more correct way of stating the situation manifestly is that considerations of public

policy are the basis upon which the implication of the contract depends and by which it is justified. In *Goode v. Boston & A. R. Co.* (1894) 162 Mass. 288, 38 N. E. 500, the court, in reiterating the ordinary rule, deemed it unnecessary to inquire whether it "rests upon contract or upon the inherent reasonableness and justice of the rule itself as applied to the relations of master and servant."

⁷ *Chicago, M. & St. P. R. Co. v. Ross* (1884) 112 U. S. 377, 382, 28 L. ed. 787, 789, 5 Sup. Ct. Rep. 184.

courts for the expression of the principle that the risks which an employment still involves after a master has done everything that the law requires him to do for the purpose of securing the safety of his servants are presumed to be accepted by each and all of those servants, unless by reason of their immature age or their inexperience they are incapable of appreciating the hazards to which they are exposed.¹

The risks of employment assumed are those which occur after the master has done what the law enjoins. *Benzing v. Stearns & Sons* (1886) 101 N. Y. 547, 1 N. E. 449. "The law implies as part of the contract of service that the servant agrees to and does assume all the ordinary risks of personal injury, without negligence of his employer." *Sheridan v. Rochester & S. R. Co.* (1858) 17 N. Y. 153, 156. "In all cases at common law, a master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work." *Atchison, T. & S. F. R. Co. v. Moore* (1883) 29 Kan. 632. "It is well settled that where one enters into the service of another he assumes to run all the ordinary risks pertaining to such service; and this means only that he cannot recover for any injury that his employer, by the exercise of ordinary care and prudence, could not provide against." *Louisville, C. & L. R. Co. v. Carver* (1873) 9 Bush, 559, 565. "A servant by entering into his master's service assumes all the risks of that service which the master cannot control." *Gibson v. Eastern R. Co.* (1865) 10 Allen, 233, 87 Am. Dec. 675, quoted with approval in *Caldwell v. Brown* (1866) 53 Pa. 453. "Ordinary risks are such as remain after the employer has used all reasonable means to prevent them." *Selen v. Southern P. Co.* (1890) 6 Utah, 319, 23 Pac. 751. It is only such injuries as have arisen after the exercise of that diligence and care on the part of the master, that properly be termed accidents or chances, which the servant has im-

pliedly agreed to risk and for which the master is not liable." *Noyes v. Smith* (1856) 28 Vt. 59. The risks which the servant assumes are "necessary risks, such as attach or belong to the work, and which even the ordinary care of the master cannot provide against." *Halliburton v. Wabash R. Co.* (1894) 58 Mo. App. 27.

For other cases in which this mode of expression is employed, see *Hudson v. Ocean S. S. Co.* (1888) 110 N. Y. 625, 17 N. E. 312; *Louisville & N. R. Co. v. Boland* (1892) 96 Ala. 626, 18 L. R. A. 260, 11 So. 667; *Little Rock & Ft. S. R. Co. v. Dugan* (1880) 35 Ark. 602; *Illinois C. R. Co. v. Quick* (1893) 51 Ill. App. 607; *Hausier Stone Co. v. McCann* (1892) 133 Ind. 231, 31 N. E. 956; *Dundie v. Southern P. R. Co.* (1890) 42 La. Ann. 686, 7 So. 792; *Thomas v. Missouri P. R. Co.* (1891) 109 Mo. 187, 211, 18 S. W. 980; *Muirhead v. Hannibal & St. J. R. Co.* (1885) 19 Mo. App. 634; *Carlson v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 450, 28 Pac. 497; *Davis v. Baltimore & O. R. Co.* (1893) 152 Pa. 314, 25 Atl. 498; *H. S. Hopkins Bridge Co. v. Burnett* (1892) 85 Tex. 16, 19 S. W. 886; *Johnson v. Chesapeake & O. R. Co.* (1892) 36 W. Va. 73, 14 S. E. 432. One particular form of the principle deserves special notice, viz., that which is suggested by considering it in its relation to the doctrine that the servant cannot recover for injuries due to defective conditions of which the master had no constructive notice. See chapters X., XI., *ante*. The servant is said to assume the risks of "latent defects," i. e., defects which the master cannot be expected to discover. *Richardson v. Cooper* (1878) 88 Ill. 270 (273). The question whether the breaking of a ladder, caused by a cross piece therein breaking because a nail that fastened its left end to the side piece was driven near a knot in the side piece, was one of the ordinary risks of plain-tiff's employment, is for the jury. *Flanigan v. Guggenheim Smelting Co.* (1899) 63 N. J. L. 647, 44 Atl. 762. A jury is properly instructed that a rail

According to the other conception the essential inquiry will simply be whether or not the risk can reasonably be said to answer the description of "ordinary," supposing that word to be construed in its familiar, everyday sense.² Two separate ideas, one or other of which is more or less prominent according to the nature of the evidence, are conveyed by this epithet. One is that the occurrence which produces the risk is so regularly and normally incident to the employment that anyone who considers the matter at all must see that the liability to be injured by such an occurrence is an ever-present possibility.³ An-

road brakeman assumes the risk of a latent defect in a coupling link not discoverable on inspection. *Alabama G. S. R. Co. v. Carroll* (1898) 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 772. But as a brakeman in taking service assumes all the risks normally incident to the employment, it is a misdirection to tell a jury that he assumes only the risk of such secret defects as could not be discovered by the employer by ordinary diligence and those which were open to common observation. *Texas Mexican R. Co. v. King* (1896) 14 Tex. Civ. App. 290, 37 S. W. 34.

² This term is the one most commonly used to designate risks of the class now under discussion. The cases in which it is found are so numerous that it is not worth while to undertake to collect them. In *Prather v. Richmond & D. R. Co.* (1888) 80 Ga. 434, 9 S. E. 530, the defendant criticised the use of the words "ordinary perils," in a charge, because the jury might infer from it that, if accidents frequently happened, they were therefore ordinary perils, and no recovery could be had though the other employees were negligent. But the court said: "We do not think that any such inference could be drawn from the language used. Taken in connection with the charge upon the question of negligence, it is a sound proposition in law. The only adverse criticism we can make upon the charge as given is the use of the word 'ordinary.' Why confine it to the word 'ordinary?' Does not the employee assume the risk of all perils incident to his employment,—necessary, ordinary, and extraordinary,—except the negligence of the company, its servants and agents?" (It should be remembered, in reading the extract, that in Georgia the doctrine of common employment has been abrogated by statute, so far as railroad companies are concerned).

³ A servant assumes the risk of injury occasioned by a casualty, the happening

of which is to be reasonably anticipated as a natural incident to and consequence of the work in which he is employed. *Noble v. Jones* (1897) 103 Ga. 584, 30 S. E. 535. In a leading case the servant was spoken of as assuming the "probable dangers attendant upon entering the engagement in question." *Morgan v. L. & N. Ry. Co.* (1864) 5 Best & S. 570, 33 L. J. Q. B. N. S. 260.

The idea expressed in the text obviously underlies the following phrases, which have been used in speaking of ordinary risks: Obviously incident to the work (*Winkler v. St. Louis Basket & Box Co.* [1896] 137 Mo. 394, 38 S. W. 921); ordinary incident as a matter of common knowledge (*Hannigan v. Lehigh & H. R. Co.* [1898] 157 N. Y. 244, 51 N. E. 992); belonging to the work itself or to the service in which the servant engages (*Perry v. Marsh* [1854] 25 Ala. 659); ordinarily incident to the employment (*Consolidated Coal Co. v. Haenni* [1893] 146 Ill. 614, 35 N. E. 162; *Little Rock & Ft. S. R. Co. v. Duffey* [1880] 35 Ark. 602; *Texas & P. R. Co. v. Minnick* [1893] 6 C. C. A. 387, 13 U. S. App. 520, 57 Fed. 362; *Rhea v. West Virginia C. & P. R. Co.* [1885] 27 W. Va. 146; *Gaffney v. New York & N. E. R. Co.* [1887] 15 R. I. 456, 7 Atl. 284; *Galveston, H. & S. A. R. Co. v. Garrett* [1889] 73 Tex. 262, 13 S. W. 62); incident to the service, work, business, or employment (*Noyes v. S. & O.* [1856] 28 Vt. 59; *Tuttle v. Detroit, G. H. & M. R. Co.* [1886] 122 U. S. 195, 39 L. ed. 1114, 7 Sup. Ct. Rep. 1166; *Davis v. Baltimore & O. R. Co.* [1893] 152 Pa. 314, 25 Atl. 498; *Quinn v. Johnson Forge Co.* [1892] 9 Houst. 338, 32 Atl. 858; *Tribay v. Brooklyn Lead Min. Co.* [1886] 4 Utah, 468, 11 Pac. 612; *Stonhauser v. Spraul* [1895] 127 Mo. 541, 27 L. R. A. 441, 28 S. W. 620, 30 S. W. 102); common occurrence (*Doyle v. St. Paul, M. & M. R. Co.* [1889] 42 Minn. 79, 43 N. W. 787); common incident

other is that the risk is one which must always exist by reason of the inherent and unavoidable characteristics of the operations which the servant is required to perform.⁴ In some statements these two ideas are combined.⁵ The second of these ideas clearly carries us very near

(*Davis v. Baltimore & O. R. Co.* [1893] 152 Pa. 314, 23 Atl. 498); usually incident to the employment (*Texas & P. R. Co. v. Archibald* [1898] 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777); usual (*Davidson v. Cornett* [1892] 132 N. Y. 234, 30 N. E. 573; *Blanton v. Dold* [1891] 109 Mo. 75, 18 S. W. 1149); usual and ordinary (*Worlds v. Georgia R. Co.* [1896] 99 Ga. 283, 25 S. E. 646; *Atchison, T. & S. P. R. Co. v. Wagner* [1885] 33 Kan. 666, 7 Pac. 208); usual or ordinary (*Illinois Steel Co. v. Bauman* [1899] 178 Ill. 351, 53 N. E. 107); naturally incident to the employment (*Morgan v. Vale of Neath R. Co.* [1864] 5 Best & S. 570, 33 L. J. Q. B. N. S. 260; *Uren v. Golden Tunnel Min. Co.* [1901] 24 Wash. 261, 64 Pac. 174); natural and ordinary (*Landgraf v. Kuh* [1900] 188 Ill. 481, 59 N. E. 501; *Hoard v. Mississippi C. R. Co.* [1874] 50 Miss. 178); natural or ordinary (*Schneidner v. Borge* [1884] 33 Hun. 186); natural (*Morgan v. Vale of Neath R. Co.* [1864] 5 Best & S. 570, 33 L. J. Q. B. N. S. 260; *Cumberland & P. R. Co. v. State* [1875] 44 Md. 283; *Couch v. Charlotte, C. & A. R. Co.* [1884] 22 S. C. 557; *Gulf, C. & S. F. R. Co. v. Silliphant* [1888] 70 Tex. 623, 8 S. W. 673); accompanying or arising from the natural or usual method of conducting the particular business (*Strager v. Troy Laundry Co.* [1901] 38 Or. 480, 53 L. R. A. 459, 63 Pac. 645); naturally and reasonably incident to the service (*Jenny Electric Light & P. Co. v. Murphy* [1888] 115 Ind. 566, 18 N. E. 30; *Philadelphia, W. & B. R. Co. v. Keenan* [1883] 103 Pa. 124; *Rummell v. Diltworth* [1885] 111 Pa. 343, 2 Atl. 355; *Wagner v. H. W. Jayne Chemical Co.* [1892] 147 Pa. 475, 23 Atl. 772).

The use of the word "naturally" in charging the jury that a servant assumes all risks ordinarily or naturally incident to his employment is not objectionable. *Missouri, K. & T. R. Co. v. St. Clair* (1899) 21 Tex. Civ. App. 345, 51 S. W. 666.

That a hazard is not necessarily taken out of the category of those which are assumed, merely for the reason that it is "unusual" in the sense of being infrequent, see *Jackson-*

ville, T. & K. W. R. Co. v. Galvin (1892) 29 Fla. 636, 16 L. R. A. 337, 11 So. 231, where it was held that a brakeman was held to assume the risk of injury from iron or lumber projecting over the end of a car.

In an action for injuries received by a brakeman while coupling cars owing to a sinking of the drawhead alleged to be the result of a defect in the carrier iron, it is error to refuse to impart greater explicitness to an instruction which merely tells the jury in general terms that the employer is bound to use ordinary care in furnishing reasonably safe appliances, by the addition of a charge to the effect that, in determining whether the defendant company is liable or not, they may consider whether or not it was a usual thing for the defendant to have on its line cars with different heights of drawbars, and whether or not those engaged in the transportation and inspection of cars, in the exercise of reasonable care on their part, would consider such defects as may be shown by the evidence to be such as would be likely to occur in the business of railroading, which may be reasonably anticipated by those engaged in the business of handling the cars. *Texas & P. R. Co. v. Rhodes* (1895) 18 C. C. A. 9, 30 U. S. App. 561, 71 Fed. 145.

⁴In this point of view ordinary risks have been described by one of the following epithets: Necessary (*Sommers v. Carbon Hill Coal Co.* [1898] 91 Fed. 337); necessarily incident to the employment or business (*Bond v. Harris* [1896] 176 Pa. 484, 35 Atl. 222; *Louisville & N. R. Co. v. Boland* [1892] 96 Ala. 626, 18 L. R. A. 260, 11 So. 667; *Louisville & N. R. Co. v. Gauer* [1887] 85 Tenn. 465, 3 S. W. 824); necessarily attendant upon the conduct of the business (*Dowell v. Burlington, C. R. & N. R. Co.* [1883] 62 Iowa, 629, 17 N. W. 901); inseparable from the business (*Brown v. Chicago, R. I. & P. R. Co.* [1886] 69 Iowa, 161, 28 N. W. 487; *Dowell v. Burlington, C. R. & N. R. Co.* [1883] 62 Iowa, 629, 17 N. W. 901).

⁵As, where the courts speak of neces-

to the conception that the risks which are assumed are those which cannot be obviated by the exercise of due care on the master's part.

In a strictly logical sense it is manifest that, as the proposition that the master was not in fault in permitting the existence of a given risk is directly and necessarily implied in the proposition that the risk was an ordinary one, the situations covered and defined by these two conceptions must be identical. But the present writer is strongly of the opinion that, in practical litigation, the method of inquiry which will produce the most equitable and satisfactory results is that which fixes the attention first of all upon the question of the defendant's negligence.

It is impossible to make any extensive study of the cases without coming to the conclusion that the application of the test supplied by the second conception not infrequently results in the formation of a sort of vicious circle, in which the essential question whether there was culpability on the master's part is apt to be lost sight of or obscured to the servant's disadvantage.

The question whether a risk is ordinary, being one of fact, is primarily for the jury.⁶ But the risk may be declared by the court to be an ordinary one whenever it is of opinion that there is no sufficient evidence to warrant the opposite conclusion.⁷ Cases illustrating both these situations will be found cited in the notes to the ensuing sections.

262. Risks caused by the acts of fellow servants.— In the earlier case in which the doctrine as to ordinary risks was laid down, the injury was caused by the negligence of a fellow servant.¹ The cases dealing with this aspect of the doctrine are reviewed at length in the second volume of this treatise, and need not be further discussed in this place.

263. Risks arising from the character of the instrumentalities used.— The recognition of the right of an employer to carry on his business in his own way, and to adopt any pattern or description of instrumen-

ary and usual risks (*Strahlendorf v. Western Teleph. Co.*, 1892, 56 Ark. 206, 19 S. W. 575; *Rosenthal* [1872] 30 Wis. 674; *Schultz v. Chicago & N. W. R. Co.*, [1878] 44 Wis. 638); or natural and necessary hazards (*Harding v. Redman Transfer Co.*, [1900] 80 Minn. 504, 83 N. W. 395).

As a servant assumes the risks which commonly attend the employment, it is error to charge that he assumes only the risks which are necessarily incident to it. *Gulf, C. & S. F. R. Co. v. Kizziah* (1893) 86 Tex. 81, 23 S. W. 578, Reversing (1893) 4 Tex. Civ. App. 362, 22 S. W. 110, 26 S. W. 242; *South-*

western Teleph. Co. v. Woughter (1892)

56 Ark. 206, 19 S. W. 575.

⁶A charge is erroneous which precludes the jury from the right to consider whether the coupling of a car loaded in a particular way came within the ordinary risks of the employment. *Jacksonville, T. & K. W. R. Co. v. Gorman* (1892) 29 Fla. 636, 16 L. R. A. 37, 11 So. 231.

⁷*Inland Steel Co. v. Eastman* (1898) 80 Ill. App. 59.

¹*Pringle v. Fowler* (1837) 3 M. & W. 1, Murph. & H. 395, 1 Jur. 987.

talities which he may prefer (see chapter v., *ante*), involves the consequence that any risk which is due merely to the character of an instrumentality, and not to its abnormal condition or intrinsically defective quality, is to be deemed an ordinary risk of the employment.¹

¹(a) *Risks assumed on railways.*—A railway servant who has to couple or otherwise handle cars assumes any risks which are created by the peculiar manner in which they are constructed, the inability to maintain the action being asserted whether the cars belong to his own employers or to another company. *Winkler v. St. Louis Basket & Box Co.* (1896) 137 Mo. 304, 38 S. W. 921 (peculiar kind of brake on defendant's own car); *Hulett v. St. Louis, K. C. & N. R. Co.* (1878) 67 Mo. 239 (drawheads of different heights); *Wright v. Delaware & H. Canal Co.* (1886) 40 Hun. 343 (brake on foreign car was of a common construction familiar to injured servant); *Thomas v. Missouri P. R. Co.* (1891) 109 Mo. 187, 18 S. W. 980 (foreign car with couplings of peculiar construction); *Chicago, B. & Q. R. Co. v. Montgomery* (1884) 15 Ill. App. 205 (similar facts).

In several cases the servant has been declared to have no right of action where he is injured while coupling cars with double deadwoods or bumpers, whether the cars belong to his own employers or to another company. *Dysinger v. Cincinnati, S. & M. R. Co.* (1892) 93 Mich. 646, 53 N. W. 825; *Kohn v. McNulta* (1893) 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298; *Toledo, W. & W. R. Co. v. Black* (1878) 89 Ill. 112; *Indianapolis, B. & W. R. Co. v. Flanigan* (1875) 77 Ill. 365; *Batter v. Illinois C. R. Co.* (1892) 69 Miss. 642, 13 So. 827; *Chicago, B. & Q. R. Co. v. Curtis* (1897) 51 Neb. 442, 71 N. W. 42; *Norfolk & W. R. Co. v. Cottrell* (1887) 83 Va. 512, 3 S. E. 123. See also § 394, note 1, subd. c, and § 396, note 3, subd. d, *post*.

Brakemen take the risk of the use by their employers of cars not equipped with air brakes, which will necessitate their moving about over the tops of moving trains. *Rogers v. Louisville & N. R. Co.* (1898) 88 Fed. 462.

The risk arising from the want of check chains on cars is one incident to the employment of a trainman, and he is chargeable with its assumption where he knows that some of the cars are not provided with them, and did not notice, when he took his place on a certain car, whether it had or had not check chains.

Ladd v. New Bedford R. Co. (1876) 119 Mass. 412, 20 Am. Rep. 331. A railroad engineer who knows and understands the features and workings of the engines used by the company, and the character and extent of a watch kept upon a wooden bridge forming part of the road bed, assumes the risk of injuries due to the burning of such bridge by fire set by sparks escaping from the smokestack of one of such engines. *Texas & P. R. Co. v. Winnick* (1893) 6 C. C. A. 387, 13 U. S. App. 529, 57 Fed. 362 (1894), 10 C. C. A. 1, 23 U. S. App. 310, 61 Fed. 635 (smokestack was of a peculiar design, rendering the escape of sparks a common occurrence).

Another application of the general rule is that the enhanced risk of handling cars or engines of different construction is assumed by railway servants, if such risk is apparent and does not require special skill or knowledge to detect it. *Price v. Bane* (1897) 27 C. C. A. 361, 53 U. S. App. 297, 80 Fed. 988 (receiver of railway company held not to be liable for an injury caused by the want of a continuous handrail across the rear end of a switch engine, although such rails were proved to be in use on other engines of that kind); *Woodworth v. St. Paul, M. & M. R. Co.* (1883) 5 McGray, 574, 18 Fed. 282; *Simms v. South Carolina R. Co.* (1886) 26 S. C. 490, 2 S. E. 486; *Henry v. Bond* (1888) 34 Fed. 101; *Rogers v. Louisville & N. R. Co.* (1898) 88 Fed. 462 (cars not of uniform size). In *Louisville & N. R. Co. v. Boland* (1892) 96 Ala. 626, 18 L. R. A. 260, 11 So. 667, it was said: "It is a matter of common knowledge that the demands and exigencies of commerce require, in the transportation of freight, that the cars of one company shall be hauled over the road of another, and that, in order to meet this demand, the gauge of the tracks of the great trunk lines has been made uniform. . . . The taste and judgment of the managers of railroads in selecting styles or patterns of coupling, it has been said, have been as varied as the ingenuity of others in their invention, and, consequently, not only do such patterns vary on different roads, but sometimes on the same road. Cars of these different patterns carrying

264. Risks created by permanent conditions incident to the business as openly conducted.—A doctrine which, in a logical point of view, is perhaps only a specific application of that which is stated in the last section, but which is often formulated as one expressive of a distinct principle, is that an employee assumes, as an incident of his service, any risks which arise from the permanent, visible conditions of the master's plant.¹ In the last analysis this doctrine is obviously referable either to the principle that a master has a right to carry on his business in his own way, or to the principle that it is not negligence to require a servant to encounter perils which he fully understands. In most, if not all, the cases cited below as exemplifying the servant's assumption of the risk in question, one or the other of these two principles is explicitly adverted to as a ground of the decision.²

through freight so often pass from one road to another that the extra hazard thereby occasioned in handling them by employees ought to be considered, and, we may say, is one of the risks or dangers necessarily incident to the employment or business, and which the servant must be deemed to have assumed at the time of entering the service." In *Toledo, W. & W. R. Co. v. Black* (1878) 88 Ill. 112, it was laid down that the risk of coupling cars with coupling bars of different heights which it is necessary to join with crooked links was assumed by brakemen. In *Holmes v. Southern P. Co.* (1898) 120 Cal. 357, 52 Pac. 652, the court, in holding that a railroad switchman assumes the risk of any increase of danger arising from the coupling of cars, the drawhead in one of which is 1½ inches higher than that in the other, when he is frequently required to couple cars with drawheads of different heights, said: "It is manifest that the coupling could have been safely made if the brakeman had been on the alert. . . . Difference (in height) may be expected, and when due diligence is used does not materially increase the danger. In *Gulf, W. T. & P. R. Co. v. Abbott* (1893: Tex. Civ. App.) 24 S. W. 299, the action failed, where there was only 3 inches difference in the heights of the drawbars, and this was shown to be quite a common difference not causing any extra hazard.

(b) *Risks assumed in other occupations.*—An employee engaged in driving piles, whose duty requires him to be at the top of the piles to swing them into position, assumes the risk of injury from the fall of the driving hammer as the machine is constructed. *McPhee v.*

Scully (1895) 163 Mass. 216, 39 N. E. 1007. The risk caused by the want of a loose pulley for shifting the belt by which power is communicated to a machine is assumed by a man who is operating the machine and undertakes to shift the belt. *Thompson v. C. & T. Co.* (1901) 62 App. Div. 279, 70 N. Y. Supp. 1086. For other cases, see notes to chapter v. *ante*.

"So far as risks are obvious, pertaining to the apparently permanent features of the business as it is openly conducted, an employer has a right to believe that his employee agrees to assume them. They are, therefore, not included among those to be guarded against in the performance of his general duty to furnish reasonably safe appointments for the employee, and the employer cannot be held guilty of negligence in failing to make provisions against them." *Muel v. Thomas W. Son's Sons & Co.* (1897) 168 Mass. 408, 47 N. E. 111.

(a) *Risks assumed on railroads.*—A brakeman assumes the risk arising from the fact that the curves in a railroad yard are so sharp as to allow drawbars to pass each other when the cars come together. *Little v. Detroit, G. H. & M. R. Co.* (1887) 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166. A brakeman assumes the risk caused by the want of blocking in frogs, where there has been their normal condition on the defendant's line as long as he has been in the employment. *Southern P. Co. v. Selby* (1893) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *St. Louis, I. M. & S. R. Co. v. Davis* (1891) 51 Ark. 389, 15 S. W. 895 (same facts); *For*

265. Risks arising out of temporary conditions incident to the use of the instrumentalities.—The cases cited in the last two sections exemplify the assumption of these ordinary risks which, in a broad sense, may be regarded as arising from the intrinsic qualities of the instrumentalities or materials used in the employer's business. In the sub-

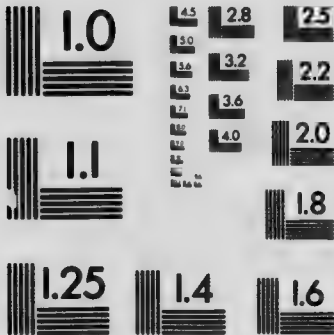
(1881) 74 Ind. 440; (In this case one of the special findings of the jury was that the plaintiff might easily have ascertained the condition of the frogs if he had taken pains to inquire about it). As it is manifest that a split switch can not be blocked without destroying its efficiency, the risk arising from the absence of blocking in this case is one of those assumed by a man who enters the service of a railroad company which, to his knowledge, uses such switches. *Grand v. Michigan C. R. Co.* (1890) 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837. A brakeman after three months of service assumes the risk of falling into a properly located cattle guard while he is coupling cars. *Henderson v. Coons* (1888) 31 Ill. App. 75. A brakeman or switchman who knows that the culverts or ditches crossing the track are without coverings assumes risk of injury therefrom. *West v. Southern P. Co.* (1898) 20 C. C. A. 249, 56 U. S. App. 323, 85 Fed. 392; *De Forest v. Jewett* (1882) 88 N. Y. 264. An employee in a railway yard assumes the risk of falling into an unguarded ash pit at night. *Williams v. Louisville & N. R. Co.* (1901) 64 S. W. 738. The risks arising from the use of a ground switch are assumed by anyone who enters the service of a railway company, in any work connected with the moving or making up of trains in a yard. *Randall v. Baltimore & O. R. Co.* (1883) 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322. A switchman assumes the risk of coming in contact with switches or other structures near the track when boarding or riding on freight cars. *Dacey v. New York, N. H. & H. R. Co.* (1897) 168 Mass. 479, 47 N. E. 418; *Bell v. New York, N. H. & H. R. Co.* (1897) 168 Mass. 443, 47 N. E. 118; *Gooden v. Boston & A. R. Co.* (1894) 162 Mass. 247, 38 N. E. 500; *Fisk v. Fitchburg R. Co.* (1893) 158 Mass. 238, 33 N. E. 150. The existence of a "clearing post" between the main and switch tracks of a railroad, the office of which is to indicate the line beyond which standing cars are to be considered free from danger of interference with moving cars on the main track, creates an

ordinary risk. *Scudmore v. Milwaukee, L. & W. R. Co.* (1895) 80 Wis. 188, 61 N. W. 765. A railroad company is not liable for injuries to an experienced brakeman who had been employed on the road for a year, and was generally familiar with it, and who was struck by a box car standing on a side track used for the storage of cars, as he was climbing a ladder of a passing freight car, although the distance between the bodies of the cars was less than 2½ feet, and that between their eaves less than 2 feet, where the accident occurred in the daytime, and the cars did not differ in width or otherwise from ordinary box cars. *Vining v. New York & N. E. R. Co.* (1897) 167 Mass. 539, 46 N. E. 117. A railroad switchman cannot recover for an injury caused by his slipping or stumbling against the arm of a guard rail while uncoupling cars. *Curtis v. Chicago & N. W. R. Co.* (1897) 95 Wis. 460, 70 N. W. 665. The risk arising from the use of worn rails for side tracks in a railroad yard is one of the ordinary risks of a switchman's employment. *Michigan C. R. Co. v. Austin* (1879) 40 Mich. 247. Marston, J., dissenting. Compare § 68, subd. d, ante. A railroad employee familiar with the construction of the roadbed and track assumes all the risks arising from the fact that the ballast slopes from the middle of the tracks so that no filling is left under the end of the ties. *Clark v. Missouri P. R. Co.* (1892) 48 Kan. 654, 29 Pac. 1134. Compare § 69, subd. b, ante. The risk of striking a tree close to a street railway track is assumed by an employee on the cars. *Hall v. Wakefield & N. Street R. Co.* (1901) 178 Mass. 98, 59 N. E. 668. An engineer who is familiar with the conditions assumes the risk incident to walking alongside his engine upon a trestle at a place where there is no platform. *Chicago B. & Q. R. Co. v. Abend* (1880) 7 Ill. App. 130. A station agent assumes the risk arising from the want of platform or warehouse accommodations at the station. *Chaddick v. Lindsay* (1897) 5 Okla. 616, 49 Pac. 940. A trunk thrown on the right of way was struck by an engine and hung round so



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joined note are collected a large number of decisions intended to show the circumstances under which recovery has been denied on the same ground in the case of risks resulting from the manner in which the instrumentalities are used. It is sometimes not easy to say whether a particular decision should be classified under this head or under one

as to strike and break a car step on which the agent was standing).

(b) *Risks assumed in other occupations.*—Employees working in factories, etc., assume the risk of coming into contact with uncovered machinery. *Shaw v. Sheldon* (1886) 103 N. Y. 667, 9 N. E. 183; *Kleinest v. Kunhardt* (1893) 160 Mass. 230, 35 N. E. 458 (servant slipped on a wet floor and fell against an exposed pulley). A servant whose clothing was caught in a rapidly revolving shaft about 3 feet above the floor of a mill cannot recover where he had repeatedly passed under it at other times, as had other employees, and at the time of the injury it was no more dangerous than at other times. *Brown v. Tabor Mill Co.* (1900) 22 Wash. 317, 60 Pac. 1126. An employee in a mill assumed the risk of stepping into a depression in the floor, which existed at the time of her employment and was perfectly visible. *Heard v. Blackstone Mfg. Co.* (1900) 177 Mass. 69, 58 N. E. 180. An employee engaged to assist in shoveling coal under boilers and to keep the fronts of such boilers clean assumed the risk of working upon the uneven and ridgy brick floor of the boiler room, where it was expected by both employer and employee to be used until the former chose to replace it. *Nealand v. Lyon & B. R. Co.* (1899) 173 Mass. 42, 53 N. E. 137. A servant who had been employed for four years in defendant's boiler room, and had seen the construction of the boilers, and understood their position with respect to a bridge suspended in front of them, cannot recover for injury caused by his falling through a space between the end of the bridge and the boilers, while he was making his way from the boilers, where he had gone to shut off escaping steam caused by an explosion. *Rohan v. Metropolitan Street R. Co.* (1901) 59 App. Div. 250, 69 N. Y. Supp. 570. One who sustained personal injuries by reason of a fall from a running board in a mill, while leaning forward to clean a coupling, cannot recover therefor, when he had long been familiar with the position and length of the board, which was not altered during the time of his em-

ployment. *French v. Columbia Spinning Co.* (1897) 169 Mass. 531, 48 N. E. 269. An employee who knows of the existence of a skylight in a roof on which he is employed, and the danger of working on the same by reason thereof, assumes the risk of falling through the skylight. *Garety v. King* (1898) 27 App. Div. 114, 50 N. Y. Supp. 179. An employee of ordinary intelligence who has worked in a plant for manufacturing salt, and understands its plan, assumes the ordinary risks incident to the service, where the construction of the plant is simple, and the methods easily understood. *Foster v. Kansas Salt Co.* (1899) 60 Kan. 859, 57 Pac. 961. An employee who is familiar with the means adopted by the employer for the safety of the outer garments of employees, and makes no complaint with reference thereto, assumes the risk of the loss of a garment incident to such means. *Cantancaro v. Siegel-Cooper Co.* (1898) 23 Misc. 664, 52 N. Y. Supp. 29 (employer provided a wardrobe guarded by a competent person). An employee using a circular saw to cut pieces of wood assumes the risk that one of them may be thrown back by it and strike him. *Wilson v. Steel Edge Stamping & Retaining Co.* (1894) 163 Mass. 315, 39 N. E. 1039. An employee in a factory assumes the risk of being unable to get out of the windows in case of fire, where they have always been screwed down in order to maintain the high temperature required for the processes carried on. *Huda v. American Glucose Co.* (1897) 154 N. Y. 474, 40 L. R. A. 411, 48 N. E. 897. Affirming (1896) 12 App. Div. 624, 42 N. Y. Supp. 1126 (no violation of a statute was shown by the circumstances proved). An experienced employee twenty-seven years of age who is neither hurried, coerced, deceived, nor surprised, assumes the risk of working near an uncovered pit by candle light. *McAhearn v. Myrick* (1896) 68 Ill. App. 225.

In *Murch v. Thomas Wilson's Sons & Co.* (1897) 168 Mass. 408, 47 N. E. 111, recovery was denied to a pilot who went to sleep in a chart room without leaving

of those adverted to in the preceding sections. But in most instances there is a well-marked distinction between the two classes of risks.¹

the door open, as he had been warned to do, and was injured by the fumes of a special kind of fuel used in the stove. The conduct of the plaintiff, therefore, seems to have been clearly negligent. But the court does not rely on this possible deduction from the evidence, its conclusions being summed up as follows: "The chart room and the stove by which it was heated were a part of the permanent construction and arrangement of the steamship, and in all their details they were open to the observation of everybody who came upon that part of the ship. Such danger as there was from the use of them to one who engaged to act as pilot was an obvious risk of the business, which was covered by his contract to serve on that ship. It may be fairly questioned, however, if the application of the principle relied upon would have been justifiable, if the plaintiff had not received a special warning as to the properties of the fuel. For numerous other cases of a similar type see §§ 67-80, 239, note 3, ante.

(a) *Risks incurred by trainmen.*— (Compare §§ 209, 209a, 217, ante). The risks incident to the manipulation of the coupling apparatus of cars are ordinary as respects a brakeman. *Oliver v. Ohio River R. Co.* (1896) 42 W. Va. 703, 26 S. E. 444; *Hannigan v. Lehigh & H. River R. Co.* (1898) 157 N. Y. 244, 51 N. E. 992, Reversing (1895) 91 Hun, 300, 36 N. Y. Supp. 293 (danger of injury from the meeting of drawheads). See also § 263, *supra*. The danger of injury from the operation of trains over cattle guards is one incident to the service of any servant who has to couple cars. *Fuller v. Lake Shore & M. S. R. Co.* (1896) 108 Mich. 690, 66 N. W. 593.

A trainhand assumes the risk of injury from those jerks which are common occurrences in the operation of trains, whether from the taking up of the slack or other causes. *Davis v. Baltimore & O. R. Co.* (1893) 152 Pa. 314, 25 Atl. 498; *Central R. & Bkg. Co. v. Sims* (1888) 749, 7 S. E. 176; *Shields v. Kansas City Suburban Belt R. Co.* (1901) 100 Mo. App. 637 (switchman on top of car was thrown off by the jerk consequent upon stopping them to enable another switchman to uncouple them, after he had failed to do so while they were in motion). Or from a stopping of the cars not more sudden than ordinarily occurs. *Puffer v. Chicago G.*

W. R. Co. (1896) 65 Minn. 350, 68 N. W. 39 (plaintiff stooped over from the footboard of an engine without having hold of the handrail, and was thrown off by the shock). Nor can he recover where a piece of ore with which a car is loaded turns under his foot, and precipitates him to the ground (*East Tennessee, V. & G. R. Co. v. Suddeth* [1890] 86 Ga. 388, 12 S. E. 682); nor where he is thrown down by treading on an unusually large clinker which has dropped on the track (*Lee v. Central R. & Bkg. Co.* [1890] 86 Ga. 231, 12 S. E. 307); nor where his foot is caught by the brake beam of a car at a place where there are cinders on the track which do not extend above the tops of the rails, while he is attempting to make a coupling (*Houston & T. C. R. Co. v. Smith* [1896] Tex. Civ. App. 38 S. W. 51. Writ of Error Denied in [1896] 90 Tex. 123, 38 S. W. 985).

A switchman assumes the risk of attempting to pass from his switch on to a track on which an engine is slowly following cars which he has switched. *Dering v. New York C. & H. R. R. Co.* (1893) 50 N. Y. S. R. 832, 22 N. Y. Supp. 344. A switchman assumes the risk of injury from the explosion of a load of nitro-glycerine which is being transported on a foreign car. *Foley v. Chicago & N. W. R. Co.* (1880) 48 Mich. 622, 42 Am. Rep. 481, 12 N. W. 879.

The frequent movement of cars without any signal to indicate that they are in motion is one of the risks assumed by yard hands. *Crowe v. New York C. & H. R. R. Co.* (1893) 70 Hun, 37, 23 N. Y. Supp. 1100. A brakeman assumes the risk caused by the piling of lumber at its proper and usual distance from the track. *Gaffney v. New York & N. E. R. Co.* (1887) 15 R. I. 456, 7 Atl. 284. Compare the similar decisions cited in § 264, *supra*, as to permanent structures.

Trainmen assume the risk of injury by the trains coming into collision with animals trespassing on the road, whether there are cattle guards or not. *Ward v. Bonner* (1891) 80 Tex. 168, 15 S. W. 805. A switchman assumes the risk of the derailing of a train from a horse unexpectedly straying upon the railroad track. *Boues v. Hopkins* (1898) 28 C. A. 524, 56 U. S. App. 217, 64 Fed. 767.

A locomotive fireman assumes the

266. Risks incident to specially dangerous employments.— A doctrine frequently recognized in the formal statements of the courts is

risk of being overcome by the heat while in a position over the boiler which he is obliged to assume when oiling the machinery by hand, while the automatic lubricator is in a defective condition. *Stackrell v. Chicago & N. W. R. Co.* (1898) 106 Iowa, 63, 75 N. W. 665.

A fireman who knew that on his run the engine, owing to the want of a turntable, was run backwards when the train was traveling in a certain direction, cannot recover for an injury caused by the derailment of the engine due to the fact that it was reversed. *Kuhns v. Wisconsin, I. & N. R. Co.* (1887) 70 Iowa, 561, 31 N. W. 868. Whether an accident occasioned by a switch being misplaced, whereby a train is run upon a side track and against cars standing there, is not within the risks assumed by an engineer in entering into the employment of the company to run its engines, was queried in one case, but not determined. *Lyon v. Detroit, L. & L. M. R. Co.* (1875) 31 Mich. 429.

A motorman who took a car from the east by the direction of the despatcher, eastward on the west-bound track, assumed the risk of the possible, although infrequent, return of a car on that track for repairs, when the motorman was experienced, knew the general rule of all railroads that cars should proceed on the right-hand track, and knew that it was possible that he might meet a returning car or wagons. *Savage v. Nassau Electric R. Co.* (1899) 42 App. Div. 241, 59 N. Y. Supp. 225. A conductor on an open street car assumes, as part of the risk of the employment, any enhancement of the danger from the presence of a passenger on the running board along the side of the car. *Hall v. Wakefield & N. Street R. Co.* (1901) 178 Mass. 98, 59 N. E. 668. The court declined to make any distinction because of the fact that the passenger in question was a superintendent, who was not obliged to be on the board, as there was room on the seats.

Employees operating trains assume the risks which inclement weather conditions add to their employment. *Martin v. Chicago, R. I. & P. R. Co.* (1901; — Iowa, —) 87 N. W. 654. Hence no action can be maintained by a trainman who has been injured by the accumulation of ice or snow on the brake of a car otherwise in good order, after it leaves a yard (*Hannan v. Brooklyn*

Elce, R. Co. [1897] 17 App. Div. 389, 45 N. Y. Supp. 474); nor by one who has been injured by the accumulation of ice on the edge of a car where he was obliged to stand to work the brake. (*O'Bannon v. Louisville & V. R. Co.* [1888] 9 Ky. L. Rep. 706, 6 S. W. 434). They also assume such risks as are usually and customarily incident to the falling of snow and forming of ice on and removal of the same from the tracks and places where employees are required to work, if such removal is made in a proper and reasonable manner. *Larson v. Truesdale* (1895) 60 Minn. 410, 62 N. W. 546 (switchman slipped while he was mounting a car); *Fay v. Chicago, St. P. M. & O. R. Co.* (1898) 72 Minn. 192, 75 N. W. 15 (similar facts); *Piqueño v. Chicago & G. T. R. Co.* (1883) 52 Mich. 40, 50 Am. Rep. 243, 17 N. W. 232 (similar accident to brakeman). So, it was held that the conditions caused by the removal of snow from a track in the usual manner by means of a snow plough create risks which are presumed to be contemplated by them when they accept employment in winter. They cannot recover, therefore, for injuries due to their being swept off of an engine by a snowbank formed beside the track by the operation of clearing the track. *Dowell v. Burlington, C. R. & N. R. Co.* (1883) 62 Iowa, 629, 17 N. W. 901; *Brum v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 652, 21 N. W. 193.

(b) *Risks incurred by trackmen.*— (Compare §§ 209, 209a, 218-220, ante). A servant engaged in keeping a railway track in proper condition assumes the risk of the passage of trains at any time without being specially warned as to their approach. This rule has been applied in the case of section men. *Chicago, B. & Q. R. Co. v. Soderberg* (1897) 50 Neb. 674, 70 N. W. 230; *Brum v. Southern P. Co.* (1899) 34 Or. 256, 56 Pac. 129; *International & G. N. R. Co. v. Arias* (1895) 10 Tex. Civ. App. 190, 30 S. W. 446 (rule declared to be applicable, whether the plaintiff was experienced or inexperienced). And of a laborer employed to clean snow and ice from the switches in a yard. *Chicago & E. I. R. Co. v. Maloney* (1898) 77 Ill. App. 191.

Such a servant also assumes the risk of a collision between a train and a hand

that the principle which charges a servant with an assumption of the ordinary risks of an employment is applicable whether that employ-

car upon which he is riding (*Chicago & A. R. Co. v. Goltz* [1897] 71 Ill. App. 414); even where it is not being run upon schedule time. (*Sullivan v. Fitchburg R. Co.* [1894] 161 Mass. 125, 36 N. E. 751, where the court declined to rule that this conclusion was affected by the existence of a rule of the company requiring such trains to "run cautiously around curves and over grade crossings, looking out for trackmen." This caution was deemed to have reference to the safety of the trains, not of the trackmen). For the purposes of this rule it makes no difference that the day is foggy, since the service contracted for embraces all kinds of weather. *Hinz v. Chicago, B. & N. R. Co.* (1896) 93 Wis. 16, 66 N. W. 718; *International & G. N. R. Co. v. Hester* (1885) 64 Tex. 401. These decisions are based upon the supposed knowledge of the injured servant that his employers have adopted the system in question for the operation of trains. The existence of this essential element of knowledge is sometimes inferred from specific testimony of circumstances conveying notice to the servant,—as, where he had been specially instructed to be on the lookout for special trains, and, as a matter of precaution, to flag round curves and through cuttings (*Turner v. Norfolk & W. R. Co.* [1895] 40 W. Va. 675, 22 S. E. 83); or where he knew that there was a standing rule that a train might be expected by trackmen at any moment, and that no notice whatever would be given of the despatch of extra trains or the passage of such a train (*Olson v. St. Paul, M. & M. R. Co.* [1888] 38 Minn. 117, 35 N. W. 866; *Jolly v. Detroit, L. & N. R. Co.* [1892] 93 Mich. 370, 53 N. W. 526); or where, although there is no express announcement to this effect in the rules, the wording of a rule relating to the despatch of wild trains is such as to amount to an implied notification that, under certain circumstances, such trains may be expected to come along the track without any warning being given of their approach (*Shepard v. Boston & M. R. Co.* [1893] 158 Mass. 174, 33 N. E. 508); or where he had ascertained by practical experience that his employer was in the habit of running special trains without warning (*Pennsylvania R. Co. v. Wachter* [1883] 60 Md. 395). A section man who has

worked more than three months on the track of a railroad, where about one third of the trains are irregular, or extra trains not running on schedule time, is chargeable with notice of the practice to run such trains, and assumes the risk incident to the service from that cause. *Larson v. St. Paul, M. & M. R. Co.* (1890) 43 Minn. 423, 45 N. W. 722.

A trackwalker assumes the risk of being caught by a train on a trestle. *Gibson v. Oregon Short Line R. Co.* (1893) 23 Or. 493, 32 Pac. 295. See also subd. (f) of this note.

(c) *Risks incurred by other railway employees.*—A man stationed on a trestle to signal trains in a fog assumes the risk of being caught by one of them. *Kennedy v. Manhattan R. Co.* (1884) 33 Hun, 457. An employee required to pass over a railroad bridge to get from his work to his boarding house assumes the risk of the bridge being used by a derick car which was being operated when he was hired. *Olsen v. Andrews* (1897) 168 Mass. 261, 47 N. E. 90. A railroad employee permitted by the company to sleep in a caboose which stood at night on a side track, who knew that it was a dangerous place to sleep because the company used the side track for switching other cars, assumed the risk of a collision between the caboose and such other cars. *Jacobs v. Lake Shore & M. S. R. Co.* (1890) 84 Mich. 299, 47 N. W. 669.

Car repairers while working beneath cars in a railway yard take the risk of injury from the cars being struck by another car, when they habitually do such work without asking that the cars be protected by a flag. *Unfried v. Baltimore & O. R. Co.* (1890) 34 W. Va. 260, 12 S. E. 512 (this is spoken of as an "ordinary risk" in the opinion, but seems to be rather a case of the servant's acquiescence in a faulty system). An allegation of negligence stating that the plaintiff's son was crushed between two cars where an opening had been left in the train for the use of the employees, which opening was suddenly closed up without notice to him, is not sustained by evidence that the opening was such as was usual and necessary from time to time in shifting cars in the yard. *Plunkett v. Central R. Co.* (1898) 105 Ga. 203, 30 S. E. 728. An employee at a railway station, whose duty it is to throw the mail bags into passing trains, assumes

ent may or may not be described as being inherently dangerous. It is, in fact, quite clear that any other position would be entirely illogi-

the risk of falling under a train while performing that duty. *Coolbroth v. Maine C. R. Co.* (1885) 77 Mo. 165 (declaration describing the service as one "known to defendants, and not known to the plaintiff, to be dangerous, held not to allege anything beyond the "ordinary and apparent dangers" which plaintiff assumed). A painter in the employ of a railroad corporation, who is in the habit of going from point to point on a steam hand car, assumes the risk of its jumping the track, unless it appears that the accident is due to a defect unknown to him. *McQueen v. Central Branch Union P. R. Co.* (1883) 30 Kan. 689, 1 Pac. 139.

It has been held that the traveling auditor of a railroad company, whose duties are to travel on the railroad company's cars from station to station on its roads and audit accounts, is a servant of the company, and assumes the risk of injury from a derailment of the train as an ordinary risk of his employment. *Minty v. Union P. R. Co.* (1889) 2 Idaho, 437, 4 L. R. A. 409, 21 Pac. 660. But this rule is, of course, only applicable where such an accident is not caused by the negligence of the company. The introduction of the theory of the assumption of the risk seems, therefore, to be rather out of place, except as an implied deduction from the absence of negligence.

An employee of a street railway company, who is stationed between the tracks for the purpose of turning switches, assumes the risk of injury from stepping back against a moving trailer in sudden alarm caused by the plunging of horses attached to a car on another track. *Thompson v. Citizens' Street R. Co.* (1899) 152 Ind. 461, 53 N. E. 462.

(d) *Risks incident to the manner in which the load is placed on railway cars.*—Trainmen who are required in broad daylight to couple cars loaded with materials projecting beyond their ends are not subjected to a risk of an extraordinary or unusual character. *Northern C. R. Co. v. Husson* (1882) 191 Pa. 1, 47 Am. Rep. 690. So, it has been laid down that, while the loading of cars so that the materials composing the load project over the ends of the car is possibly negligence as regards a brakeman unfamiliar with the fact that it is the custom of his employers to do this, no negligence can be predicated where the

work of coupling the car is done in the daytime, and the brakeman must have become aware of the custom to load in this manner during the time that he has been in the company's service prior to the accident in suit. *Irvine v. First & P. M. R. Co.* (1891) 89 Mich. 416, 50 N. W. 1008.

Other cases declare the company not to be liable for injuries caused by such a risk, without adverting specially to the question whether the car was handled in the daytime or at night. *Tobol W. & W. R. Co. v. Black* (1878) 88 Ill. 112; *Wabash, St. L. & P. R. Co. v. Dondorf* (1883) 14 Ill. App. 401; *Boyle v. New York & N. E. R. Co.* (1890) 151 Mass. 102, 23 N. E. 827; *Jackson v. Missouri P. R. Co.* (1891) 104 Mo. 448, 16 S. W. 413 (load had slipped); *McIntosh v. Missouri P. R. Co.* (1894) 58 Mo. App. 281; *Jacksonville, T. & K. W. R. Co. v. Galvin* (1892) 29 Fla. 636, 16 L. R. A. 337, 11 So. 231; *Brennan v. Michigan C. R. Co.* (1892) 93 Mich. 156, 53 N. W. 358 (there the rules of the company had called the attention of the servant to the frequency of this manner of loading cars); *Doyle v. St. Paul, M. & M. R. Co.* (1889) 42 Minn. 79, 43 N. W. 783; *Nash v. Chicago, M. & St. P. R. Co.* (1897) 95 Wis. 327, 70 N. W. 203 (in this case there was the corroborative circumstance that the servant's attention had been called by a printed notice to the danger in coupling cars loaded in this manner).

In several other decisions the specific ground on which the servant's right to recover was denied was that the loading of cars in this manner cannot be imputed as negligence to the railway company. *Day v. Toledo, C. S. & D. R. Co.* (1880) 42 Mich. 523, 4 N. W. 293 (brakeman was compelled by the projecting load to stoop, and the delay thus caused led to his fingers being caught by the coupling link); *Louisville & N. R. Co. v. Gorman* (1887) 85 Tenn. 465, 3 S. W. 824 (disapproving instruction which left jury to infer that such a service was not to be anticipated by a brakeman, as an occasional though extremely hazardous duty to be performed); *Lothrop v. Fitchburg R. Co.* (1890) 150 Mass. 423, 23 N. E. 227. In the last case it was suggested that, under some circumstances, there might be an obligation to notify brakemen when a load was in that condition;

cal and unreasonable. Provided the risk from which the injury results is, as a matter of fact, obviously incident to the employment undertaken by the servant, it is impossible to argue, with any show

but it was declared that, at all events, no such obligation existed as to a brakeman who was called upon to handle a car in broad daylight.

Some decisions merely go to the extent of asserting that such a risk is assumed, or that its existence implies no negligence, where the servant has frequently been called upon to handle such cars before. *Atchison, T. & S. F. R. Co. v. Plunkett* (1881) 25 Kan. 188; *Scott v. Oregon R. & Nav. Co.* (1886) 14 Or. 211, 13 Pac. 98 (foreign car).

In some instances, it will be observed, cases of this type are treated as being controlled by the conception that the manner of placing a load is a mere detail of the work, the result being that the servant cannot recover even if the arrangement was a negligent one. See chapter XXXII., *post*. By this indirect route, we are conducted through the doctrine of common employment to the same conclusion as that embodied in the above-cited decisions which view such an arrangement as an ordinary risk.

The risk of the displacement of rails or other freight, so that it projects over the ends of a car, is assumed so far as it is obvious. *Doyle v. St. Paul, M. & M. R. Co.* (1889) 42 Minn. 79, 43 N. W. 783.

It is not negligent to pile coal and wood above the top of a tender, so that it is liable to be thrown off by a jolt. *Schultz v. Chicago & N. W. R. Co.* (1887) 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321.

A brakeman who is injured by stepping on one of the loose pieces of lumber with which a car is loaded cannot recover, such a risk being an ordinary one so far as he is concerned. *Miller v. New York C. & H. R. Co.* (1888) 14 N. Y. S. R. 656.

(e) *Risks incurred by persons not employed by railway companies, but exposed to the risks resulting from the operation of railways.*—(See also subd. (k), *infra*.) An employee engaged in loading coal into cars upon a coal dock in the nighttime assumes the risk from empty cars running down an inclined track by gravity to the place of loading, in walking upon the track with knowledge that cars are to be expected at any time, while the sight of approaching cars is obscured by escaping steam from an

engine. *Osborne v. Lehigh Valley Coal Co.* (1897) 97 Wis. 21, 71 N. W. 814.

So an employee in a blast furnace whose duties require him to cross a track frequently along which cars are passing every few minutes assumes the risk of being struck by one of them. *Adams v. Iron Cliffs Co.* (1889) 78 Mich. 271, 44 N. W. 270. Compare similar cases, cited in subd. (b), *supra*, as to railway employees.

An assumption of risks under a specific contract by a local employee of an express company includes the risk of injuries by cars of a railroad company with which the express company does business. *Pittsburgh C. C. & St. L. R. Co. v. Mahony* (1897) 148 Ind. 196, 40 L. R. A. 101, 46 N. E. 917. Motion to Modify Overruled in (1897) 148 Ind. 207, 47 N. E. 464.

(f) *Risks incurred in handling heavy objects.*—A railroad company is not liable for an injury to a section hand caused by the accidental stumbling of the foreman while assisting such section hand and another person in carrying a heavy tie over rough ground, where the section hand knew the condition of the ground. *Lee v. Chesapeake & O. R. Co.* (1897) 18 Ky. L. Rep. 829, 38 S. W. 509. One engaged with coemployees in moving iron rails assumes the risk of injury from the rebounding of a rail as it is thrown upon the other rails, and the employer is not liable therefor because he may have failed to furnish tongs or other appliances proper and convenient for the work. *Beichert v. Reed* (1897) 20 App. Div. 635, 47 N. Y. Supp. 119. A servant is presumed to understand the danger that pieces of timber which are laid upon hooks attached to a belting which elevates them to the required level may drop out and fall,—especially when they are covered with a coating of ice. *Jones v. Manufacturing & Invest. Co.* (1899) 92 Me. 565, 43 Atl. 512. As to a workman employed to brace slabs of stone after they have been placed in an upright position on a flat car, so that they will not fall while being transported, the risk of being injured by their fall before they are permanently braced is obvious and inseparably incident to the business. *Stone v. Bedford Quarries Co.* (1901) 156 Ind. 432, 60 N. E. 35.

One employed to place pigs of lead up-

on an inclined wooden elevator, up which they were drawn by an endless chain with an apron attachment, cannot recover for an injury sustained by one of the bars falling upon him, since it was one of the risks incident to his employment, although a few hours before the accident a strip of iron had been nailed along the worn sides of the elevator to protect them, and the weight of a pig of lead forced this band into a scallop leaving a nail protruding which threw the bar of lead down the elevator. *Elliot v. Carter White-Lead Co.* (1898) 53 Neb. 458, 73 N. W. 948. Whether an injury caused to a section foreman by the falling or slipping of railroad ties while he is superintending their loading from a flat car is an ordinary risk is a question for the jury. *Texas C. R. Co. v. Lyons* (1896; Tex. Civ. App.) 34 S. W. 362.

(g) *Risks incurred in operating machinery.*—The risk that a strip of hard board which may fall on the teeth of a rapidly revolving circular saw will be thrown violently forward is assumed by an experienced employee. *Tenant v. Boston Mfg. Co.* (1898) 170 Mass. 323, 49 N. E. 654. The danger due to a saw's not being set is an ordinary incident of work in a sawmill. *Webber v. Piper* (1886) 38 Hun, 353. Affirmed (1888) in 109 N. Y. 496, 17 N. E. 216, on the ground that the failure to set the saw was the negligence of a fellow servant in regard to a matter of detail. See chapter XXXII., *post*. The risk of being cut by the knives of a "jointer" is assumed by an experienced workman. *Rudd v. Bell* (1887) 13 Ont. Rep. 47.

In *Glover v. Meinrath* (1896) 133 Mo. 292, 34 S. W. 72, holding that an engineer in a mill assumes the risk arising from the substitution of hot water for steam in a cornmeal dryer which it is his duty to repair when out of order, the court said that the undertaking of the engineer was that he comprehended the proper manner of handling the particular machine he saw in use when he began work at the mill, unless it was deceptively changed, and not that he could handle it properly, if operated after the method contemplated by the builder.

(h) *Risks incident to the use of elevators.*—Where warehouse employees are accustomed to remove an elevator at will, though at the time another employee is engaged in loading freight thereon, an employee who, after the elevator has been thus removed, backs into

the shaft with his load in the customary manner, and is killed, will be held to have assumed the risk. *Perran v. Booth & Co.* (1901) 82 Minn. 191, 84 N. W. 739, 85 N. W. 179 (case, however, was held to be for the jury, as the evidence was not conclusive as to the existence of an habitual practice which would make the possible absence of the elevator an ever-present danger). A porter whose duty it is to clean the floors of a store at night, and who knows that the freight elevator by which it is customary to transfer him and his utensils from one story to another may at any time not be standing at the particular story where he happens to be, in which case it will have to be raised or lowered to that story by the employee assigned to that duty, assumes, as a risk incident to his service, the danger arising from this system of operating it; and no action can be maintained by his personal representative if he walks through the gate of the shaft after the operator has opened it for the purpose of lowering the elevator, and is killed by falling to the bottom of the shaft. *Bronne v. Siegel, C. & Co.* (1901) 191 Ill. 226, 60 N. E. 815. Affirming (1900) 90 Ill. App. 49. This seems to be a case of contributory negligence, rather than a case of assumption of a risk, though it is so designated by the court.

(i) *Risks incident to manufacturing operations.*—One of the natural incidents of the handling of glass in the processes of its manufacture is that it will be broken without violence from or the fault of those who handle it. *Myers v. W. C. DePauw Co.* (1894) 138 Ind. 590, 38 N. E. 37. Whether an explosion of an iron mould, occasioned by the intentional act of a "pourer" in purposely permitting slag to pass into the mould in a quantity known to be dangerous, is an ordinary, usual, and known risk of one employed in the work of cooling and uncapping such moulds, is a question of fact for the jury. *Illinois Steel Co. v. Bateman* (1899) 178 Ill. 351, 53 N. E. 107, Affirming (1898) 78 Ill. App. 73. An employee in a rolling mill cannot recover for injuries caused by the fact that a rail which was not sufficiently heated curled upwards as it passed through the rolls. *Inland Steel Co. v. Eastman* (1898) 80 Ill. App. 59. That a servant who enters the employ of another assumes all the risks ordinarily incident to the business and arising from patent and obvious defects was an instruction given in a case where the question was whether

er the plaintiff had knowledge of the danger of entering a room filled with the fumes of iron pyrites. *Williams v. Walton & W. Co.* (1892) 9 Houst. 322, 32 Atl. 726. An employer is not liable for an injury to a servant resulting from the floor being wet and slippery, if such is its normal condition. *Murphy v. American Rubber Co.* (1893) 159 Mass. 266, 34 N. E. 268. An employee in a mill assumes the obvious risk of slipping on a wet floor while turning a lever and being thus brought into contact with an uncovered gearing. *Schurenbroich v. St. Cloud Fiber-Ware Co.* (1894) 59 Minn. 116, 60 N. W. 1093. Compare similar cases cited under § 263, *supra*. The liability of a hammer to chip is a risk assumed by a riveter. *H. S. Hopkins Bridge Co. v. Burnett* (1892) 85 Tex. 16, 19 S. W. 886.

(j) *Risks incident to the handling of ice.*—A laborer employed to fill an ice house, whose work requires him to stand upon the tiers of ice blocks, assumes as a risk ordinarily incident to his employment the danger of an injury caused by the slipping of a cake of ice. *Shea v. Kansas City, Ft. S. & M. R. Co.* (1898) 76 Mo. App. 29.

(k) *Risks incident to the use of horses.*—The possibility that the team of a wagon from which a servant is helping to unload heavy machinery may be frightened by a passing train is assumed by him. *Steffen v. Mager* (1888) 96 Mo. 420, 9 S. W. 630. A tender who knows that steam occasionally blows off from boilers assumes the risk of his horses being frightened by the noise, whether the escape of the steam is due to the direct act of the engine or to the automatic operation of the safety valve. *Denver Tramway Co. v. R. J. Bennett* (1899) 8 Colo. App. 74, 44 Pac. 261. A carpenter at work upon a ladder in front of a ear stable, who knows that another employee is engaged in removing waste material with a horse and cart which frequently pass in and out of the building, necessitating the removal and replacing of the ladder, accepts the risk that the horse, while not held by the driver, may start off and come into collision with the ladder. *Byrnes v. Brooklyn Heights R. Co.* (1899) 30 App. Div. 355, 55 N. Y. Supp. 269.

(l) *Risks incident to work in mines.*—The slippery condition of a ladder at the bottom of a shaft in a coal mine is an ordinary risk as regards a miner. *O'Neill v. Wilson* (1858) 20 Sc. Sess. Cas. 2d Series, 427. An experienced

miner assumes the risk of injury from the falling of ore, where that is likely to happen in the ordinary course of his work. *Paule v. Florence Min. Co.* (1891) 80 Wis. 350, 50 N. W. 189. A miner assumes the risk that the roof of a tunnel which has been properly inspected may fall in. *Davis v. Nuttallsburg Coal & Coke Co.* (1890) 34 W. Va. 509, 12 S. E. 539, or that fire-damp may explode. *Borns v. Gaston Gas Coal Co.* [1885] 27 W. Va. 285, 55 Am. Rep. 304, at all events, where the accumulation of the dangerous vapor takes place so suddenly that the employer cannot be expected to discover it in time to prevent the accident. Thus, it has been held that a mine owner is not liable for an explosion of gas which accumulates in sufficient quantities to explode within fifteen minutes. *Sommers v. Carbon Hill Coal Co.* (1898) 91 Fed. 337.

(m) *Risks incurred by quarrymen.*—Where the bank of earth above the stripped ledge in a stone quarry was more apt to slide than usual owing to a heavy rain, but before going to work, plaintiff, an experienced quarryman, in company with other employees of defendant, including the foreman of the quarry, examined the ledge and pronounced it safe, he cannot recover for injuries caused by the subsequent sliding of the earth. *Western Stone Co. v. Musial* (1899) 85 Ill. App. 82.

(n) *Risks incurred by crews of vessels.*—As to a fireman on a sea-going steamer it is an ordinary risk that an unfastened ladder descending into a coal bunker may be thrown down by the pitching and rolling of the steamer. *Palting v. New York & C. Mail S. S. Co.* (1899) 28 Misc. 238, 58 N. Y. Supp. 1074. One of the crew of a steamer, who slept on the vessel after it was tied to the dock and being prepared for the winter, assumed the risk of so doing; and his administratrix cannot recover for his death caused by a fire which broke out at night, where he was familiar with the boat and knew of the method of lighting and heating it, and that the night watchman had been dismissed. *Lang v. H. W. Williams Transp. Line* (1898) 119 Mich. 80, 77 N. W. 633. The risk attendant upon landing a steamboat for the delivery of a small quantity of freight, by running the bow into the shore of the river and holding the boat in position by the revolutions of the wheel merely, and without putting out lines in accordance with the general usage of vessels navigating

of reason, that the essential elements from which an assumption of that risk is predicable are not present.¹

such river, is incidental to the employment of a deckhand upon such steamboat. *Red River Line v. Chatham* (1894) 9 C. C. A. 124, 23 U. S. App. 49, 60 Fed. 517. The risks arising from the necessity of working at night with such light as lanterns afford is assumed by the crews of steamboats engaged in the river trade on the Mississippi. *Red River Line v. Smith* (1900) 39 C. C. A. 620, 99 Fed. 520.

(c) *Risks caused by wild animals kept in confinement.*—An employee assumes the risk of injury by animals, *ferre naturæ*, such as elk and deer, when he voluntarily engages to work inside of the inclosure in which they are kept. *Boraman v. Milwaukee* (1896) 93 Wis. 522, 33 L. R. A. 652, 67 N. W. 924.

(p) *Risks incurred by workmen handling electrical appliances.*—In the absence of anything to show that he is excusably ignorant of the hazards incident to his work, the servant of an employer who produces electricity for the purposes of his business assumes the risk of coming in contact with wires along which a current is passing, unless he has good reason to suppose that they are not charged. *Davis v. Port Huron Engine & Thresher Co.* (1901) 126 Mich. 429, 85 N. W. 1125 (servant fell on slippery roof over which he was stringing a wire, and, either to save himself, or involuntarily, took hold of another wire which was charged); *Carr v. Manchester Electric Co.* (1900) 70 N. H. 308, 48 Atl. 286 (lamp trimmer injured owing to the crossing of the wires of his own employer with those of another company); *Junior v. Missouri Electric Light & P. Co.* (1895) 127 Mo. 79, 29 S. W. 988; *Neurum v. Southwestern Teleg. & Teleph. Co.* (1898) Tex. Civ. App. 47 S. W. 669. In one case the risk caused by an imperfectly insulated wire was declared to be the "most characteristic" one of a lineman's employment. *Chisholm v. New England Teleph. & Tel. Co.* (1900) 176 Mass. 125, 57 N. E. 383. The danger of contact with a live dynamo is assumed by a workman who thoroughly understands the conditions. *Fritz v. Salt Lake & O. Gas & Electric Light Co.* (1899) 18 Utah, 493, 56 Pac. 90.

¹ "When a servant enters on an em-

ployment from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it." *Charles v. Holman* (1862) 7 Hurst. N. 917, 31 L. J. Exch. N. S. 356, 8 L. N. S. 992, 10 Week. Rep. 105, per Colburn, C. J.

"There are many kinds of work in which danger is necessarily involved, where precautions such as would insure safety to the workman are either impossible, or would only be attainable at an expense altogether incommensurate with the end to be accomplished. In all such cases the workman must rely upon his own nerve and skill; and in the absence of express stipulation to the contrary the risk is held to be with him, and not with the employer." Lord Watson in *Smith v. Baker* (1891) A. C. 325, 10 L. J. Q. B. N. S. 683, 65 L. T. N. S. 357, 40 Week. Rep. 392, 55 J. P. 600. When the servant "undertakes hazardous duties, he assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he has had opportunity to ascertain." *Sylva v. Packe* (1882) 99 Pa. 465, citing *Whart. Neg. § 214*. Same passage also quoted in *Southwest Improvement Co. v. Cadner* (1889) 86 Va. 270, 9 S. E. 1015. "The fact that the service is a dangerous one adds nothing to the liability of the master for injuries resulting from the natural and ordinary incidents of the undertaking." *Mayer v. W. C. De Pauw Co.* (1894) 138 Ind. 309, 38 N. E. 37. A servant assumes all the ordinary hazards incident to the employment, whether the employment be dangerous or otherwise. *Rose v. Wheeling & E. O. R. Co.* (1896) 32 W. Va. 333, 26 S. E. 294; *H. Turner v. Deacon* (1888) 31 W. Va. 142, 6 S. E. 53; *Oliver v. Ohio River R. Co.* (1896) 32 W. Va. 703, 26 S. E. 444; *Kahn v. Coager* (1892) 36 W. Va. 232, 14 S. E. 999.

Sometimes this doctrine appears in the form that "extraordinary" dangers are among those assumed, where the risks are essentially incident to the business. *Thomas v. Missouri P. R. Co.* (1891) 109 Mo. 187, 18 S. W. 980 (brakeman injured in coupling foreign cars of peculiar construction). Compare the statement that the ordinary risks of a particular business are those which are part of the natural and ordinary method

It is not easy to see what useful purpose is served by enunciating the doctrine of assumption of risks in terms which recognize a distinction between occupations which are inherently dangerous and those which are not so. If that descriptive phrase has any definite meaning at all, it may certainly be applied with perfect propriety to any industrial occupations which involve the use of electricity or machinery, as well as to the work of miners and seamen. Yet there is no general agreement to segregate these employments and place them in a class by themselves. Sometimes they are spoken of as inherently dangerous; sometimes the injuries which they produce are discussed without any reference to this conception. The same remark is applicable to the injuries of the kind noted in the ensuing sections.

267. Risks incident to construction work.—The principle has already been stated (§ 29, *ante*), that a master's obligations to servants engaged in doing work of which the essential purpose is to bring the material substances which will compose the plant into a condition in which they will be suitable for use as instrumentalities of a going concern are less onerous than the obligations which he owes to the servants who deal with those instrumentalities when the business is in operation. When viewed from our present standpoint, facts of the

of conducting that business, although they may fairly be called extraordinary with reference to a different business, or a different department of the same business, *Jackson v. Missouri P. R. Co.*, 1891 104 Mo. 448, 457, 16 S. W. 413, quoting 1 Shearn, & Redf. Neg. § 185 "brakeman injured by projecting load on which he was coupling). In *Lawrence v. Worcester* (1885) 140 Mass. 245, 4 N. E. 565, the following instruction was approved: "If the employment is attended with extraordinary dangers or risks which are fully known to the workman when he enters on the employment, he assumes those risks also." But the use of this phraseology, if not absolutely incorrect, is at least to be deprecated in view of the customary application of the epithet "extraordinary" to designate risks caused by the master's negligence.

In an instruction that an employer contracts to use diligence to protect the employee from ordinary risks, it was not necessary to qualify the expression "ordinary risks" by the words, "not obvious to the employee, and in regard to which he had not been warned," where the court also charged that, when the employment presents special features of danger, such as are open to one ordina-

rily skilled in the employment, then the servant also assumes the risks of those obvious dangers which he enters upon in the employment. *Bellerille Stone Co. v. Camden* (1898) 62 N. J. L. 449, 45 Atl. 1090, adopting and affirming the judgment in (1898) 61 N. J. L. 353, 39 Atl. 641.

In *Massie v. Peck Splint Coal Co.* (1896) 41 W. Va. 620, 24 S. E. 644, it was held that liability of a mine owner for injuries to an employee from the fall of slate could not be based upon his negligent failure to provide the latter with props, where the fall was caused by the employee's tapping the slate, as it was his duty to do before propping. The general proposition relied upon in the syllabus written by the court was that the plaintiff had knowledge of the danger, and wilfully encountered it, but the case seems to be more properly classified with those which deny the right of recovery where the occurrence is one of those contemplated as incident to an employment involving special dangers. The court, in fact, said that it was not necessary to speculate as to what was the proximate cause of the injury,—whether it was plaintiff's want of due care, or whether the accident was due to an unavoidable incident of the service.

kind involved in the cases in which this principle is regarded as furnishing a protection to the master are usually such as to bring them within the scope of the defense now under discussion. The position taken is that, although the servants belonging to the former of the classes above specified are sometimes exposed to certain risks which are different in character from, as well as greater in degree than, the ones entered by the other class of servants, there is no logical ground upon which it can be asserted that these risks, if they are, as a matter of fact, ordinarily and naturally incidents of the work to be done, are not impliedly assumed like other kinds of risks which answer the description.¹

¹ (a) *Principle applied to risks incurred in the construction of railways.*

"An employee cannot complain of the imperfect condition of a road he is employed to assist in making perfect. . . . He assumes greater risks upon such a road than upon a completed one, where he might expect that the track was clear and all obstructions removed." *Manning v. Chicago & W. M. R. Co.* (1895) 105 Mich. 260, 63 N. W. 312 (brakemen killed by tree projecting over track running through a forest). A servant in engaging to work in and about the construction of a railroad assumes the ordinary risks of such employment, including the risk of being transported to and from his work on a construction train over a newly constructed and imperfect roadbed. *Colorado Midland R. Co. v. O'Brien* (1894) 10 Colo. 249, 27 Pac. 701. To same effect see *Evansville & R. R. Co. v. Henderson* (1893) 134 Ind. 636, 33 N. E. 1021 (1895) 142 Ind. 596, 42 N. E. 216; *Evansville & R. R. Co. v. Barnes* (1894) 137 Ind. 306, 36 N. E. 1092 (both cases in which a construction train was derailed on a road where the process of building was to lay the track on half the necessary number of ties, after which the rest of the ties were put in and the ballast added); *Moss v. Johnson* (1859) 22 Ill. 633 (rails not secured by chairs); *Walling v. Congaree Constr. Co.* (1893) 41 S. C. 288, 19 S. E. 723 (imperfectly spiked rails spread and derailed train); *Baltimore & O. S. W. R. Co. v. Welsh* (1897) 17 Ind. App. 505, 47 N. E. 182 (accident caused by sag in track); *Central R. & Bk. Co. v. Sims* (1888) 80 Ga. 749, 7 S. E. 176 (servant while walking over a flat car to reach the caboose was injured by sudden jerk of gravel train, not more severe than might have been expected).

An employee riding on a construction train cannot recover for injuries caused by a side track constructed in the ordinary manner, though it may be imperfectly graded and ballasted. *Ross v. Baum* v. St. Paul & D. R. Co. (1888) Minn. 173, 36 N. W. 447.

The backing of a construction train in the usual manner does not subject track hand employed thereon to any unusual risk. *Galveston, H. & S. R. Co. v. Arispe* (1891) 81 Tex. 517, 17 W. 47; *Reese v. Wheeling & E. O. R. Co.* (1896) 42 W. Va. 333, 26 S. E. 204.

An employee of an elevated railroad company, who has been employed for more than three weeks in a yard elevated some distance above the ground, and who has actual knowledge that it is not in a completed state, and that carpenters are constantly employed in covering it with plank, assumes the risk of working therein while there are uncovered spaces. *Kennedy v. Manhattan R. Co.* (1895) 145 N. Y. 288, 39 N. E. 97. An employee engaged in building a railway bridge, who knows that wedges used for the purpose of procuring an even surface on a track on which heavy timbers are conveyed are liable to slip out of place, assumes the risk of injury from that cause. *Bedford Belt R. Co. v. Brown* (1895) 142 Ind. 659, 42 N. E. 329.

Principle applied to other kinds of construction work.—*Reique v. Homer* (1897) 169 Mass. 541, 48 N. E. 3 (open hole in unfinished building); *Clancy v. Guaranty Constr. Co.* (1898) 25 App. Div. 355, 50 N. Y. Supp. 80 (same facts); *Conroy v. Faust* (1896) 51 N. J. L. 645, 32 Atl. 380 (workman in unfinished building fell down chime shaft); *Stuart v. New Albany Mfg. Co.* (1895) 15 Ind. App. 181, 43 N. E. 1 (beam fell). A subcontractor of a car-

The necessary qualifications of this principle are indicated by the decisions that it can only be invoked against servants who are actually connected with the work of construction;² that those servants are entitled to expect a degree of care and skill equal to that ordinarily exercised in railway construction;³ and that the defense of an assumption of ordinary risks is not a bar to the action, where such servants are injured by a defect in a portion of the road which is already in operation.⁴

painter, remaining at work until it was so dark that he could not see in the passage through which it was necessary for him to pass, cannot recover from the contractor for injuries by falling through an opening in the floor. *Murphy v. Greeley* (1888) 146 Mass. 196, 15 N. E. 654. The court said: "If it can fairly be said, contemplating the probabilities from the situation of the parties when they made their contract, that there was any risk that Sinnott would remain at his work until it was so dark in the passageway that he could not see his hand before his face, and then attempt to go through there without a light and meet with an accident, that must be deemed to have been an ordinary risk of the business which he contracted to do, or a risk growing out of the peculiar manner in which he chose to do it."

In *Holloran v. Union Iron & Foundry Co.* (1895) 133 Mo. 470, 35 S. W. 260, where a plank slipped on a girder and allowed the plaintiff to fall while he was assisting to move a derrick, the court said: "In the course of the erection of a new building it is almost impossible to keep it in an absolutely safe condition at every moment of the work. The skeleton has to be erected before the covering, the iron work before the brick and frame. Certain risks are ordinarily incident to the state of things found in the unfinished condition of every building in course of construction. But the mechanics and laborers employed and paid to build it are presumed to understand their duties and the risks usually attendant upon them, and, knowing beforehand the methods in use, they assume the risks usually incident to the discharge of their duties."

After being a month in the service, a laborer whose duty it is to carry coal for a forge resting on an elevated part of a bridge in course of construction assumes the risk of falling off a narrow

plank which he has to cross in order to reach the forge. *Behring v. Detroit Bridge & Iron Works* (1895) 46 Neb. 556, 65 N. W. 186.

An employee engaged in shifting a platform in the shaft of a salt mine during the process of its construction, who knows that the work is incomplete and that there are holes in the platform, assumes the risk of falling through a hole. *Sharpsteen v. Laramie Salt & Min. Co.* (1896) 3 App. Div. 144, 38 N. Y. Supp. 49. A workman assumes the risk of working near a dam having an angle of about 135 degrees with the surface of the water, where the current is so swift that he cannot swim out of it, if there is nothing to prevent his seeing and appreciating the peril. *Hallmont v. Spokane* (1896) 14 Wash. 577, 45 Pac. 42. A person familiar with the work of building a slip by driving piles assumes the risk of driving; and no recovery can be had for his death by drowning while shoving a float around the end of a pile-driver, where it appears that his pike pole slipped, and that he overbalanced himself and fell in. *Fisher v. Chicago & G. T. R. Co.* (1889) 77 Mich. 546, 43 N. W. 926. See also *Yager v. The Recreators* (1882) 4 Hughes, 192, 88 Fed. 773 (bridge gave way).

² A brakeman on a freight train is not so connected with the work of improving the yards at a division station as to charge him with having assumed the risk arising from the defective condition of the yards resulting from such improvements, which causes his injury. *Hurst v. Kansas City, P. & G. R. Co.* (1901) 163 Mo. 309, 63 S. W. 695.

³ *Colorado Midland R. Co. v. Naylon* (1892) 17 Colo. 501, 30 Pac. 249 (simple spiking of three ties, and entire failure to spike fourth tie, on a curve of 5 degrees, not a risk assumed by men on construction work).

⁴ *Evansville & R. R. Co. v. Maddux*

Some cases involving injuries received in doing construction work are governed by the principle stated in § 269, *infra*.

As to the limits of the master's exemption in cases of construction work, see § 270, *infra*.

268. Risks incident to the work of restoring instrumentalities to a normal condition of safety.—A principle analogous to that which is stated in the preceding section is that a servant who engages in the work of bringing back to a safe condition any part of the plant which has become abnormally dangerous assumes all the risks which are obviously incident to the work thus undertaken. As regards such a servant those risks are ordinary, even though their existence may, as regards servants whose duties involve merely the use of the instrumentality in question, imply culpability on the master's part. In other words, a servant put to work to repair a defective appliance can not be heard to complain of its being defective, "inasmuch as that very thing is the cause of his being there, and he undertook to set it right, being paid for the risk he ran, and voluntarily incurring it."¹ The rule which casts upon the master a liability for failing to provide reasonably safe instrumentalities for the use of his servants is deemed to be suspended under such circumstances.²

A perusal of the subjoined note will show that the facts presented in this class of cases, no less than those presented in the class of cases referred to in the preceding section, are usually of such a nature that the servant's inability to maintain an action may be predicated as a result of the operation of the principle discussed in § 29, *ante*.³

(1893) 134 Ind. 571, 33 N. E. 345. Rehearing denied in 134 Ind. 585, 34 N. E. 511.

¹ *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, per Fry, L. J., quoting Roberts & Wallace, *Liability of Employers*, 3d ed. page 252.

It is a most undoubted principle that, where a piece of property is out of repair, the men who are employed in making it safe take upon themselves whatever of added risk comes from the existing condition of the place or the work. *Colorado Coal & I. Co. v. Lomb* (1895) 6 Colo. App. 255, 40 Pac. 251.

² *Chicago & N. W. R. Co. v. Ward* (1871) 61 Ill. 130; *Flanagan v. Chicago & N. W. R. Co.* (1880) 50 Wis. 462, 7 N. W. 337.

³ (a) *Principle applied to servants repairing the roadbed or structures on a railway.*—A railroad employee sent out in the nighttime with a gang of extra

section men to assist in tearing up, removing, and relaying a portion of the track in imminent danger of being washed into a river by high water, assumes the risk incident to the ground being broken and obstructed by debris, and so causing the stumbling of one of his fellow servants engaged with him in carrying a rail. *Gulf, C. & S. F. R. Co. v. Jackson* (1894) 12 C. C. A. 507, 27 U. S. App. 519, 65 Fed. 48.

Among the risks assumed by such servants are those arising from the necessity of doing the required work in the intervals between the running of the regular trains. *Come v. Union P. R. Co.* (1890) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382 (servant injured by the failure of his co-servants to act in concert with him in lifting a rail, the consequence being that it falls, cannot recover, although such want of co-operation may be due to their confusion of mind produced by an impatient order of the foreman upon the approach

269. Risks incident to work the progress of which is constantly creating new elements of unsafety.—The rule that it is the duty of a

of a train for which it was necessary to leave a clear track.)

The master is deemed to be free from liability for injuries received by such servants, not only where, as in the cases just cited, the accident happened while they were actually engaged on the task of reparation, but also where it happened while they were being conveyed upon a construction train to or from the place at which the work was to be done. *Brick v. Rochester, N. Y. & P. R. Co.* (1885) 98 N. Y. 211. *Vaughn v. California C. R. Co.* (1890) 83 Cal. 18, 23 Pac. 215 (employees upon a construction train engaged in finding and repairing washouts caused by a severe storm, with a knowledge of all the facts and of the purpose for which the train started, held to have assumed the extra-hazardous risks of such employment); *Carlson v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 450, 28 Pac. 497 (in which the contention of counsel that the particular bridge at which the accident occurred was not known to be out of repair, or that deceased was not employed to assist in repairing that bridge, took the case out of the rule stated in the text, was rejected, the court observing: "It was known that the track of defendant's road from the Cascade Locks west for several miles was obstructed by landslides and washouts, caused by the unusual, if not extraordinary, storms then prevailing, and deceased was employed to go out upon the road and assist in putting it in condition for use, making such repairs as might be necessary, and wherever needed. The particular labor in which he was engaged at the time of the casualty involved the use of the very track which he was employed to assist in repairing").

(b) *Principle applied to servants repairing other structures.*—*McGillyn v. Brodie* (1866) 31 Cal. 376. The servant was injured by the fall of a cupola in a foundry which he was repairing, the injury being received on the second day in which he was engaged in the job. The court said: "He was engaged with Fitzpatrick in making the repairs during the preceding day. He therefore knew—for he had the opportunity to know—its exact condition far better than the defendants, who do not appear to have been about the cupola at all during the time Fitzpatrick [a co-servant of

plaintiff] and plaintiff were at work upon it. . . . The risk of the accident was a risk incident to the employment in which plaintiff was engaged.

Possessed of all the knowledge which defendants had as to the condition of the cupola, and with an opportunity of becoming better informed in the progress of the work in which he was engaged, plaintiff accepted the employment and continued in it down to the moment of the accident. Where a party works with or in the vicinity of a piece of machinery insufficient for the purposes for which it is employed, or for any reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained arising out of the accidents resulting from such defective condition of the machinery. This is the principle established by all the cases. . . . Any other rule would place the defendants in a very embarrassing position, for, the cupola having got out of repair and become dangerous, they were liable to become responsible for accidents that might result from allowing it to continue in that condition; and if plaintiff can recover they are also responsible for injuries arising to those at work on and about it in attempting to remedy the evil by putting it in a safe condition. It would be hazardous for defendants to allow the cupola to continue in an unsafe condition, and equally hazardous to employ workmen to put it in a safe condition."

(c) *Principle applied to servants removing ice and snow from railway tracks.*—*Howland v. Milwaukee, L. S. & W. R. Co.* (1882) 54 Wis. 226, 11 N. W. 529 (shoveler of snow on a train engaged in removing snow was injured by the overturning of the car in which he was traveling, owing to an unsuccessful attempt of the conductor to remove a snowbank from the track by means of the snowplow alone); *Derr v. Lehigh Valley R. Co.* (1893) 158 Pa. 365, 27 Atl. 1002 (engineer injured while engaged in opening a track obstructed by snow); *Morse v. Minneapolis & St. L. R. Co.* (1883) 30 Minn. 465, 16 N. W. 358 (engineer injured while "bucking" snow with locomotive); *Drake v. Union P. R. Co.* (1889) 2 Idaho, 453, 21 Pac. 560

master to exercise ordinary care to provide a reasonably safe place of work for his servants is held not to be applicable to cases in which

(same accident to fireman); *Bryant v. Burlington, C. R. & N. R. Co.* (1885) 66 Iowa, 305, 55 Am. Rep. 275, 23 N. W. 678 (same accident to fireman).

In the last cited case the court said: "In this latitude storms of more or less severity, like the one in question, frequently occur. It is a duty railroad companies owe to the public to remove snow from the track and operate the road as soon as it can be done by the exercise of great diligence and the use of all the means and appliances at their command. The company has the undoubted right to adopt such methods for that purpose as its best judgment may dictate. It may be that it would not have the right to adopt doubtful experiments. Experience has undoubtedly demonstrated in what manner the required duty can be best performed. Such methods, it must be assumed, are known to the companies and its employees. The latter therefore, when they undertake the performance of any duty which requires them to engage in 'bucking snow,' assume the usual and ordinary hazards of their occupation: and if the effort to remove the snow by that method is made in the manner in common use they have no right to complain if an accident occurs."

It has been held, however, that the conductor of a train ordered to run as an extra to carry snow shovellers to a certain station beyond which the road is blockaded does not assume the risk of a snow slide between the stations on the trip he is ordered to run. *Fisher v. Oregon Short Line & U. N. R. Co.* (1892) 22 Or. 533, 16 L. R. A. 519, 30 Pac. 425, distinguishing *Carlson v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 450, 28 Pac. 497, subd. (a) *supra*.

(d) *Principle applied to servants repairing machinery.*—Injuries caused by a defect in machinery do not constitute a cause of action as regards a servant employed to remedy that defect, even though the dangerous condition resulted from the incompetency or neglect of other employees, officers, or agents of the company. *Dartmouth Spinning Co. v. Achord* (1889) 84 Ga. 14, 6 L. R. A. 190, 10 S. E. 449. Speaking of the plaintiff the court said: "So far as appears, no one knew more of the state and condition of the machinery at the time than he did; and the object of calling

him in the room was that he might ascertain the cause of the trouble and apply the remedy. . . . The incompetency and inattention of the other gave him more to do in his vocation, somewhat as a sickly climate favors a physician's practice. It is to the interest of those who use machinery for it to be always in good condition, but for it to fail often and get out of order is advantageous to the man whose business is to make repairs. True it is that the risk of concealed dangers incident to the work of making repairs is upon him, but as the skilled machinist is best competent to discover and avert such dangers, he is the proper man to incur the hazard." In *Martineau v. National Blank Book Co.* (1896) 166 Mass. 4, 43 N. E. 513, the court said that the defendant had no ground of complaint, where the jury were instructed that the plaintiff assumed the risk incident to the condition in which he was informed that the machine was, and that, if the request or the information was that the machine was out of repair and for the plaintiff to go and repair it, he impliedly contracted to take the obvious risks of the condition in which the machine was when he agreed to repair it.

(e) *Principle applied to trainmen handling disabled cars.*—The enhanced risk created by the defective condition of rolling stock which is set apart to be taken to the repair shop will, as regards a trainman, be treated as an ordinary one wherever it is reasonable to infer that he knew, or should have known, the peril to which he was exposed. *Judkins v. Maine C. R. Co.* (1888) 80 Me. 417, 14 Atl. 735; *Yeaton v. Boston & L. R. Corp.* (1883) 135 Mass. 418; *McCosker v. Long Island R. Co.* (1881) 84 N. Y. 77 (*arguendo*). Such knowledge is inferred where he deliberately took charge of a crippled engine and operated it (*Houston & T. C. R. Co. v. O'Hare* [1885] 64 Tex. 600), or where the defective car was marked "out of order," or where it was his special duty to take defective cars out of trains (*Arnold v. Delaware & H. Canal Co.* [1890] 125 N. Y. 15, 25 N. E. 1064; *Chesapeake & O. R. Co. v. Hennessey* [1899] 38 C. C. A. 307, 96 Fed. 713; *Chicago & N. W. R. Co. v. Ward* [1871] 61 Ill. 130; *Fennell v. St. Paul, M. & M. R. Co.* [1884] 32 Minn. 54, 19 N. W. 349). In the last-

the very work which the servants are employed to do is of such a nature that its progress is constantly changing the conditions as regards

cited case, where plaintiff mistook a damaged car for a sound one, the trial court modified the defendant's sixth request by inserting the words italicized so that, as given, it reads as follows: "The peril incident to the coupling of damaged cars is one to which every railroad brakeman may be exposed by the very nature of his employment, and one which at times must necessarily be incurred. The existence of such peril while such car is being taken to the place of repair implies no negligence whatever upon the part of the railway company, and is no ground for recovery by an injured brakeman, if he is either directly or by the circumstances notified that the car is damaged or is being moved to a place for repairs. It is a risk he assumes for himself." To this modification defendant excepted. The comments of the supreme court were as follows: "The vice of this instruction as thus modified and given is, we think, that it makes the question of the defendant's liability turn upon the fact of actual notice directly or indirectly, to the brakeman, leaving out of view the question as to the exercise of due diligence by the company in the matter of providing and publishing suitable regulations for the transfer of damaged cars, or the existence or effect of any usage which might be deemed equivalent thereto. It is clear that the arrangements and regulations made and in operation for the transfer of such cars might be reasonably suitable and proper for the purpose, and yet, through some accident or misfortune or some negligent act or omission of a fellow servant in carrying them out, a brakeman or other laborer might be misled or misdirected so as to mistake the character of the car at its destination; and mistakes or confusion in giving orders may be reasonably expected to occur without the fault of the defendant or its superior or managing officers."

In *Kelley v. Chicago, St. P. M. & O. R. Co.* (1886) 35 Minn. 490, 29 N. W. 173, it was laid down that, if a brakeman is notified generally that a car is in bad order, and handles it, not knowing in particular for what reasons it is to be withdrawn from service, he handles it as a car which is unsuitable for use, and at his own risk, so far as regards any risks which are apparent or are

fairly suggested by ordinarily careful and diligent observation. Especially will the servant be declared incapable of maintaining the action, if the defective car was marked "out of order," in accordance with a rule or custom of the company. *Watson v. Houston & T. C. R. Co.* (1883) 58 Tex. 434; *Gulf, C. & S. P. R. Co. v. Mayo* (1896) 14 Tex. Civ. App. 253, 37 S. W. 659.

In *Flanagan v. Chicago & N. W. R. Co.* (1880) 50 Wis. 462, 7 N. W. 337, the court pronounced reasonable a rule to send all cars used in carrying ore, after they are unladen at the point of transshipment, to the company's repair shops for inspection and for such repairs as any of them may be found to require, and reiterated the following statement of principles in the opinion rendered on the former appeal of the same case (45 Wis. 98): "Cars and engines are frequently damaged, and it becomes necessary to remove them to some proper place for repairs; and it may happen that they are so seriously damaged that their removal will be attended with some personal danger to those engaged in the work. Yet this is one of the perils of the business, and if a person so employed is injured because of the broken and unsafe condition of the car or engine, he has no remedy against the owner, unless such owner has been otherwise negligent. . . . Besides, in this case the defect in the car which he attempted to climb upon was plain and visible,—one which he could not fail to see had he looked where he was placing his foot."

(f) *Other illustrative cases.*—Other decisions to the same effect are those which hold that an employee sent into a room on the day of the explosion of a fly-wheel, to clear away the ruins, assumes the risk of a piece of iron falling upon him from the ceiling (*Kanz v. Page* [1897] 168 Mass. 217, 46 N. E. 620); that a miner assumes the risk of rock falling from the roof of a mine as the result of a blast in the locality, where he goes to the vicinity for the purpose of determining whether all the shots have been fired (*Boemer v. Central Lead Co.* [1897] 69 Mo. App. 601); that the duty of a lineman to repair a defect in insulation of a wire makes the risk of injury in so doing one which he assumes (*Smart v. Louisiana Electric*

an increase or diminution of safety. The hazards thus arising as the work proceeds are regarded as being the ordinary dangers of the employment, and by his acceptance of the employment the servant necessarily assumes them.¹

Light Co. [1895] 47 La. Ann. 869, 17 So. 346; that a lineman assumes hazards growing out of the defective or insecure condition of the poles he is compelled to climb and assist in removing (*Peoria General Electric Co. v. Gallagher* [1896] 68 Ill. App. 248); that one employed to assist in replacing unsafe wooden poles supporting trolley wires, with iron poles, cannot recover for an injury caused by the fall of a decayed wooden pole against which the ladder upon which he was standing rested, since he was harmed by the defect he was hired to repair (*Broderick v. St. Paul City R. Co.* [1898] 74 Minn. 163, 77 N. W. 28; *Sutton v. Northwestern Teleph. Exch. Co.* [1900] 81 Minn. 314, 84 N. W. 109); that a workman in a sugar refinery who is injured by falling with a mass of sugar through the funnel of a bin, while he is engaged in removing an obstruction which had interrupted the downflow, cannot recover (*Block v. Hagemeyer* [1887] 46 Hun. 557).

For other cases presenting similar facts, see § 269, *infra*.

¹ *Finlayson v. Utica Min. & Mill Co.* (1895) 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 507. To the same effect see *Gulf, C. & S. F. R. Co. v. Jackson* (1894) 12 C. C. A. 507, 27 U. S. App. 519, 65 Fed. 48. The insecurity necessarily incident to the work of tearing down a building is a risk assumed by a man engaged in that work. *Clark v. Liston* (1894) 54 Ill. App. 578; *Chicago Edison Co. v. Davis* (1900) 93 Ill. App. 284 (servant backed off a platform from which the railing had been removed in the course of the work). An injury resulting from the accidental fall of a joist of a building, due, so far as appears to some latent defect in the construction of the edifice, creates no cause of action in favor of a laborer hired to assist in its demolition. *Smith v. Sellers* (1888) 40 La. Ann. 527, 4 So. 333. The danger to workmen walking on the keelson of a barge which they were engaged in unloading, owing to the rounding top thereof, is not one for which the master is responsible, as it is a condition which the workmen create as the work progresses and the keelson is exposed.

Foley v. Brooklyn Gaslight Co. (1896) 9 App. Div. 91, 41 N. Y. Supp. 66. A workman in a mine engaged in timbering an entry assumes the danger of the fall of a mass of mud and other material which has resisted the efforts of the foreman and workmen to dislodge it with picks, and is loosened by the arising from such employees' drilling. *Finlayson v. Utica Min. & Mill Co.* (1895) 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 507. Judge Caldwell dissented, contending, in a vigorous opinion, that it was for the jury to say whether the primary duty of the master's representative was not to have the place of work carefully inspected after every blast, and ascertain the conditions of the roof and walls of the tunnel. The employment of timbering was considered by the learned judge to have had no relation to the presence of dangerous masses of materials like that which injured the plaintiff, and the case was essentially different from one in which the injury was inflicted while the plaintiff was in the act of removing such masses.

A servant who undertakes the work of removing stoops in a mine accepts the risk of a fall of the roof. *Cook v. Bell* (1857) 20 Sc. Sess. Cas. 2d Series 137. A shot worker employed in a coal mine to pull down the loose coal after a blast, from the effect of which the rooms are liable to be in a more or less dangerous condition, assumes such dangers as a risk incident to his employment. *Muddy Valley Min. & Mfg. Co. v. Parrish* (1897) 74 Ill. App. 559. A sectionman engaged in repairing a culvert which had been washed out cannot recover for an injury caused by the fall of a heavy mass of earth from the side of the trench which had been dug to receive the timbers composing the culvert although during his temporary absence from the place of work the side had been made perpendicular, and he had had no opportunity to observe the change after his return, owing to the fact that he was hurried about his work. *Kletschka v. Minneapolis & St. L. R. Co.* (1900) 80 Minn. 238, 83 N. W. 133. An employee assumes the additional risk incident to the removal of an embankment by undermining the base and pris-

If the conditions exemplified in cases of this type are proximately caused by the negligence of the injured person's fellow servants, recovery is of course denied as a result of the operation of the doctrine of common employment. See more especially, in this connection, chapter XXXII., *post*.

C. ASSUMPTION OF EXTRAORDINARY RISKS.

270. Extraordinary risks not assumed by a servant.— A principle

ing or blasting off the top. *Bradley v. Chicago, M. & St. P. R. Co.* (1897) 138 Mo. 293, 31 S. W. 763. A laborer who, being acquainted with the nature of the work, engages in undermining a bank for the purpose of causing it to fall, cannot recover against his employer for an injury caused by a fall of earth, which extended further along the bank than was expected. *Allen v. Logan City* (1894) 10 Utah, 279, 37 Pac. 496 (Bartch, J., dissented on the ground that the evidence showed the fall to have been caused by the loosening of the material, caused by the blasting of the day before that on which the injury was received, a fact of which the plaintiff was ignorant. This he thought was an additional risk not assumed by the plaintiff). An employee, who, while engaged in digging a bed of gravel from under a thin stratum of clay, is injured by the falling of the clay, cannot recover, as he is bound to know where the earth is undermined and will fall in. *Griffin v. Ohio & M. R. Co.* (1890) 124 Ind. 326, 24 N. E. 888. A laborer working in a gravel pit assumes the risk arising from the liability of sand and gravel to fall during the process of excavation. *Swanson v. Lafayette* (1893) 134 Ind. 625, 33 N. E. 1033. A laborer engaged in excavating a bank of iron ore assumes the risk incident thereto, if he understands the condition. *Aldridge v. Midland Blast Furnace Co.* (1883) 78 Mo. 559. A laborer engaged in digging a trench at a part of a street which has been filled in assumes the risk incident to a collapse of the earth at the sides of the trench, where it is obvious from the nature of the materials that the street has been filled. *Carlson v. Sioux Falls Water Co.* (1895) 8 S. D. 47, 65 N. W. 449. An employee assumes the risk in going above an overhanging gravel ledge, in digging a ditch for the purpose of dislodging the ledge. *Missouri, K. & T. R. Co. v. Spellman* (Tex. Civ. App. 1896) 34 S. W. 298.

In *Swanson v. Great Northern R. Co.* (1897) 68 Minn. 184, 70 N. W. 978, the allegations of the plaintiff showed that he was put at work at a large hill from which defendant was removing gravel; that he was ordered upon the slope of this hill to assist other workmen in loosening the material, that it might, following the laws of gravitation, fall down to the bottom of the pit, there to be loaded upon cars by the steam shovel. The remarks of the court on this state of facts were as follows: "The place was made dangerous and its character was continually changing, by reason of the work in which plaintiff and others were engaged. The progress of the work necessarily changed the character of the place and enhanced the danger, and under such conditions it has never been held that it is the absolute duty of the master to furnish the servant a safe place in which to work."

For other cases involving similar facts, but decided against the servant on a different ground, see § 278, note 1. *subd. (p)*, *infra*.

The principle stated in the text has also been relied upon in a case where it was held that a railroad company is not liable for injuries to a laborer engaged to load merchandise into its cars, from the fall of a pile of boxes of tea upon which he had climbed for the purpose of loading them into the car, due to the unsafe piling by a steamship company in unloading the same upon the wharf near the track of the railroad company, where the railroad company had no authority or duty to perform in piling the boxes. *Carolan v. Southern P. Co.* (1897) 84 Fed. 84. But if the unsafety was, as it would seem, due to the negligence of the servants of a third party, and the dangerous conditions existed before the servant began work, it is obvious that the principle was not properly applied under the circumstances, and was in fact wholly irrelevant.

which has been formulated and applied so frequently as to have become axiomatic is that a servant is *prima facie* not chargeable with an assumption of extraordinary risks,—risks, that is to say, which may be obviated by the exercise of reasonable care on the master's part. The use of this somewhat singular phraseology for the purpose of affirming the master's responsibility for injuries caused by his negligence is accounted for by the historical accident, noticed in § 1, *ante*, by which it happened that the foundations of the law of employers' liability were originally laid by asserting the servant's assumption of all the risks which were manifestly incident to his employment; and the various circumstances under which the servant's right to recover has been conceded have, in the first instance at least, been viewed merely as grounds for predicating an exception to the rule thus formulated.¹

¹"One, and perhaps the most important, of those exceptions [*i. e.*, to the doctrine of assumption of risks], arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. . . . It is equally implied in the same contract [*i. e.*, of hiring] that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk." *Hough v. Texas & P. R. Co.* (1879) 105 U. S. 213, 217, 25 L. ed. 612, 615. "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the mas-

ter's negligence in this respect." *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598. Increased dangers caused by negligence on the part of the employer are not to be deemed incident to the business. *Anglin v. Texas & P. R. Co.* (1894) 9 C. C. A. 130, 23 U. S. App. 62, 60 Fed. 553. "A risk which the master has created by doing or permitting something to be done which ought not to have been done, or by omitting some precaution which in the exercise of ordinary care ought to have been taken, cannot be regarded as one of the ordinary risks of any employment" assumed by the employee. *George v. Clark* (1898) 29 C. C. A. 374, 56 U. S. App. 505, 85 Fed. 608. An exception to the rule that a servant assumes the risks of the employment "arises from the obligation or duty of the master not to expose the servants, while conducting his business, to perils or hazards which might have been provided against by the exercise of due care and proper diligence upon the part of the master." *Baltimore & O. & C. R. Co. v. Rowan* (1885) 104 Ind. 88, 3 N. E. 627. The servant does not assume "the hazard of extraordinary risks added by the failure of the employer to perform the duty enjoined upon him by law." *Rogers v. Leyden* (1890) 127 Ind. 59, 26 N. E. 210. "It is those risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the master that the servant assumes." *Pantzar v. Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 376, 2 N. E. 24. "Dangers which are known and can be mitigated or avoided by the exercise

Any instruction is correct which embodies the principle that an employee does not assume all the risks incident to his employment, but

of reasonable care and precaution on the part of those carrying on the business, and injuries from which happen through neglect to exercise such care, are not incident to the business; and the master is generally liable for damages occurring therefrom." *McGovern v. Central Vermont R. Co.* (1890) 123 N. Y. 290, 23 N. E. 373. "There is no implied contract growing out of the contract of service, that the servant shall take the risk of the master's negligence, or that the latter shall be exempt from responsibility to the servant for his own personal wrongs." *Anthony v. Lecret* (1887) 105 N. Y. 591, 12 N. E. 561.

The decisions in which the extent of the master's liability is defined in language similar to that of the above-cited cases are so numerous that it would be unprofitable to cite them all. The following will serve as sufficient examples: *Ashworth v. Stanwix* (1861) 3 El. & El. 701, 30 L. J. Q. B. N. S. 183, 7 Jur. N. S. 467, 4 L. T. N. S. 85; *Southern P. Co. v. Burke* (1894) 9 C. C. A. 229, 13 U. S. App. 110, 23 U. S. App. 1, 60 Fed. 704; *Perry v. Marsh* (1854) 25 Ala. 659; *Little Rock, M. R. & T. R. Co. v. Leavett* (1886) 48 Ark. 333, 3 S. W. 50; *Little Rock & Ft. S. R. Co. v. Voss* (1892; Ark.) 18 S. W. 172; *Zeigler v. Danbury & N. R. Co.* (1885) 52 Conn. 543; *Middle Georgia & A. R. Co. v. Barnhill* (1898) 104 Ga. 582, 30 S. E. 771; *Illinois Steel Co. v. Bauman* (1899) 178 Ill. 351, 53 N. E. 107; *Alton Paving, Bldg. & Fire Brick Co. v. Hudson* (1898) 176 Ill. 270, 52 N. E. 256; *Consolidated Coal Co. v. Haenni* (1893) 146 Ill. 614, 35 N. E. 162; *Lasalle v. Kostka* (1901) 190 Ill. 130, 60 N. E. 72; *Baltimore & O. S. W. R. Co. v. Peterson* (1901) 156 Ind. 364, 59 N. E. 1044; *Hall v. Bedford Quarries Co.* (1901) 156 Ind. 460, 60 N. E. 149; *Moran v. Harris* (1884) 63 Iowa, 390, 19 N. W. 24; *Knapp v. Sioux City & P. R. Co.* (1887) 71 Iowa, 41, 32 N. W. 18; *Buzzell v. Laconia Mfg. Co.* (1861) 48 Me. 113, 77 Am. Dec. 212; *Rhoades v. Varney* (1898) 91 Me. 222, 39 Atl. 552; *Frye v. Bath Gas & Electric Co.* (1900) 94 Me. 17, 46 Atl. 804; *Wonder v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143; *Cumberland & P. R. Co. v. State* (1875) 44 Md. 283; *Edly v. Aurora Iron Min. Co.* (1890) 81 Mich. 548, 46 N. W. 17; *King v. Ford River Lumber*

Co. (1892) 93 Mich. 172, 53 N. W. 10; *Tierney v. Minneapolis & St. L. R. Co.* (1885) 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229; *Beaquist v. Chandler Iron Co.* (1892) 49 Minn. 511, 52 N. W. 136; *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497; *Whalen v. Centenary Church* (1876) 62 Mo. 326 (defective machinery or incompetent servants); *Henry v. Wabash Western R. Co.* (1891) 109 Mo. 483, 19 S. W. 239; *Nichols v. Crystal Plate Glass Co.* (1894) 126 Mo. 55, 27 S. W. 519, 28 S. W. 991; *O'Melia v. Kansas City St. J. & C. B. R. Co.* (1893) 115 Mo. 305, 21 S. W. 503; *Blanton v. Duld* (1894) 109 Mo. 75, 18 S. W. 1149; *Nichols v. Crystal Plate Glass Co.* (1894) 126 Mo. 55, 27 S. W. 516, 28 S. W. 991; *Kearney Electric Co. v. Laughlin* (1895) 45 Neb. 401, 63 N. W. 941; *O'Neill v. Chicago, R. I. & P. R. Co.* (1901) 62 Neb. 358, 86 N. W. 1698; *Comben v. Bellerive Stone Co.* (1896) 59 N. J. L. 226, 36 Atl. 473; *Abel v. Delaware & H. Canal Co.* (1891) 128 N. Y. 664, 28 N. E. 663; *Farley v. New York* (1897) 152 N. Y. 222, 46 N. E. 506, Rev'g 9 App. Div. 536, 41 N. Y. Supp. 622; *Porter v. Western North Carolina R. Co.* (1887) 97 N. C. 63, 2 S. E. 580; *Boss v. Northern P. R. Co.* (1891) 2 N. D. 128, 49 N. W. 655; *Fisher v. Oregon Short Line & U. N. R. Co.* (1892) 22 Or. 533, 16 L. R. A. 519, 30 Pac. 425; *Stager v. Troy Laundry Co.* (1901) 38 Or. 480, 53 L. R. A. 459, 63 Pac. 645; *Maguire v. Little* (1887; R. I.), 13 Atl. 108; *Missouri P. R. Co. v. Crenshaw* (1888) 71 Tex. 340, 9 S. W. 262; *Gulf, C. & S. F. R. Co. v. Silphiant* (1888) 70 Tex. 623, 8 S. W. 673; *Galveston, H. & S. A. R. Co. v. Arispe* (1891) 81 Tex. 517, 17 S. W. 47; *Texas & P. R. Co. v. Eberheart* (1897) 91 Tex. 321, 43 S. W. 510, Affirming (1897; Tex. Civ. App.) 40 S. W. 1060; *Chapman v. Southern P. Co.* (1895) 12 Utah, 30, 41 Pac. 551; *Hill v. Southern P. Co.* (1901) 23 Utah, 94, 63 Pac. 814; *Trihay v. Brooklyn Lead Min. Co.* (1886) 4 Utah, 468, 11 Pac. 612; *Dumas v. Stone* (1893) 65 Vt. 442, 25 Atl. 1097; *Houston v. Brush* (1894) 66 Vt. 331, 29 Atl. 380; *Sacerance v. New England Tule Co.* (1900) 72 Vt. 181, 47 Atl. 833; *Walty v. Lake Superior Terminal & Transfer R. Co.* (1898) 100 Wis. 128, 75 N. W. 1022.

only such as are ordinarily incident to the employment.² On the other hand, any instruction which is inconsistent with or ignores the principle is erroneous.³

² *Moore Lumber Co. v. Richardson* (1897) 95 Va. 326, 28 S. E. 334. It is error to refuse a request for a requested instruction to this effect. *Gulickson, H. & S. A. R. Co. v. Pitts* (1897; Tex. Civ. App.) 42 S. W. 255. In any case where there is prima facie evidence of negligence, an unqualified instruction that a servant assumes the ordinary risks of the employment is properly supplemented by a statement in which the jury are told that this rule does not apply to risks which are extraordinary and which did not exist at the time the servant was hired. *Libby, McV. & L. v. Scherman* (1893) 146 Ill. 553, 34 N. E. 801. An instruction that a locomotive engineer assumes all risks ordinarily incident to the business, but he may presume that the company will furnish a reasonably safe track, and he does not assume risks brought about by the company's negligence, is not subject to the objection that he could only presume the company would use all ordinary diligence to furnish a safe track, and that he assumed the risk of a defective track if, by the exercise of ordinary care, he might have known of it. *Texas & P. R. Co. v. McClane* (1900) 24 Tex. Civ. App. 321, 62 S. W. 565.

³ As, where the jury are told that the law presumes that every person who accepts employment does so with the risks incident thereto. *Piette v. Bavarian Brewing Co.* (1892) 91 Mich. 605, 52 N. W. 152. Or where the words of the trial judge are open to the construction that a servant assumes every danger which may possibly arise in the performance of his duties. *Pittsburg Bridge Co. v. Walker* (1897) 170 Ill. 550, 48 N. E. 915. An instruction that a brakeman on a train assumes the risk of dangers incident to the speed at which the train is run is not correct, unless it is qualified by the proviso that such assumption is implied only if the defendant was not negligent in running the train at that speed. *Connors v. Burlington, C. R. & N. R. Co.* (1888) 74 Iowa, 383, 37 N. W. 966. An instruction that plaintiff in entering upon his work in connection with a derrick by the breaking of which he was injured assumed all the risk in connection with his association as to the place in which he worked and the character of the material, uten-

sils, and employments, which were obvious to him or ascertainable in the exercise of ordinary care, is improper in the master's duty in respect to such matters and plaintiff's right to rely on the discharge of such duty is stated. *Ambrose v. Angus* (1895) 169 Ill. App. 304. A requested instruction that, if a railroad employee knew or might have known that the company operated its trains in such a manner as to make his employment unusually dangerous, and voluntarily continued to expose himself to such hazard in performing his duty, recovery cannot be had for his death from being struck by a train while so employed, is properly refused where the circumstances affecting the duty of the employer and the employee to exercise care and control commensurate with the danger are ignored. *Illinois C. R. Co. v. Galt* (1895) 157 Ill. 354, 41 N. E. 724. In an action for an injury received by a railway employee by having his foot caught in an imperfect track and being run over, the defendant is not entitled to have the jury instructed that, if the injured man was in the habit of driving cars over the track, and by the use of ordinary care and observation could have been aware of its condition, he took upon himself the risk of the employment. Such a charge was considered misleading for the reason that it might have led the jury to suppose that, under the conditions shown, the risk was one incident to the employment. *Philadelphia, W. & B. R. Co. v. State* (1882) 58 Md. 372.

A requested instruction, that if a car repairer knew of the custom or manner in which cars were placed upon the repair tracks, where he was liable to be at work, he assumed all the risks incident to the manner of making entry on such track, and plaintiff would not be entitled to recover by reason of the manner of the entry, is properly refused, as it would prevent a recovery though the jury should believe that the defendant was guilty of negligence in running the car onto the repair track, without reference to the question as to whether he had made proper rules. *Texas & P. R. Co. v. Eberheart* (1897) 91 Tex. 321, 43 S. W. 510. Affirming (1897; Tex. Civ. App.) 40 S. W. 1060.

This qualification of the general rule as to the assumption of ordinary risks, and not that rule itself, is deemed to be controlling in cases of the types adverted to in §§ 267-269, *ante*, where the peculiar hazards of the employment are unnecessarily augmented by a specific want of care on the master's part.⁴

There is some authority for the doctrine that a contract by which the master is declared in unqualified terms to be free from responsibility for accidents occurring from any cause whatever should be construed in such a sense as to leave him still liable for injuries caused by his negligence.⁵ Still less can an intention to undertake extraor-

⁴ A laborer sent out on a work train to repair a track after a storm assumes the enhanced risks arising from the want of repair, so far as they are due to the action of the storm. But he does not assume any risks which result from the neglect of the master to use proper care, before the storm, to keep a bridge in repair, or to ascertain the condition of the track or bridge after the storm, or to take such due and proper precautionary measures to prevent accidents to its employees as the exigencies of the situation may require. *Carlson v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 450, 28 Pac. 497. A shoveler engaged by a railway company to assist in removing dirt and other obstructions from its track, upon which they have been washed by an unusual storm or freshet, does not assume the risk of the company's failure before the storm to keep in proper repair a bridge over which the train on which he is carried is required to pass, or to send out a track walker in advance of the trains to ascertain the condition of the track or bridge after the storm, or to take such other due and precautionary measures to prevent accidents as may be required by the exigency of the situation. *Conlon v. Oregon Short Line & U. N. R. Co.* (1893) 23 Or. 499, 32 Pac. 397. The court said: "It may be admitted that, if the performance of his duties had required that he should ride over the track from place to place where his services were needed to clear the track of obstructions, the risk he assumed included the danger of bridges being undermined or swept out by freshets or floods, when they occurred from inevitable accident, but not when the danger might have been ascertained and averted in time to avoid the injury, by the exercise of reasonable care or of proper precautions."

A civil engineer in the employ of a railroad company, who rides on a train over a new track which he is engaged in laying, when ordered to do so, assumes only the risks ordinarily incident to travel over such new track, with due care in the management of the train and the condition of the track. His assumption of such risks will not relieve the company of the charge of negligence arising from an undue rate of speed and the failure to repair defects in the track made by stones. *Helon v. Chicago & N. W. R. Co.* (1889) 77 Iowa, 743, 4 L. R. A. 287, 42 N. W. 563. An employee assumes the additional risk incident to the removal of an embankment by undermining the base and prying or blasting off the top, over that involved in taking the bank down from the top, but not that incident to the failure of the master to exercise reasonable care to remove the overhanging earth as the excavation proceeds. *Bradley v. Chicago, M. & St. P. R. Co.* (1897) 138 Mo. 293, 39 S. W. 763. An experienced tile setter employed in a fireproof building where steel workers are engaged in joining the framework of the building assumes all ordinary hazards of the work he engages in, but not the risk of being injured by falling material, which it is customary to guard against and make suitable provision to prevent. *Pioneer Fireproof Constr. Co. v. Howell* (1901) 189 Ill. 123, 59 N. E. 535, Affirming (1900) 90 Ill. App. 122.

In *Memphis & C. R. Co. v. Jones* (1859) 2 Head, 517, a slave was hired from his owner under a contract to the following effect: "All risks incurred or liability to accidents whilst in said service is compensated for and covered by the pay agreed upon; the said railroad company assuming no responsibility for damages from accident, or any cause whatever. The court said: "It might

ordinary risks be attributed to a servant, where the words relied upon as being indicative of such an intention are reasonably susceptible of a different construction.⁶

271. — unless comprehended by the servant.— In statements of the general principle enunciated in the last section there are often found words which recognize, in the form of an exceptive limitation, the existence of the principle which declares, as will presently be shown, the circumstances under which a risk, though extraordinary, is deemed to have been assumed. An extraordinary risk, it is said, is not assumed unless it is, or ought to be, known to and comprehended by the servant, or—as the same conception may also be expressed in logically equivalent terms—where the servant is chargeable neither with an actual nor a constructive knowledge and comprehension of the risk.¹

It is somewhat difficult to define the exact meaning and effect of the foregoing stipulation. This, however, is not necessary for the present determination. But there is no sort of difficulty in determining what it does not mean. It is true the language of the instrument is very strong, but it must receive a reasonable and sensible construction. It would be most absurd to suppose that it was the intention and understanding of the parties that the company should be protected from liability, not only against all the ordinary casualties to which the slave might be exposed in working on the road, and also against injuries caused by third persons in which the company had no participation, but likewise against injury or loss occasioned by the wilful wrong or gross negligence of the company itself, or its agents! Such a construction of the agreement is altogether inadmissible. The stipulation is not available for the defendant against its own wilful wrong or culpable negligence." In jurisdictions where express agreements not to sue a master for injuries resulting from his negligence are regarded as invalid (see volume III.), a contract like the one in the case cited would, for the purpose of upholding it, naturally be construed in the same manner as that favored by the court. But the validity of such agreements does not seem to have been anywhere discussed till some years after this case was decided.

⁶ A man employed to run an elevator does not assume risks of defective construction because, after he has been hired, he is told that he "must look out

and run at his own risk," and that the employer will stand no responsibility, and replies that he has run elevators, and that there need be no fear of him. The natural meaning of such an answer, under the circumstances, is merely that the employer need not be concerned about the servant's competency. *Fairbank Canning Co. v. Innes* (1887) 24 Ill. App. 33, Affirmed (1888) 125 Ill. 410, 17 N. E. 720.

¹ In *Rummel v. Diltworth* (1889) 131 Pa. 509, 19 Atl. 345, 346, the court said: "The general rule that a workman assumes the risks incident to his employment when he enters upon it is well settled, but its application is subject to certain qualifications. He certainly has the right to expect his employer to provide machinery, tools, and appliances that are reasonably safe for his use, and he assumes no risks growing out of their defective character, unless he has been fully advised that they are defective and dangerous. He has the right to suppose that his employer has provided such guards and means of protection from injury, in the use of the machinery, tools, and appliances, as are usual and reasonably necessary for his safety, and he cannot be held to assume the risks attendant on their absence, unless such absence is apparent, or his attention has been called to it. . . . If the plaintiff did not appreciate the danger of the work he was doing, arising from the defective appliances, and if the defendants were not justified in supposing he understood it, it cannot be held that, in the contractual relation of master and servant, he assumed the risk which

Instructions are correct or erroneous according as they conform to or are inconsistent with this principle.²

resulted in his injury." *Demura v. Glen Mfg. Co.* (1892) 67 N. H. 404, 40 Atl. 902. A servant does not assume the unusual and extraordinary risk of which the master knows or which he should know or foresee, unless such risks are obvious, or the servant has actual or presumptive knowledge of the danger. *Reed v. Stockmeyer* (1896) 20 C. C. A. 384, 34 U. S. App. 727, 74 Fed. 186. A servant does not assume the danger from the failure of the master to exercise reasonable care to provide safe machinery and appliances, or a safe place in which to do his work, unless the danger is obvious, or he can acquire knowledge thereof in the exercise of ordinary care. *Comben v. Bellefonte Stone Co.* (1896) 59 N. J. L. 226, 36 Atl. 473.

For language including a similar point of view, see *Sutton v. Hawksorth* (1872) 26 L. T. N. S. 851; *Heale & H. Coal Min. Co. v. Schmidt* (1900) 43 C. C. A. 532, 164 Fed. 282; *Carpenter v. Mexican Nat. R. Co.* (1889) 39 Fed. 315; *Little Rock, M. & T. R. Co. v. Leverett* (1886) 48 Ark. 333, 3 S. W. 50; *Gissoon v. Schuchbacher* (1893) 99 Cal. 419, 34 Pac. 104; *Higdon v. Wilkins* (1896) 114 Cal. 176, 45 Pac. 1041; *Cooper v. Porter Brewing Co.* (1901) 112 Ga. 894, 38 S. E. 91; *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92; *Chicago & W. W. R. Co. v. Gillison* (1898) 173 Ill. 264, 50 N. E. 657, affirming (1897) 72 Ill. App. 207; *Whitney & S. Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242; *Salom Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141, 38 N. E. 411; *Olsen v. Hanford Produce Co.* (1900) 111 Iowa, 347, 82 N. W. 903; *McDermott v. Iowa Falls & S. C. R. Co.* (1891) Iowa 47, N. W. 1037; *Bradbury v. Goodwin* (1886) 108 Ind. 286, 9 S. E. 302; *Pennsylvania Co. v. White* (1887) 111 Ind. 212, 12 N. E. 380; *Pennsylvania Co. v. Bush* (1891) 130 Ind. 347, 28 N. E. 615; *Blund v. Shreveport Belt R. Co.* (1896) 48 La. Ann. 1057, 36 L. R. A. 114, 20 So. 284; *Vegman v. Horse* (1893) 160 Mass. 143, 35 N. E. 451; *Bonathue v. Brown* (1891) 154 Mass. 21, 27 N. E. 675; *Scanton v. Boston & A. R. Co.* (1888) 147 Mass. 484, 18 N. E. 209; *Piette v. Bavarian Brewing Co.* (1892) 91 Mich. 605, 52 N. W. 152; *Ragon v. Toledo, A. A. & N. M. R. Co.* (1893) 97 Mich. 265, 56 N. W. 612; Vol. I. M & S.—40.

Phelps v. Chicago & W. M. R. Co. (1899) 122 Mich. 171, 84 N. W. 101, 84 N. W. 66; *Clapp v. Minneapolis & S. L. R. Co.* (1886) 36 Minn. 6, 29 N. W. 340; *Murphy v. Wabash R. Co.* (1892) 115 Mo. 111, 21 S. W. 862; *Hofenstein v. Hedart* (1896) 136 Mo. 795, 36 S. W. 863, 37 S. W. 829, 38 S. W. 894; *Cammerick v. Collins* (1876) 61 Mo. 520; *Hollenbeck v. Missouri P. R. Co.* (1897) 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; *Kierney Electric Co. v. Laughlin* (1895) 45 Neb. 390, 63 N. W. 941; *Fancher v. New York, L. E. & W. R. Co.* (1894) 75 Hun. 350, 27 N. Y. Supp. 62; *Holmesworth v. Long Island R. Co.* (1895) 94 Hun. 641, 36 N. Y. Supp. 1126; *Derrin v. Herriman* (1890) 26 Jones & S. 193, 9 N. Y. Supp. 722; *Walker v. Raleigh & C. F. R. Co.* (1900) 127 N. C. 203, 37 S. E. 204; *Philadelphia & R. R. Co. v. Heber* (1889) 128 Pa. 63, 5 1/2 R. A. 439, 18 Atl. 334; *Hoffmann v. Clough* (1889) 124 Pa. 505, 17 Atl. 19; *Maguire v. Little* (1887) R. I. 5 New Eng. Rep. 666, 13 Atl. 108; *Taylor, B. & H. R. Co. v. Taylor* (1890) 79 Tex. 101, 14 S. W. 918; *Rouner v. La Nove* (1891) 80 Tex. 117, 15 S. W. 803; *San Antonio & A. P. R. Co. v. Engelhorn* (1900) 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; *Pidcock v. Union P. R. Co.* (1888) 5 Utah, 612, 1 L. R. A. 131, 19 Pac. 191; *Dumas v. Stone* (1893) 65 Vt. 442, 25 Atl. 1097; *Carbine v. Bennington & R. R. Co.* (1889) 61 Vt. 348, 17 Atl. 491; *Houston v. Brush* (1894) 66 Vt. 331, 29 Atl. 380; *Johnson v. First Nat. Bank* (1891) 79 Wis. 414, 48 N. W. 712.

² *Heidler v. Beck's Store & Range Co.* (1896) 136 Mo. 3, 37 S. W. 115; *Pikesville, R. & E. G. R. Co. v. State* (1878) 88 Md. 563, 42 Atl. 214. It is proper to refuse an instruction that a servant "assumes the risk of all ordinary hazards and dangers of his employment, whether the same were known to him or not." *Whitney & S. Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242. A refusal to charge that plaintiff could not recover if his decedent knew that trains were habitually sent out insufficiently manned, and he had always gone on such trains, is not error, where it does not appear that decedent had any knowledge that the train which preceded his own on the morning in question had only two brakemen. *Rose v. Boston & A. R. Co.*

It will be observed that the affirmation of the servant's right of action, in the phraseology thus used, involves elements which, when considered from a different standpoint, supply another generic principle, *viz.*, that the exposure of a servant to dangers of which he has no knowledge, actual or constructive, imports culpability. See § 48, *ante*.

From the principle, as thus stated, it follows that assumption of an extraordinary risk cannot be predicated, as a matter of law, where there is no evidence going to show that the servant understood, or ought to have understood, that risk, or where the evidence actually produced is fairly susceptible of the construction that he did not understand it.³

As to the burden of proving the servant's knowledge of an extraordinary risk, see chapter XLIII., *post*.

272. Application of the doctrine to specific cases.—Most of the cases in which the servant's nonassumption of extraordinary risks is asserted relate to injuries caused by dangerous conditions which arise from, or are incident to the intrinsic quality or the permanent arrangements and relative disposition of the instrumentalities of the business or the materials which the servant is required to handle.¹ But the general

(1874) 58 N. Y. 217. Where a servant while engaged in his duty of cleaning a headlight slipped from a step on an engine, due to an accumulation of grease on such step, it is error to instruct the jury that he "assumed all risk of injury incident to the performance of the service that he was engaged to perform," where it was not shown that he knew the condition of the step, or that it was his duty to keep it clean. *Bookrum v. Galveston, H. & S. R. Co.* (1900; Tex. Civ. App.) 57 S. W. 919.

It is proper to refuse a request for an instruction that a railroad employee assumed the risk of being struck by a cattle guard along defendant's line where he had reasonable ground to believe that they were constructed so near the track as to render it "possible" for him to be struck thereby when on the ladder of a freight car. Such assumption is inferable only where he knew that it was "probable" that he would be so struck. *San Antonio & A. P. R. Co. v. Engelhorn* (1900) 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68.

¹ *Western Coal & Min. Co. v. Ingraham* (1895) 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219; *Collins v. Greenfield* (1898) 172 Mass. 78, 51 N. E. 454; *Ostrander v. Lansing* (1897) 111 Mich.

693, 70 N. W. 332; *Plefka v. Knapp*, *Stout Lumber Co.* (1897) 72 Mo. App. 309; *George v. Clark* (1898) 29 C. C. A. 374, 56 U. S. App. 505, 85 Fed. 608; *New York Biscuit Co. v. Rouse* (1890) 20 C. C. A. 555, 45 U. S. App. 45, 71 Fed. 608; *Malone v. Harbey* (1873) 16 Cal. 409; *Pittsburg Bridge Co. v. Worcester* (1897) 170 Ill. 359, 48 N. E. 91; *Kann v. Meyer* (1898) 88 Md. 541, 17 Atl. 1065; *McMahon v. McHale* (1895) 174 Mass. 326, 54 N. E. 854; *Leon v. Minneapolis, St. P. & N. W. R. Co.* (1896) 63 Minn. 489, 65 N. W. 1681; *Hechan v. Judson* (1899) 43 App. Div. 46, 59 N. Y. Supp. 578; *Simmous v. Peters* (1895) 85 Hun. 93, 32 N. Y. Supp. 680; *Comben v. Bellerille St. Co.* (1896) 59 N. J. L. 226, 36 Atl. 173; *Postal Telegraph Co. v. Coote* (1900) Tex. Civ. App.) 57 S. W. 912.

² The servant's nonassumption of extraordinary risks has been declared in asserting his prima facie right to recover for accidents caused by the conditions indicated by the subjoined headings or the mention of facts appended to the citations.

(a) *Defective track on railway.* *O'Donnell v. Allegheny Valley R. Co.* (1868) 59 Pa. 239, 98 Am. Dec. 336; *Wilson v. Louisiana & N. W. R. Co.*

principle is also frequently asserted with reference to accidents resulting from improper methods of carrying on the business, or from negligence in respect to the use and management of the instrumentalities

(1890) 51 La. Ann. 1123, 25 So. 961 (tracking of cars due to excessive speed threw off a tie which caused a derailment); *Taylor, R. & H. R. Co. v. Taylor* (1890) 79 Tex. 104, 14 S. W. 918 (defective roadbed); *Clapp v. Missouri & St. L. R. Co.* (1886) 36 Minn. 9, 29 N. W. 319 (defective roadbed and switches); *Hollenbeck v. Missouri P. R. Co.* (1897) 141 Mo. 97, 38 S. W. 723, 41 S. W. 887 (uncovered ditch in road bed); *Daridson v. Southern P. Co.* (1890) 44 Fed. 476 (defectively constructed ditch); *San Antonio & A. P. R. Co. v. Wilburn* (1899) Tex. Civ. App. 52 S. W. 89 (brakeman tripped up by silver detached from rail); *Curtes v. Chicago & N. W. R. Co.* (1897) 95 Wis. 460, 70 N. W. 665 (want of blocking, *see, however*, §§ 69, c, and 264, *ante*). See also § 270, note 4, *ante*.

(b) *Defective bridges on railways.*—See § 270, note 4, *ante*.

(c) *Other defective structures on railways.*—*Great Northern R. Co. v. Kaskaskia* (1900) 43 C. C. A. 626, 104 Fed. 140 (fastening of upon of coal chute); *Paul v. Chicago, M. & St. P. R. Co.* (1881) 53 Wis. 657, 11 N. W. 15 (defective method of laying planks on a crossing).

(d) *Unsafe roof of railway tunnel.*—*Kearney Elec. Co. v. Laughlin* (1895) 15 Neb. 390, 65 N. W. 941 (tunnel was imperfectly propped and caved in). A servant who chooses to ride upon a locomotive assumes all the risks peculiar to that situation; but of such risks, the danger of a rock falling from the roof of a tunnel is not one. *Northern P. R. Co. v. Baton* (1894) 12 C. C. A. 301, 29 U. S. App. 88, 64 Fed. 563.

(e) *Dangerous objects near railway tracks.*—(Compare §§ 70, 86, b, *ante*). *Murphy v. Walsh R. Co.* (1893) 115 Mo. 111, 21 S. W. 862 (cattle guard fence); *Bonner v. La Aone* (1891) 80 Tex. 117, 15 S. W. 893 (switch stand); *Crandall v. New York, N. H. & H. R. Co.* (1896) 19 R. L. 594, 35 Atl. 307 (telegraph pole close to side track); *Pikesville, R. & E. G. R. Co. v. State* (1898) 88 Md. 563, 42 Atl. 214 (pole exceptionally near track of street railway).

(f) *Dangerous objects above railway track.*—(Compare §§ 71, 86, c, *ante*).

Louisville, N. & C. R. Co. v. Wright (1888) 115 Ind. 478, 394, 17 N. E. 584 (overhead bridge).

(g) *Defective coupling and pilot bar.*—*Cooper* §§ 72, 87, *note*. *H. & T. C. R. Co. v. Quill* (1900) Tex. Civ. App. 55 S. W. 1126 (defect in Adamed bar) (1900) 93 Tex. 616, 37 S. W. 948, but this point was not adverted to.

(h) *Defective roll on stock on rail cars.*—(Compare §§ 73, 74, 88, *ante*). *Faulner v. New York, L. E. & W. R. Co.* (1894) 75 Hun. 350, 27 N. Y. Supp. 62 (heavy faucet made floor of engine slippery); *Hollingsworth v. Long Island R. Co.* (1895) 91 Hun. 641, 36 N. Y. Supp. 1126 (defective brakes); *Goodrich v. New York C. & H. R. R. Co.* (1889) 116 N. Y. 398, 5 L. R. A. 750, 22 N. E. 397 (drawheads and not nuts).

A brakeman does not, as a matter of law, assume the risk of coupling a freight car equipped with link and pin couplers to a coach equipped with a Miller hook, which permits the coupling bars to slip by each other, leaving a space of only about a foot between the ends of the cars, where there is on the freight car a bolt projecting several inches from the end of the car and beyond the nut, and he is not familiar with the construction of such a car with reference to the bolt. *Thompson v. Missouri P. R. Co.* (1897) 51 Neb. 527, 71 N. W. 61.

(i) *Unusual combinations of certain types of rolling stock.*—A yard employee is not bound at his peril to know of a danger which is so unusual as that of coupling a pilot bar to a box car. *Kearney v. Chicago, M. & St. P. R. Co.* (1895) 91 Iowa, 121, 62 N. W. 692.

(j) *Defective high ways.*—The driver of a fire engine or hose cart going to a fire does not assume the risks from obstructions in the streets negligently allowed there by the city. *Faulner v. New York* (1897) 152 N. Y. 222, 46 N. E. 506, Reversing (1896) 9 App. Div. 536, 41 N. Y. Supp. 622.

(k) *Defective hoisting apparatus.*—*Thomas v. Ann Arbor R. Co.* (1897) 114 Mich. 59, 72 N. W. 40; *Madison R. Co. v. Harrison* (1900) 12 C. C. A. 234, 162 Fed. 264 (loop of track; steel used for hitting bridge girders).

One employed to wash bottles in the

or materials.² As regards both these classes of cases, it is evident that, if the injury is not traceable to an act or omission of the master himself, there is always a preliminary question to be settled, *vi*:

basement of a building, no part of whose duty it is to carry anything up or down stairs, does not, as a matter of law, assume the risk incident to the running of an elevator, although he understands how to use it, and has run it on a number of occasions. *Dallemand v. Saalpeit* (1898) 175 Ill. 310, 48 L. R. A. 753, 51 N. E. 645. Affirming (1897) 73 Ill. App. 151.

(b) *Want of proper protection against falling bodies*.—An employee in the shaft of a mine engaged in removing dirt does not assume the risk of working therein after the removal of a bulkhead from under a column of dirt 75 feet long, and the loosening of the dirt by running water through it, where he does not know of the removal of the bulkhead. *Mollie Gibson Consol. Min. & Mill. Co. v. Sharp* (1894) 5 Colo. App. 321, 38 Pac. 859.

(m) *Defective structures*.—*William Geiser Tank Works v. O'Donnell* (1900) 91 Ill. App. 524 (scaffold). A factory hand hired to do knitting, who is injured by the fall of a privy attached in an insecure and dangerous manner to the wall of the factory, may recover damages from his employer. Such an injury is not the result of any accident incident to the employment. *Ryan v. Fowler* (1862) 24 N. Y. 410, 82 Am. Dec. 315.

(n) *Dangerous openings in floors, etc.*—*Hogarth v. Pocasset Mfg. Co.* (1897) 167 Mass. 225, 45 N. E. 629; *Maguire v. Little* (1898) R. L. 5 New Eng. Rep. 666, 13 Atl. 108; *Cassius v. Collins* (1876) 61 Mo. 520; *Hoffman v. Clough* (1889) 124 Pa. 505, 17 Atl. 19; *Johnson v. Brauer* (1869) 61 Pa. 58, 100 Am. Dec. 613; *Pallman Palace Car Co. v. Conell* (1897) 74 Ill. App. 17; *Mayhew v. Sullivan Min. Co.* (1884) 76 Mo. 100 (pitfall made by cutting a ladder hole in a platform, and leaving it without light or railing); *Janison v. Russell* (1892) 19 Se. Sess. Cas. 4th Series, 898 (open tank not covered or protected by a light as it usually had been).

(o) *Dangerous conditions in mines*.—*Harder & H. Coal Min. Co. v. Schmidt* (1900) 43 C. C. A. 532, 104 Fed. 282 (roof fell).

(p) *Defective machinery*.—*Packer v. Thomson-Houston Electric Co.* (1900)

175 Mass. 496, 56 N. E. 704 (undercut machine would start from a dead stop); *Kann v. Hoyer* (1898) 88 Md. 541, 41 Atl. 1065 (machinist, while repairing an elevator, was injured by a defectively constructed piston rod of an adjoining elevator); *Steger v. Troy Laundry Co.* (1901) 38 Or. 480, 53 L. R. A. 459, 63 Pac. 645 (improper adjustment of guard rail on mangle); *McGregor v. Reid, M. & Co.* (1899) 178 Ill. 464, 53 N. E. 323. Reversing (1898) 76 Ill. App. 610 (elevator safety device); *Higgins v. Williams* (1896) 114 Cal. 176, 45 Pac. 1041 (machine for hoisting earth from a trench).

(q) *Unfit servants*.—(Compare chapter XIII.). *Hall v. Bedford Quarries Co.* (1901) 156 Ind. 460, 60 N. E. 149 (complaint good against a demurrer which alleges an injury caused by incompetency of a fellow servant); *Gabreston, H. & S. A. R. Co. v. Arispe* (1891) 81 Tex. 517, 17 S. W. 47; *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92; *Postal Teleg. Cable Co. v. Coote* (1900; Tex. Civ. App.) 57 S. W. 912.

The master may be held liable where the ordinary dangers of operating machinery are enhanced, through the negligence of a superintendent who is known to be intemperate, in allowing an intoxicated workman to do an act which must obviously cause unnecessary danger to another workman. *McPherson v. Scully* (1895) 163 Mass. 216, 39 N. E. 1007. In one case the court rejected the contention that an employee assumes the risk arising out of the negligence of an incompetent coemployee though he is ignorant of the latter's incompetency, if it is apparent that, under the circumstances, it is necessary to employ an inexperienced and incompetent employee for the work. *Chicago, St. L. & P. R. Co. v. Champion* (1894) 9 Ind. App. 510, 36 N. E. 221. Rehearing Denied in 9 Ind. App. 526, 37 N. E. 21.

(r) *Vicious animals*.—*Cooper v. Partner Brewing Co.* (1901) 112 Ga. 894, 38 S. E. 91.

(s) *Breach of statutory requirements*.—*Landgraf v. Kah* (1901) 188 Ill. 484, 59 N. E. 591. Reversing (1899) 90 Ill. App. 131.

(t) *Movements of railway cars*.—*Luebke v. Chicago, M. & St. P. R. Co.*

whether the employee for whose negligence it is sought to make him responsible was his representative, either under common-law doctrines or a statute in force in the jurisdiction where the accident occurred. See chapters xxvii-xxxii, *post*.

It is scarcely necessary to point out that, although the descriptive

(1883) 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870 (car repairer held not to have assumed the risk of the want of proper precautions for protecting him from moving cars); *Felice v. New York C. & H. R. R. Co.* (1897) 14 App. Div. 315, 43 N. Y. Supp. 922 (action held to be maintainable for injuries received by a workman in a tunnel who was run over by an engine which came along the track unexpectedly and without warning).

Assumption of the risk is not an available defense where an employee of a city, employed on a railroad track which was in a rough condition, is complaining of an injury caused by running a train at an unreasonable speed over a switch, and then bringing it to a sudden stop (*Coughlin v. Cambridge* [1896] 166 Mass. 268, 44 N. E. 218); nor where a railroad employee assisting in loading coal into a tender was injured by the negligence of the engineer in failing to take the necessary precautions to prevent an involuntary movement of the engine, the result being that he was caught between the top of the cab and the coal chute (*Missouri, K. & T. R. Co. v. Felts* [1899] Tex. Civ. App.] 50 S. W. 1031); nor where a switchman coupling cars was injured by their being jammed together while he was between them by shoving other cars against them (*Missouri, K. & T. R. Co. v. Crane* [1896] 13 Tex. Civ. App. 426, 35 S. W. 797); nor where a foreman commanded a servant engaged in the work of getting derailed cars on the track, to hold a stick against one of them in order that it might be pushed by a train backing against it, and not only omitted to have the stick placed in the proper manner, but had the train backed with unnecessary force (*Missouri, K. & T. R. Co. v. Hamilton* [1895] Tex. Civ. App.] 30 S. W. 679).

Even if a railway brakeman can be held to have assumed the risk of injury from a dangerously defective condition of the track, on account of his knowledge of the defect, he cannot be said, as matter of law, to have assumed the additional risk caused by running over such defective track at an unusual and

dangerous rate of speed. *Lawhorn v. Millen & S. R. Co.* (1895) 97 Ga. 742, 25 S. E. 492.

The knowledge of a brakeman that a fireman was handling an engine will not necessarily prevent him from recovering for injuries caused by the negligent management of the engine, where the brakeman understood that the fireman was acting under the supervision of the regular engineer. In such a case the essential question is whether the engineer was exercising due care. *Leonard v. Minneapolis, St. P. & S. M. R. Co.* (1896) 63 Minn. 489, 65 N. W. 1084.

A requested instruction that a brakeman on a railroad train assumes the risk of dangers incident to the speed at which a train may run is properly modified by the introduction of the proviso, only if the defendant was not negligent in running at that rate of speed. *Conners v. Burlington, C. R. & N. R. Co.* (1888) 74 Iowa, 383, 37 N. W. 966.

(b) *Manner of placing loads on railway cars.*—*McCrean C. R. Co. v. Shann* (1891; Tex.) 18 S. W. 151 (projecting load on railway car); *Hamilton v. Des Moines Valley R. Co.* (1872) 36 Iowa, 31 (usage of defendant and other companies no excuse for loading cars so that load projects); *Croll v. Atchison, T. & S. F. R. Co.* (1896) 57 Kan. 548, 46 Pac. 972 (trackman struck by piece of coal which fell from an overloaded tender of a passing train); *Gulf, C. & S. F. R. Co. v. Wood* (1901; Tex. Civ. App.) 63 S. W. 164 (similar facts); *Derore v. St. Louis & S. F. R. Co.* (1900) 86 Mo. App. 429 (push car improperly loaded by section foreman). Whether the receivers of a railroad company were guilty of negligence in permitting coal cars to be so loaded with telephone poles that insufficient space was left between the ends of the poles and a box car to which the cars were attached, and in placing such cars in a train in such manner as would probably render it necessary to detach them from the train and couple them with other cars while in transit, is for the jury. *George v. Clark* (1898) 29 C. C. A. 374, 56 U. S. App. 505, 85 Fed. 608.

(c) *Dangerous mode of operating ma-*

epithet "extraordinary" is applicable, as a mere matter of verbal definition, to any risk which is uncommon or unusual, whether its existence does or does not charge the master with negligence, the fact of rarity may, in the present connection, be left out of account as a differentiating test, except in so far as it tends to show that the master was culpable. Apart from its significance in this regard, evidence of rarity is plainly of no avail to a servant whose right of action is dependent upon his proving that his injury was caused by a breach of duty. See chapter XVIII., *post*.

273. Rationale of the servant's nonassumption of extraordinary risks.—In view of the fact that the doctrine as to the servant's nonassumption of extraordinary risks was originally introduced into the common law as an exception to a principle which had been propounded as a universal one, it may be said that, as a matter of ultimate an-

chinery.—*Helfenstein v. Medart* (1896) 136 Mo. 595, 30 S. W. 863, 37 S. W. 829, 38 S. W. 294 (grindstone run at dangerous speed) *Nall v. Louisville, N. E. & C. R. Co.* (1891) 129 Ind. 268, 28 N. E. 611 (servant called to help in removing an accumulation of driftwood which was endangering a bridge was struck by a rope which was jerked suddenly by the engine to which it was attached).

(d) *Changed position of instrumentalities.*—*Fairbank v. Haentzsch* (1874) 73 Ill. 236.

(e) *Dangers caused by the fall of heavy objects.*—*Libby, McN. & L. v. Scherman* (1893) 146 Ill. 553, 34 N. E. 801 (empty barrel was left at the bottom of a pile of full barrels, thus weakening the pile and causing it to fall); *John Spry Lumber Co. v. Duggan* (1898) 80 Ill. App. 394 (lumber fell on servant while passing it).

Where it is not customary for rocks to be rolled from a tunnel down a gulch in which another tunnel is building by the same company, the danger from a rock negligently rolled down such gulch is not assumed by an employee working therein. *Uren v. Golden Tunnel Min. Co.* (1901) 24 Wash. 261, 64 Pac. 174.

The falling of a post standing perpendicularly on a plate or beam at the level of the third story of a building, by which the plaintiff's intestate was killed while grading a railroad belonging to the owner of the building, is not one of the risks incident to service and assumed by him. *Micko v. Walter A. Wood Moving & R. Mach. Co.* (1893) 70 Hun, 456, 24 N. Y. Supp. 501.

(f) *Conditions due to deposits of ice and snow.*—*McDermott v. Iowa Falls & N. C. R. Co.* (1891); — *Iowa*, — 47 N. W. 1037 (end gate of car lay on an incline owing to an accumulation of ice and snow); *Harding v. Railway Transfer Co.* (1900) 90 Minn. 504, 83 N. W. 395 (ice accumulates on steps).

(g) *Use of explosives.*—An employee in a quarry does not assume the risk of finding unexploded dynamite in the rocks he is required to break. *Alton Lime & Cement Co. v. Calvey* (1892) 47 Ill. App. 343.

(h) *Bringing heated metals into contact with water.*—*Kirus v. Nichols Chemical Co.* (1901) 59 App. Div. 79, 69 N. Y. Supp. 44 (explosion of hot slag thrown into a crack which had opened, without servant's knowledge, in marshy ground).

(i) *Improper method of handling heavy objects.*—*Knight v. Overton Wheel Co.* (1899) 174 Mass. 455, 54 N. E. 890 (dangerous method of putting a heavy shaft in position).

A servant does not assume the risk caused by the failure of a foreman to adopt reasonable precautions to protect from injury a servant whom he requires to assist in loading ties on a railway car in an unusual and extra-hazardous manner. *Clayburgh v. Kansas City, Ft. S. & M. R. Co.* (1894) 56 Mo. App. 630.

(j) *Improper method of excavating banks of earth, etc.*—An employee assumes the additional risk incident to the removal of an embankment by undermining the base and prying or blasting off the top, over that involved in taking the bank down from the top. See

analysis, that doctrine simply embodies the opinion of the courts that it is more conformable to justice and expediency to treat the extent of the master's liability as a question to be determined with reference to the general principle, *Culpa tenet auctores suos*, and not with reference to the theory of an implied agreement to undertake every risk incident to the employment. If we bear in mind that the rationale of this implied agreement is the servant's supposed advertence to the possibility of being injured by certain perils which may at any time eventuate in an accident, the reasons assigned for this opinion can scarcely be regarded as satisfactory. Indeed, they set in a striking light the logical difficulties in which the courts found themselves entangled when they set out to establish a qualification of the intolerably severe doctrine which had been produced by taking the servant's assumption of risks, instead of the master's obligation to provide for his servant's safety, as the basic conception of this department of the law of negligence.

The root of these reasons is derived from the simple consideration that, as the master has control of the conditions which affect the servant's safety, he is the party who ought in fairness to be held responsible if those conditions are not such as a prudent man would maintain under the circumstances.¹ It is clear that, when closely scrutinized,

§ 269, *supra*), but not that incident to the failure of the master to exercise reasonable care to remove the overhanging earth as the excavation proceeds. *Bradley v. Chicago, M. & St. P. R. Co.* (1897) 138 Mo. 293, 39 S. W. 763. A person ordered to work in excavating earth from an embankment which is from the nature of the earth peculiarly liable to cave off, which fact he does not know although it is known to his superior, does not assume the risk of obeying the order, so as to prevent a recovery for his death by the falling of the earth. *Thompson v. Chicago, M. & St. P. R. Co.* (1883) 4 McCrary, 629, 14 Fed. 564.

(k) *Failure to warn.*—A railway company is liable for the death of an employee who, being in imminent danger, jumped from driftwood which he with others had been attempting to dislodge from against the false works and pier of a railway bridge, and was drowned while endeavoring to swim ashore, although he would have been rescued if he had remained where he was, where the danger of his position on the drift was not seen or known by him, but was known to the superintendent of the

work, who failed to warn him or provide any means of escape. *Louisville & N. R. Co. v. Shirell* (1892) 13 Ky. L. Rep. 902, 18 S. W. 944.

If an inexperienced workman who is engaged in undermining a bank of earth continues to work there after his employer's superintendent, whose duty it is to watch the bank and to warn him of the danger of its falling, has left the place with the intention of returning soon, and the workman is injured before his return by the falling of the bank upon him, it cannot be ruled, in an action against his employer for the injury, that he assumed the risk attendant upon the superintendent's absence, but the question is for the jury. *Lynch v. Allyn* (1893) 160 Mass. 248, 35 N. E. 550.

"The servant who is to use the instrumentalities provided by the master has ordinarily no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master." *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612.

"The servant has no general control.

this reason is nothing but a judicial declaration, of a quasi-legislative nature, that the servant's appreciation of the possibility of being injured by a certain occurrence, although it is conclusive against his right to recover if it relates to some kinds of risks, shall not entail

He is the actor. The master is the director. The one commands, the other obeys. The servant is in subordination. He relies on the judgment of the master that suitable machinery and the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may be safe, and he may be wanting in the intelligence required for the proper determination of the question. His service is compulsory, from the pressure of want. His attention is exclusively due to the peculiar duties incident to his branch of employment."

"The capital of the master furnishes the means of his employment. His will determines the place. His sagacity directs, controls, and supervises not merely the labor, but the machinery and other instruments and appliances by which the labor is performed. The superior intelligence and determining will of the master demand vigilance on his part, that his servants shall neither wantonly nor negligently be exposed to needless and unnecessary peril." *Buzzell v. Laconia Mfg. Co.* (1861) 48 Me. 113, 77 Am. Dec. 212.

"It is in most cases impossible that a workman can judge of the condition of a complex and dangerous machine wielding irresistible mechanical power, and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine; but the master may be able, and generally is able, to estimate both. The master, again, is a volunteer; the workman ordinarily has no choice. To hold that the master is responsible to his workmen for no absence of care, however flagrant, seems to me in the highest degree both unjust and inconvenient." *Byles, J., in Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 105.

See also *Little Rock & S. F. R. Co. v. Voss* (1892; Ark.) 18 S. W. 172.

In *Harrison v. Central R. Co.* (1865) 31 N. J. L. 293, the court thus disposed of the argument that the servant accepted the risk in question: "The first consideration which naturally arises on an examination of this proposition is

that the hazard which, it is insisted, the servant agreed to incur, is not, so far as the master is concerned, one necessarily inherent in the business. It appears but just and fair and every way reasonable that the servant should agree to take upon himself the usual perils of the employment and over which the party whom he serves has no control. He knows that there will be risk from the want of skill or from the inattention and neglect of those associated with him in the conduct of the common business; but these dangers are the necessary, inseparable concomitants of the employment; and there is, certainly, every appearance of justice in the legal implication that as to injuries arising from such causes, over which the employer possesses no power, and the effects of which he is not morally responsible, they shall be borne by the servant. But upon what plausible pretense can it be said that the servant consents to bide the consequences of his employer's neglect? The misfortunes of a fellow servant are, as between himself and his employer, the alienable incidents of the thing undertaken, which it would be hardly admissible for a master to predicate that an injury to the servant, arising from his own want of care, was one of the necessary consequences of the servant's employment. The only view consistent with reason is that the servant undertakes to bear the risks naturally attendant on the business he assumes; and both sound morals and common justice forbid the master to allege that one of those risks is the probability of his own default, carelessness which works an injury to another is, in the eye of the law, civil misconduct; and a stipulation that a party shall have the privilege of committing such misconduct with impunity will not be incorporated into a contract by consent. Every rational implication is opposed to the existence of such an understanding. The claim to such exemption is inconsistent with morality and public policy, so much so, indeed, that it might be somewhat questionable whether, if such contract existed in point of fact and by express stipulation, it would not be, on that account,

than consequence where the risk is due to the master's negligence. In other words, the element of anticipation, when such a risk is in question, is not to be regarded as one of the determinant factors of the problem to be solved.²

13. The facts of the present case exhibit, in a striking point of view, the exorbitance of the proposition claiming immunity for the consequences to the servant of the master's negligence. The defendant in this case admits that the servant lost his life by reason of want of care in the master; that is, that the latter was guilty of the commission of a grave misdemeanor. It would be singular indeed if the law, in annexing incidents to the relationship of master and servant, should clothe the former with the privilege to commit this criminal act so far as the private rights of the servant are concerned, with impunity. If the rights of the parties, then, are to be regulated on the basis of a contract, any opinion, upon the plainest rules of law, the defendants were responsible to their employee for all damage which was the product of their own misconduct. Nor will this result, as it seems to me, be varied if we consider this matter on the broader ground of general convenience and public security. That the master should be careful in the conduct of a business to which peril to life attaches is important, not only to the servant, but, in an equal degree, to the community also. It is of public interest, therefore, that no motive to the exercise of care on the part of the principal mover of such business should be taken away or impaired; and this would be the effect of declaring him irresponsible for his negligence to his employee. It is also of moment that those who are employed in carrying out the details of an undertaking which is at all hazardous should have an interest in observing and detecting the lapses of those at the head of such business; for it is, in most cases, impracticable for such subordinates to protect themselves against the consequences of such misconduct without, at the same time, contributing something to the safety of the citizens at large. The interest of the servant to bring to light the neglects and omissions of duty of the employer should be coincident with that of the community. All considerations of welfare to the public, therefore, seem to lead to the same result as that reached by an examination of the contract which the law

implies from the connection of master and servant."

² It has actually been argued, though of course unsuccessfully, in several cases, that the servant's knowledge of the possibility or the likelihood that the master or some employee for whose acts he is responsible may at some future indeterminate time be guilty of negligence is a sufficient basis for the inference that he implicitly accepts the risk of an injury from such negligence whenever it shall actually be committed. But this theory has been rejected. *Little Rock, M. R. & T. R. Co. v. Lerrett* (1886) 48 Ark. 333, 346, 3 S. W. 50; *Blanton v. Dold* (1891) 109 Mo. 64, 18 S. W. 1149, where the court somewhat unnecessarily supported its conclusion by adverting to the very general refusal of the American courts to enforce even express contracts exempting a master from liability for negligence in the performance of his personal duties. In *Luchke v. Chicago, M. & St. P. R. Co.* (1883) 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870, where a car inspector was injured by cars carelessly driven on to the repair track, counsel for defendant took the ground that the plaintiff accepted the chances and hazards of a most dangerous service. But the court said: "Is this so? When a car is standing still and disconnected from any power which could move it, and in a place where there was not the remotest reasonable suspicion or apprehension that it would be moved or at all disturbed, where is the danger? There would be nearly the same danger in degree, and the same in principle, if a person should go under a two-horse wagon in a farmer's yard, to repair it, without any apprehension that the farmer would hitch to it while he was so under it and draw it over him. If the rule is to be established that any railway service is dangerous because a few employees are careless and negligent, whose duty it is to guard him from injury, then there is no railway service which is not dangerous, and the employee takes his chances, not that the particular service or duty is dangerous in itself, but that it will be made so by the habitual negligence of everybody who might be able, by his negligence, to in-

This way of stating the logical situation to which this reason conduces us indicates that it is, for dialectical purposes, practically equivalent to another reason, which consists merely in a categorical denial of the fact that the servant contemplates, among the risks of his employment, the possibility that he may be injured through his master's

negligence. Under the effect of such a rule, even travelers and passengers take the chances of a most hazardous and dangerous method of travel, and cannot complain if they are injured by such negligence as is the normal characteristic of railway service. There are some presumptions upon which anyone connected with the railway service, either as employee or passenger, has a right to rely. They are (1) that the company has provided all necessary and proper means and appliances for his protection; and (2) that the employees themselves will do their duty in such responsible service. In this view, the business of repairing this car by the plaintiff, by going under it, which was necessary, was not dangerous service. The car would not move over him, unless moved by some other force applied by the gross negligence of someone else. The car standing still and disconnected was not dangerous any more than any other inert body, and it was perfectly safe to lie down under its wheels if necessary, as it could do no harm. The danger of this service consisted in the outrageous carelessness of somebody else in the management of the trains on that track, which he was not only not bound to presume, but he had no right to presume or expect."

In Minnesota (a state in which, it should be remembered, the doctrine of co-service has been abolished, so far as railway servants are concerned: see chapter XXXIX., *post*) we find the court thus discussing the contention that plaintiff voluntarily assumed all the risks resulting from the negligence of other employees of the company in violating its rules: "The line of argument advanced in support of this position is, in substance, that, inasmuch as plaintiff was advised by certain rules that other employees might violate other rules, and obstruct the main track at a forbidden time, and that rules were adopted in view of such a contingency, so that, as far as possible, a collision could not happen without a concurrent violation of rules by two sets of employees, therefore plaintiff assumed all

the risks resulting from such causes. It is a plain proposition that it does not require any rules to advise a person, or other employees of the master, that the master himself, may be guilty of negligence. Common experience tells every man that this is so. Consequently the defendant's proposition, reduced to legal terms, is that, inasmuch as every person who enters the service of a master knows that his master or his fellow servants, however careful ordinarily, are able to commit negligent acts, and as he voluntarily enters the service with knowledge of that fact, therefore he assumes all the risks liable to result from such causes. To state such a proposition is to refute it. While it is the law that a person assumes all the open and visible risks incident to the employment in which he engages, and of which he had knowledge when he entered upon the service, yet it would be pressing the principle beyond all reason or authority to attempt to carry it to the extent contended for by the defendant. To do so would be, in effect, to hold that the servant assumes all risks, known or unknown, which could possibly result from any conceivable future act of negligence on the part of the master." *Hall v. Chicago, R. & N. R. Co.* (1891) 46 Minn. 439, 49 N. W. 239.

Yet, if the element of contemplation alone be taken into account, it seems impossible to deny that the theory, which has been rejected in these cases is one from which there is no escape. The presumption that a master will do his duty, and the presumption that a fellow servant will do his duty, are, so far as appears, based upon probabilities of precisely the same character, and are equally strong. The courts, indeed, have virtually recognized the necessity of adding some extraneous consideration which shall serve as a basis for differentiating the effect of these two presumptions, and have relied back upon the supposed requirements of public policy as a justification for denying the right of action where the cause of the injury is a fellow servant's negligence. See volume II., chapter XXVI.

negligence.³ The conception that the servant is not supposed to look forward to or take into account the contingency that he may be injured by a breach of duty on the master's part has produced a form of expression which is very frequently found in the reports,—viz., that a servant has a right or is entitled to assume, or to act upon the as-

"If the master has, by his own personal negligence or malfeasance, enhanced the risk to which the servant is exposed, beyond those natural risks of the employment which must be presumed to have been in contemplation when the employment was accepted,—as, for instance, by knowingly employing incompetent servants, or supplying defective machinery, or the like,—no defense founded on this principle can apply; for the servant does not, as an implied part of his contract, take upon himself any other risks than those naturally incident to the employment." Blackburn, J., in *Morgan v. Vale of Meath R. Co.*

(1864) 5 Best & S. 570, 33 L. J. Q. B. N. S. 260. Affirmed in L. R. 1 Q. B. 149, 23 L. T. N. S. 564, 14 Week. Rep. 144, 5 Best & S. 736, 35 L. J. Q. B. N. S. 23. Risks which are not assumed are those which are "not contemplated by the servant." *Northern P. R. Co. v. Hambley* (1894) 154 U. S. 349, 38 L. ed. 1009, 11 Sup. Ct. Rep. 983; *Barke v. Anderson* (1895) 16 C. C. A. 442, 34 U. S. App. 132, 69 Fed. 814. In a leading Massachusetts case, the court, after laying down the rule as to the servant's assumption of ordinary risks, proceeded thus: "But it is otherwise where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of a work. The use of these they could not foresee. The legal implication is that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and oversight; and, if he fails to do so he is guilty of a breach of duty under his contract, for the consequences of which he ought, in justice and sound reason, to be responsible. Such we understand to be the rule of law and the principles on which it is founded, as now fully established by authority." *Snow v. Honsatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720. This statement of principles was adopted as correct in *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497.

"When a person is employed to do a

dangerous job of work or a service of any kind, he assumes all the perils which belong to the work itself; and he must be held to take all the risks which grow out of, or in any way connected with, or pertain to, the performance of the duties he has assumed to discharge. Against such risks and accidents he may, and he must, take proper precautions for himself, at his peril, and is his own insurer. But this rule does not, and should not, apply to accidents or injuries resulting from extrinsic causes and circumstances which cannot be foreseen by him, and which by the exercise of ordinary care and caution he could not anticipate or prevent." *Ryan v. Foster* (1862) 24 N. Y. 410, 82 Am. Dec. 315.

"Generally and ordinarily the master and servant, in the contract of employment between them, do not contemplate extra hazards, . . . and hence the law does not imply, in the absence of express stipulation to that effect, that the contract embraced such hazards." *Porter v. Western North Carolina R. Co.* (1887) 97 N. C. 66, 2 S. E. 581.

Only those risks are assumed which a reasonably prudent and careful man would not expect to encounter in the usual course of his employment. *Kerns v. Chicago, M. & St. P. R. Co.* (1895) 94 Iowa, 121, 62 N. W. 692 (instruction using these words approved).

"No reason of public policy, and none to be deduced from the contract of the parties, can be suggested which should relieve the culpable master from responsibility. A man cannot be understood as contracting to take upon himself risks which he neither knows nor suspects nor has reason to look for; and it would be more reasonable to imply a contract upon the part of the master not to invite the servant into unknown dangers, than one on the part of the servant to run the risk of them. But the question of contract may be put entirely aside from the case, and the responsibility of the master may be planted upon the same ground which would render him responsible if the relation had not existed. Whether invited upon the premises by the contract of service, or

assumption, that the master has exercised and will exercise proper care. Sometimes this right is predicated subject to an exception in cases in which the servant had actual or constructive knowledge of the normal danger in question. Sometimes its existence is asserted without any such qualification. But the doctrine enunciated is evidently intended to be the same, whether the excepted situation is explicitly mentioned or not.⁴

by the calls of business, or by direct request, is immaterial; the party extending the invitation owes the duty to the party accepting it to see that at least ordinary care and prudence are exercised to protect him against dangers not within his knowledge and not open to observation." *Diamond State Iron Co. v. Giles* (1887) 7 Houst. (Del.) 556, 11 Atl. 189.

In *Little Miami R. Co. v. Stevens* (1851) 20 Ohio, 442, it was argued that, when a party contracts to perform services, he takes into account the dangers and perils incident to the employment, and receives wages accordingly. Upon this proposition the court commented as follows: "Take this for granted, and we think it falls far short of sustaining the main proposition. If the party does contract in reference to the perils incident to the business, he will only be presumed to contract in reference to such as necessarily attend it when conducted with ordinary care and prudence. So far as an implied contract in reference to the business will be presumed, it will be on the hypothesis that the business is to be properly managed. He cannot be presumed to have contracted in reference to injuries inflicted on him by negligence,—by wrongful acts. An express stipulation would at least be necessary to make it a part of the contract. The employer has paid him no money for the right to break his legs, or, as in this case, to empty on him the contents of a boiler of scalding water. It was not the expectation, when the company hired Stevens, that the two trains should run by different cards and thus come in collision. When a man employs another to do work for him, each incur their obligations. The person hired is bound to perform the labor according to the agreement, and the employer is bound to pay; besides that, neither party has parted with any of his rights. The employer has no more control over the person he has employed outside of the service to be rendered, than he has over the per-

son of any other individual, and is equally accountable for an injury to him.

In a Missouri case, "extraneous perils not incident to the employment" are defined as "perils which the servant could not reasonably anticipate." *Steffen v. Mayer* (1888) 96 Mo. 420, 9 S. W. 630.

In ordinary cases, where a workman is employed to do a dangerous job, the danger belongs to the work itself, or to the service in which he engages, he must be held to all the risks which belong either; but when there is no danger in the work or service in itself, and the peril grows out of extrinsic causes or circumstances which cannot be discovered by the use of ordinary prudence and prudence, the employer is liable precisely as a third person, if the loss or injury is caused by his neglect or want of care. *Perry v. Marsh* (1851) 25 Ala. 62.

The rule that, prima facie, a servant does not assume any risks outside the scope of his employment, is referred to the conception that he has no reason to believe that he would be required to encounter them. *Northwestern Pacific Coal Co. v. Richmond* (1891) 7 C. C. A. 485, 15 U. S. App. 262, 58 Fed. 756. See § 461, post.

The following are a few out of the numerous cases in which the doctrine is formulated: *Texas & P. R. Co. v. Abbott* (1898) 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777; *Wass v. Bethlehem Iron Co.* (1898) 31 C. C. A. 263, 59 U. S. App. 627, 88 Fed. 23; *Jamieson v. Russell* (1892) 19 So. Sess. Cas. 4th Series, 898; *Whitney & Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242; *Alton Paving, Bldg. & L. Brick Co. v. Hudson* (1898) 170 Ill. 270, 52 N. E. 256; *Ford v. Fidelity R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598; *Knight v. Greenman Wheel Co.* (1899) 174 Mass. 455, 54 N. E. 890; *Union Stock-Yards Co. v. G. C. Co.* (1898) 57 Neb. 138, 77 N. W. 357; *O'Neill v. Chicago, R. I. & P. R. Co.*

The use of this particular terminology in such a connection is, to say the least, somewhat unfortunate, as it brings into juxtaposition distinct meanings of the words "assume" and "assumption." In relating the doctrine under this form, therefore, it appears to be decidedly preferable to employ the words "presume" and "presumption."

A third reason for the doctrine, which perhaps scarcely deserves notice in the present connection, is that which is given in a recent case, in which it was declared that a risk which results from the master's negligence is not assumed because it is not a natural and ordinary incident of the servant's work.⁵ What is thus assigned as a reason is really, in a logical point of view, nothing more than a statement of the doctrine itself in another form. This assertion of the court can

(1901) 62 Neb. 358, 86 N. W. 1098; *Rumel v. Diltworth* (1889) 131 Pa. 509, 19 Atl. 345; *Maguire v. Little* (1887; R. L.) 13 Atl. 108; *Neues v. Smith* (1856) 28 Vt. 59; *Curtis v. Chicago & N. W. R. Co.* (1897) 95 Wis. 490, 70 N. W. 665; *O'Brien v. Sullivan* (1900) 195 Pa. 474, 46 Atl. 130.

"The duty is on the employer to furnish his employees reasonably safe appliances with which to do the work assigned to them. It is also his duty to know what appliances are suitable and in common and ordinary use for the purpose. The employee has a right to assume that his employer will intelligently and faithfully discharge these duties. If the work in which he engages is new to him he should be instructed in it, and if he is not acquainted with the latent dangers incident to it they should be explained to him, that he may, so far as consistent with a proper performance of it, avoid them. In such case he is not presumed to know whether his employer has furnished appliances which are reasonably safe and in ordinary use, and he is not chargeable with an assumption of the risks involved in the failure to provide them." *Bannon v. Lutz* (1893) 158 Pa. 166, 27 Atl. 890.

"The servant has no control over the matter. He acts in subordination. He relies wholly on the judgment of the masters that suitable machinery and the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may be safe. His attention is exclusively due to the peculiar duties incident to his branch of the employment. He assumes the risk, more or less hazardous,

of the service in which he is engaged; but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and which might be prevented by ordinary care and precaution on the part of his employer." *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497.

"If, however, the master has superior means of knowing whether any act will be attended with danger, or whether it is about to come upon the servant, then the latter has a right to rely upon the former's guarding against it, or warning him of it in time to escape it." *Louisville & N. R. Co. v. Shirell* (1892) 13 Ky. L. Rep. 902, 18 S. W. 944.

In a Massachusetts case, Holmes, J., speaks of unusual dangers to which an employee who has not taken the risk of them with actual knowledge of their existence has a right to assume that he will not be exposed by entering an employment. *Ryan v. New York, V. H. & H. R. Co.* (1897) 169 Mass. 267, 47 N. E. 877.

A jury is properly charged that, in the absence of notice of the defect in question, an employee has a right to assume, in the absence of evidence that dangerous machinery or appliances which he has in charge are defective, that the master has used due diligence to keep it in good order and in a safe condition. *Delude v. St. Paul City R. Co.* (1893) 55 Minn. 63, 56 N. W. 461.

⁵ *Landyaf v. Kuh* (1901) 188 Ill. 484, 59 N. E. 501.

only be regarded as correct upon the hypothesis that the words "usual and ordinary incident" are to be understood in the technical or arbitrary sense which has been attached to them as a result of the creation of the doctrine. In no other sense can it be affirmed that these words are not as appropriate a description of risks caused by a master's negligence as they are of risks caused by a fellow servant's negligence, or any other of the risks commonly classed as ordinary.

274. Assumption of an extraordinary risk inferred from knowledge thereof.—The doctrine that a servant who has no knowledge, net, or constructive, of an extraordinary risk, is not chargeable with its assumption (see § 271, *supra*), is applied in every jurisdiction in which the principles of the common law are recognized. The logical converse of this doctrine, *viz.*, that a servant is to be regarded as having assumed any extraordinary risk of which he had or ought to have obtained knowledge, before his injury was received, was also applied universally until comparatively recent times (see § 280, *infra*), and is still the prevailing rule of law in the United States.¹

¹ The following list cites one or more specimen cases decided in every jurisdiction where the doctrine has been actually recognized. It should be observed that, in some of the American courts, it has been entirely or partially rejected in favor of an alternative doctrine which will be treated at length in chapter XVIII., *post*, *viz.*, that evidence which shows that the servant went on working with knowledge of an abnormal risk which supervened after the performance of the contract commenced merely raises for the jury the question whether he was guilty of negligence in continuing to expose himself to the dangerous conditions, and that this question is primarily for the jury. But even in the states where this position has been taken, the ordinary doctrine on the subject can scarcely be said to have been at any time wholly extinct, and some of the most recent decisions of the supreme court of Missouri, which has been the most prominent champion of the alternative doctrine, seem to indicate that the latter is in its turn being again superseded. (See this note, *infra*.)

It should also be observed that a large number of decisions, many of them rendered by courts which have adopted the doctrine of a contractual assumption of extraordinary risks, embody a theory which, so far as the servant's right of action is concerned, produces virtually the same consequences

as that doctrine, *viz.*, the theory, that a servant who goes on working with full comprehension of an abnormal peril may be declared, as matter of law, to be guilty of negligence. As the courts, when reviewing the evidence in the cases in which this theory has been applied, have often spoken of the servant as having "assumed" the risk in question, much confusion has resulted. See chapter XVIII., *post*, where the writer has made some criticisms on what he regards as a mischievous perversion of terminology.

United Kingdom and British Colonies.—*Priestly v. Fowler* (1837) 3 M. & W. 1, Murph. & H. 305, 1 Jur. 687; *Duncan v. Leach* (1857) 26 L. J. Exch. N. S. 221; *Ogden v. Rimmens* (1863) 3 Fost. & F. 751; *Sutton v. H. Worth* (1872) 26 L. T. N. S. 851; *Sutton v. Eastern Counties R. Co.* (1851) 1 Exch. 223, 3 C. L. Rep. 187, 21 L. J. Exch. N. S. 23; *Arrop v. Yates* (1858) 2 Hurlst. & N. 768, 27 L. J. Exch. N. S. 158; *Smith v. Dowell* (1862) 3 L. J. Exch. 238; *Potts v. Plunkett* (1859) 9 L. C. L. Rep. 290; *Metcie v. T. Iron Co.* (1883) 16 Se. Sess. Cas. P. series, 955; *McTernan v. White* (1890) 17 Se. Sess. Cas. 4th series, 308; *Stanton v. Keir* (1863) 1 Se. Sess. Cas. series, 107; *Lifton v. Thornton* (1881) 7 Viet. L. Rep. (L.) 4.

Federal courts. *Kahn v. M.A.* (1893) 147 U. S. 238, 37 L. ed. 159, 13

The effect of the operation of this doctrine with reference to a servant's inability to maintain an action may be formally stated thus:

A servant who, either before or after he commences the performance of the contract of employment, has ascertained, or ought, in the exercise of proper care, to have ascertained, that the ordinary hazards

Sup. Ct. Rep. 208; *Valley R. Co. v. Acosta* (1898) 31 C. C. A. 255, 58 U. S. App. 377, 87 Fed. 849; *Reed v. Stork* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186; *McPock v. Central Vermont R. Co.* (1897) 25 C. C. A. 110, 50 U. S. App. 27, 70 Fed. 590.

Alabama.—*Bridges v. Tennessee Coal, I. & R. Co.* (1895) 109 Ala. 287, 19 So. 495; *Georgia P. R. Co. v. Davis* (1900) 92 Ala. 300, 9 So. 252; *Birmingham R. & Electric Co. v. Allen* (1892) 99 Ala. 379, 20 L. R. A. 457, 13 So. 8. There is much inaccuracy in the use of the terms "assumption of risks" and "contributory negligence" in this state. See chapter XVIII, *post*.

Arkansas.—*Fordyce v. Looman* (1896) 57 Ark. 160, 20 S. W. 1090; *St. Louis, I. M. & S. R. Co. v. Davis* (1891) 54 Ark. 389, 15 S. W. 895; *Emma Cotton Seed Oil Co. v. Hale* (1892) 56 Ark. 232, 19 S. W. 600; *Little Rock, H. R. & L. R. Co. v. Lovett* (1886) 48 Ark. 331, 3 S. W. 50.

California.—*Sorden v. Idaho Quartz Min. Co.* (1880) 55 Cal. 413; *Seaton v. Central P. R. Co.* (1880) 57 Cal. 15; *Sabhorn v. Madera Flume & Trading Co.* (1886) 70 Cal. 261, 11 Pac. 710.

Colorado.—*Burlington & C. R. Co. v. Lohr* (1892) 17 Colo. 280, 29 Pac. 175; *Sikes v. Richie* (1896) 8 Colo. App. 393, 46 Pac. 664.

Connecticut.—*Handen v. Smithville Mfg. Co.* (1861) 29 Conn. 548.

Delaware.—*Williams v. Walton & W. Co.* (1892) 9 Houst. (Del.) 322, 32 Atl. 726; *Diamond State Iron Co. v. Giles* (1887) 7 Houst. (Del.) 556, 11 Atl. 189; *Foster v. Pusey* (1888) 8 Houst. (Del.) 168, 14 Atl. 515.

Dist. of Columbia.—*McDade v. Washington & G. R. Co.* (1886) 5 Mackey, 144.

Florida.—*South Florida R. Co. v. Worre* (1893) 32 Fla. 212, 13 So. 436.

Georgia.—*Gunn v. Willingham* (1890) 111 Ga. 427, 36 S. E. 804. *Possett v. Richmond & D. R. Co. v. Mitchell* (1893) 92 Ga. 77, 18 S. E. 290, and *Weather v. Black* (1894) 95 Ga. 15, 21 S. E. 985, may also be cited as embodying the doctrine of assumption of risks properly so called; but the language

used is rather obscure, and these decisions may merely furnish an instance of the confusion of that doctrine with that which inters negligence from the servant's continued exposure of himself to an abnormal risk. See chapter XVIII, *post*.

Illinois.—In this state the courts have oscillated between the doctrine that the knowledge of the servant bars his action on the ground of assumption of the risk, and the doctrine on the ground of contributory negligence. The former doctrine is distinctly recognized in the statement that the servant "had been there long enough to become familiar with all the dangers to which he was exposed, and it must be presumed he contracted with reference to them, taking upon himself all responsibility." *Chicago & A. W. R. Co. v. Deaulac* (1874) 75 Ill. 106. Other cases in which the true doctrine of assumption of risks seems to be recognized are *Stamm v. Chicago & T. R. Co.* (1884) 110 Ill. 340; *Prosser, D. & T. R. Co. v. Pickett* (1893) 52 Ill. App. 223; *Illinois C. R. Co. v. Scher* (1893) 53 Ill. App. 411. But this is one of the states in which the phrase "assumption of risks" is inaccurately used to express the conception that the conduct of the servant was negligent, and possibly the two last cited cases may be merely illustrations of this confusion. Other cases in which this inaccuracy is certainly found are collected in chapter XVIII, *post*.

Indiana.—*Indianapolis & C. R. Co. v. Loe* (1858) 10 Ind. 556; *Indianapolis & St. L. R. Co. v. Watson* (1887) 111 Ind. 20, 15 N. E. 824; *Louisville, N. A. & C. R. Co. v. Sandford* (1888) 117 Ind. 267, 19 N. E. 770; *Rogers v. Logden* (1890) 127 Ind. 50, 26 N. E. 210; *Louisville, V. A. & C. R. Co. v. Corps* (1890) 124 Ind. 429, 8 L. R. A. 636, 24 N. E. 1046; *Jeannet Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 566, 18 N. E. 30; *Richman v. Stolle* (1889) 120 Ind. 314, 22 N. E. 304; *Sherts v. Chicago & I. Coal R. Co.* (1894) 139 Ind. 682, 30 N. E. 154.

Iowa.—*Lambert v. Caswell* (1877) 47 Iowa, 159; *Yocell v. Southern & P. R. Co.* (1885) 66 Iowa, 316, 23 N. W. 736;

of his environment'—seen augmented by abnormal conditions produced by the negligence of his master or of his master's representative, and has accepted or continued in the employment without making any objection and without receiving any promise that the abnormal conditions will be remedied, is deemed, as a matter of fact,

- Wells v. Rutington, C. R. & N. R. Co.* (1881) 50 Iowa, 520, 9 N. W. 301; *Greenleaf v. Illinois C. R. Co.* (1870) 20 Iowa, 14, 4 Am. Rep. 181; *Kroy v. Chicago, R. I. & P. R. Co.* (1871) 32 Iowa, 357; *Money v. Lower Vein Coal Co.* (1881) 55 Iowa, 671, 8 N. W. 652; *Perigo v. Chicago, R. I. & P. R. Co.* (1879) 52 Iowa, 276, 3 N. W. 43; *Ryce v. Chicago, M. & St. P. R. Co.* (1897) 103 Iowa, 665, 72 N. W. 780.
- Kansas.**—*St. Louis, Ft. S. & W. R. Co. v. Irwin* (1887) 37 Kan. 701, 16 Pac. 146; *Atchison, T. & S. F. R. Co. v. Schroeder* (1891) 47 Kan. 315, 27 Pac. 965; *McQueen v. Central Branch Union P. R. Co.* (1883) 30 Kan. 689, 1 Pac. 139.
- Kentucky.**—*Bogenschutz v. Smith* (1886) 84 Ky. 330, 1 S. W. 578; *Sullivan v. Louisville Bridge Co.* (1872) 9 Bush, 81; *Chesapeake, O. & N. W. R. Co. v. McDowell* (1894) 16 Ky. L. Rep. 1, 24 S. W. 607; *Needham v. Louisville & N. R. Co.* (1887) 85 Ky. 423, 3 S. W. 797, 11 S. W. 300; *Norton v. Louisville & N. R. Co.* (1895) 16 Ky. L. Rep. 846, 30 S. W. 599; *Metice v. Bell* (1897) 19 Ky. L. Rep. 267, 39 S. W. 823, *Reversing* (1897) 38 S. W. 702.
- Louisiana.**—*Carey v. Sellers* (1889) 41 La. Ann. 500, 6 So. 813; *Satterly v. Morgan* (1883) 35 La. Ann. 1166; *Smith v. Sellers* (1888) 40 La. Ann. 530, 4 So. 333; *Tillotson v. Texas & P. R. Co.* (1892) 44 La. Ann. 95, 10 So. 400.
- Maine.**—*Buzzell v. Laconia Mfg. Co.* (1861) 48 Me. 113, 77 Am. Dec. 212; *Mundie v. Hill Mfg. Co.* (1894) 86 Me. 400, 30 Atl. 16; *Conley v. American Exp. Co.* (1895) 87 Me. 352, 32 Atl. 965.
- Maryland.**—*Pennsylvania R. Co. v. Wachter* (1883) 60 Md. 395; *Baltimore & P. R. Co. v. State* (1892) 75 Md. 152, 23 Atl. 310; *Baltimore & O. R. Co. v. State* (1874) 41 Md. 268; *Yates v. McCullough Iron Co.* (1888) 69 Md. 370, 16 Atl. 280; *Wood v. Heiges* (1896) 83 Md. 257, 34 Atl. 872.
- Massachusetts.**—*Hutt v. Nay* (1887) 144 Mass. 187, 10 N. E. 807; *Learn v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; *Danahue v. Washburn & M. M. Co.* (1897) 169 Mass. 574, 48 N. E. 181; *Giddihurst v. Haverhill & G. R. Co.* (1894) 160 Mass. 554, 30 N. E. 486; *Foley v. Pearson Cumber Co.* (1891) 161 Mass. 426, 37 N. E. 1; *Thain v. Old Colony R. Co.* (1894) Mass. 353, 37 N. E. 300; *Allen v. C. & F. Smith Iron Co.* (1894) 160 Mass. 557, 36 N. E. 581; *Sullivan v. F. R. Co.* (1894) 161 Mass. 125, 36 N. E. 751; *Fisk v. Fitchburg R. Co.* (1894) 158 Mass. 238, 33 N. E. 516; *B. & N. York, N. H. & H. R. Co. v. Fitchburg R. Co.* (1893) 159 Mass. 443, 47 N. E. 118; *D. & F. Lawrence Mfg. Co.* (1893) 159 Mass. 378, 34 N. E. 458.
- Michigan.**—*Dunn v. Detroit & M. R. Co.* (1870) 20 Mich. 105, 4 Am. Rep. 364; *La Pierre v. Chicago & G. R. Co.* (1894) 90 Mich. 212, 58 N. W. 1; *Ricq v. Chicago & W. M. R. Co.* (1894) 98 Mich. 222, 57 N. W. 118; *Amora Iron Min. Co.* (1890) 81 Mich. 548, 46 N. W. 17; *Ragon v. T. & A. & N. M. R. Co.* (1893) 97 Mich. 50, 56 N. W. 612; *Richards v. R. Co.* (1884) 53 Mich. 212, 18 N. W. 1.
- Minnesota.**—*McLaren v. (1892) 48 Minn. 299, 51 N. W. 1; Smith v. Winona & St. P. R. Co.* (1888) 42 Minn. 87, 43 N. W. 968; *F. & St. Paul & D. R. Co.* (1880) 27 Minn. 114, 6 N. W. 448; *Clark v. St. P. & N. City R. Co.* (1881) 28 Minn. 28, 1 N. W. 581; *Bengston v. Chicago, M. & O. R. Co.* (1891) 47 Minn. 186, 1 N. W. 531; *Russell v. Minneapolis & St. L. R. Co.* (1884) 32 Minn. 280, 2 N. W. 147; *Hungerford v. Chicago & St. P. R. Co.* (1889) 41 Minn. 114, 1 N. W. 324; *Sauter v. Minneapolis International Electric Co.* (1897) 48 Minn. 18, 70 N. W. 796; *Anderson v. Nelson Lumber Co.* (1896) 67 Minn. 69, 69 N. W. 630; *Quick v. Minneapolis & St. P. R. Co.* (1891) 47 Minn. 361, 50 N. W. 291.
- Missouri.**—As stated above, the court has rendered several decisions in support of the doctrine, as usually understood, that the assumption of abnormal risks, is not imputed (see chapter XVIII., *passim*), and that doctrine is unquestionably sustained in many other decisions. See *Dermatt v. Hannibal & St. J. R. Co.*

have assumed the risk thus superadded, and to have waived any right which he might otherwise have had to claim an indemnity for injuries resulting from the existence of that risk. For various judicial statements of the doctrine, see next section.

The inability of the servant to recover being a peremptory infer-

ence, 1855) 87 Mo. 285; *Price v. Hannibal* (1883) 77 Mo. 508; *Boyle v. Pacific R. Co.* (1872) 50 Mo. 371; *Rubin v. St. Louis, I. M. & N. R. Co.* (1879) 71 Mo. 161, 36 Am. Rep. 160; *Spain v. Osage Coal & Min. Co.* (1885) 88 Mo. 68; *Strunkmeyer v. Spauld* (1893) 111 Mo. 531, 21 S. W. 2d 859; Affirmed in (1895) 127 Mo. 511, 27 L. R. A. 141, 28 S. W. 620, 30 S. W. 102; *Epperson v. Postal Tel. Co.* (1899) 155 Mo. 316, 50 S. W. 75, 55 S. W. 1050; *Napant v. Kauff* (1900) 161 Mo. 131, 131 Mo. 241, 33 S. W. 428; *Brilques v. St. Louis, I. M. & N. R. Co.* (1879) 6 Mo. App. 389; *Doh v. St. Louis, K. C. & N. R. Co.* (1876) 63 Mo. 455.

Ashaska.—*Missouri P. R. Co. v. Becker* (1894) 12 Neb. 793, 60 N. W. 104; *Mahn v. Thelin* (1896) 47 Neb. 66, 60 N. W. 650; *Dehning v. Detroit River & Iron Works* (1895) 46 Neb. 556, 65 N. W. 186; *Chicago, B. & Q. R. Co. v. McGinnis* (1896) 49 Neb. 619, 68 N. W. 1057; *Kennison Electric Co. v. Lashlin* (1895) 45 Neb. 390, 63 N. W. 341.

New Hampshire.—*Fox v. Baker* (1882) 62 N. H. 217; *Loriotte v. Boston & M. R. Co.* (1899) 70 N. H. 5, 45 Atl. 1084; *Burcraft v. Boston & M. R. Co.* (1893) 67 N. H. 166, 30 Atl. 109.

New Jersey.—*Western F. Tel. Co. v. M. Mullen* (1895) 58 N. J. L. 155, 32 L. R. A. 351, 33 Atl. 381; *Conway v. L. Co.* (1895) 57 N. J. L. 615, 32 Atl. 50; *Foley v. Jersey City Electric Light Co.* (1892) 51 N. J. L. 411, 24 Atl. 487; *New York*.—*Wright v. New York C. R. Co.* (1862) 25 N. Y. 562; *Anthony v. Leary* (1887) 105 N. Y. 591, 12 N. E. 561; *Kaue v. Troy Steel & I. Co.* (1893) 139 N. Y. 369, 34 N. E. 901; *Gibson v. Erie R. Co.* (1875) 63 N. Y. 419, 20 Am. Rep. 552; *Crown v. Orr* (1893) 140 N. Y. 459, 35 N. E. 618; *Powers v. New York, L. E. & W. R. Co.* (1885) 98 N. Y. 274; *Freeman v. Glens Falls Paper Mill Co.* (1893) 70 Hun, 536, 24 N. Y. Supp. 403; Affirmed in (1894) 112 N. Y. 679, 77 N. E. 567; *Loesley v. Pratt* (1896) 118 N. Y. 372, 32 L. R. A. 367, 12 N. E. 986; *De*

Young v. Tricon (1896) 5 App. Div. 499, 38 N. Y. Supp. 1689; *Carr v. North River Constr. Co.* (1888) 48 Hun 966; *Monaghan v. New York C. & H. R. R. Co.* (1887) 45 Hun 113; *Hunt v. New York C. & H. R. R. Co.* (1896) 7 App. Div. 377, 39 N. Y. Supp. 938.

Ohio.—*Mad River & L. E. R. Co. v. Becker* (1856) 5 Ohio St. 562, 67 Am. Dec. 312; *Lake Shore & M. & N. R. Co. v. K. Ind.* (1878) 33 Ohio St. 168; *Lake Shore & M. & N. R. Co. v. F. Ind.* (1877) 31 Ohio St. 479; *Coal & Min. Co. v. City* (1894) 51 Ohio St. 542 sub nom. *Consolidated Coal & Min. Co. v. Flood*, 25 L. R. A. 818, 38 N. E. 610; *Oklahoma*.—*Chadwick v. Loosley* (1897) 5 Okla. 616, 49 Pac. 940.

Oregon.—*Roth v. Northern Pacific Lumbering Co.* (1889) 18 Or. 265, 22 Pac. 842; *Brown v. Oregon Lumber Co.* (1893) 24 Or. 315, 33 Pac. 567; *Stam v. Oregon City Mfg. Co.* (1870) 4 Or. 52; *Stoner v. Troy Lumber Co.* (1901) 38 Or. 480, 53 L. R. A. 459, 63 Pac. 615.

Pennsylvania.—*Brossman v. Lehigh Valley R. Co.* (1886) 113 Pa. 490, 55 Am. Rep. 479, 6 Atl. 226; *Bachelt v. Pennsylvania R. Co.* (1888) 113 Pa. 21 W. N. C. 281, 13 Atl. 81; *Botten v. v. Berner & E. Brewing Co.* (1888) 113 Pa. 11 Cent. Rep. 639, 12 Atl. 599; *Wannemaker v. Burke* (1886) 111 Pa. 423, 2 Atl. 500; *Kennedy v. Pennsylvania R. Co.* (1889) 11 Monaghan, 24, 17 Atl. 7; *Bonisch v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998; *Green & C. Street Pass. R. Co. v. Bressler* (1884) 97 Pa. 103; *Dicht v. Lehigh Iron Co.* (1891) 140 Pa. 487, 21 Atl. 430; *Ramsay v. Delaware, L. & W. R. Co.* (1892) 151 Pa. 74, 25 Atl. 37; *Kelly v. Baltimore & O. R. Co.* (1887) 10 Cent. Rep. 56, 11 Atl. 659. A good deal of the verbal confusion between assumption of risks and contributory negligence is apparent in the decisions in this state, which rely on the latter doctrine. See chapter XVIII, *infra*.

Rhode Island.—*McGee v. New York & N. E. R. Co.* (1884) 14 R. I. 348 (1885) 15 R. I. 95, 22 Atl. 927; *Comp. v. New York & N. E. R. Co.* (1887)

ence of law when it once appears that he understood the work, it follows that a declaration which shows on its face that the servant knew of the extraordinary risk, and yet went on working, is demurrable.² Nor will a general verdict for the servant be allowed to stand where it is specially found that he was aware of the abnormal conditions and the danger created by them.³

15 R. I. 456, 7 Atl. 284; *Kelley v. Silver Spring Bleaching & Dyeing Co.* (1878) 12 R. I. 112, 34 Am. Rep. 615; *Whipple v. New York, N. H. & H. R. Co.* (1896) 19 R. I. 587, 35 Atl. 305; *Crandall v. New York, N. H. & H. R. Co.* (1896) 19 R. I. 594, 35 Atl. 307.

Tennessee.—*East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 63, 47 Am. Rep. 319.

Texas.—*Galveston, H. & S. A. R. Co. v. Garrett* (1889) 73 Tex. 262, 13 S. W. 62; *Gulf, C. & S. F. R. Co. v. Brentford* (1891) 79 Tex. 619, 15 S. W. 561; *Vix v. Texas P. R. Co.* (1891) 82 Tex. 473, 18 S. W. 571; *Houston & T. C. R. Co. v. Myers* (1881) 55 Tex. 110; *Missouri P. R. Co. v. Somers* (1890) 78 Tex. 459, 14 S. W. 779; *Texas & P. R. Co. v. French* (1893) 86 Tex. 99, 23 S. W. 642; *Texas & N. O. R. Co. v. Conroy* (1892) 83 Tex. 216, 18 S. W. 609; *Texas & P. R. Co. v. Bradford* (1886) 66 Tex. 732, 59 Am. Rep. 739, 2 S. W. 595; *Houston & T. C. R. Co. v. Barrager* (1890; Tex.) 14 S. W. 242; *Mexican C. R. Co. v. Shean* (1891; Tex.) 18 S. W. 151.

Utah.—A servant in this state is declared to be unable to recover if he continues work with knowledge of an extraordinary risk. *McCharles v. Horn Silver Min. & Smelting Co.* (1894) 10 Utah, 479, 37 Pac. 733; *Reese v. Morgan Silver Min. Co.* (1899) 17 Utah, 489, 51 Pac. 759. But it is not quite clear whether the court really intends to rely on the theory of an assumption of the risk, or of contributory negligence. In *Fritz v. Salt Lake & O. Gas & E. L. Co.* (1899) 18 Utah, 493, 56 Pac. 90, the phrase "assumption of risks" is used; but the risk in that case seems to be an ordinary one. See § 265, note 1, subd. p.

Vermont.—*Carbine v. Bennington & R. R. Co.* (1889) 61 Vt. 348, 17 Atl. 491; *Dumas v. Stone* (1893) 65 Vt. 442, 25 Atl. 1097; *Latremouille v. Bennington & R. R. Co.* (1891) 63 Vt. 336, 22 Atl. 656.

Virginia.—*Clark v. Richmond & D. R. Co.* (1884) 78 Va. 709, 49 Am. Rep. 394; *Chesapeake & O. R. Co. v. Hauger*

(1894) 90 Va. 621, 19 S. E. 166; *Richmond & D. R. Co. v. Risdon* (1891) 87 Va. 335, 12 S. E. 786; *McDonald v. Norfolk & W. R. Co.* (1897) 95 Va. 48, 27 S. E. 821. In *Richmond & D. R. Co. v. Norment* (1887) 84 Va. 172, 4 S. E. 211, the doctrine of the assumption of known risks, as an inference of law, seems to be rejected; but possibly this is one of several decisions by this court in which assumption of risks and contributory negligence are confused.

Washington.—*Jennings v. Tacoma R. & Motor Co.* (1893) 7 Wash. 275, 34 Pac. 937; *Bullivant v. Spokane* (1896) 14 Wash. 577, 45 Pac. 42; *Week v. Fremont Mill Co.* (1892) 3 Wash. 629, 29 Pac. 215.

West Virginia.—*Williamson v. Newport News & M. Valley Co.* (1891) 34 W. Va. 657, 12 L. R. A. 297, 12 S. E. 824; *Woodell v. West Virginia Improv. Co.* (1893) 38 W. Va. 23, 17 S. E. 386; *Stewart v. Ohio River R. Co.* (1895) 40 W. Va. 188, 20 S. E. 922; *Riley v. West Virginia C. & P. R. Co.* (1885) 27 W. Va. 146; *Massie v. Potl & Coal Co.* (1896) 41 W. Va. 620, 24 S. E. 641; *Borns v. Gaston Gas Coal Co.* (1885) 27 W. Va. 285, 55 Am. Rep. 394.

Wisconsin.—*Peffer v. Cutler* (1892) 83 Wis. 281, 53 N. W. 508; *Schultz v. Chicago & N. W. R. Co.* (1887) 67 W. 616, 58 Am. Rep. 881, 31 N. W. 321; *Sweet v. Ohio Coal Co.* (1890) 78 Wis. 127, 9 L. R. A. 861, 47 N. W. 182; *Luebke v. Berlin Mach. Works* (1894) 88 Wis. 442, 60 N. W. 711. In this state, assumption of risks is frequently confounded with contributory negligence. See chapter XVIII, *infra*.

² *McIver v. Eglington Iron Co.* (1883) 10 Se. Sess. Cas. 4th series, 955; *McTernan v. White* (1890) 17 Se. Sess. Cas. 4th series, 368.

³ *Chicago, B. & Q. R. Co. v. McGinnis* (1896) 49 Neb. 649, 68 N. W. 1057; *Lake Shore & M. S. R. Co. v. McGinnis* (1881) 74 Ind. 440; *Lynch v. Chicago, St. L. & P. R. Co.* (1894) 8 Ind. App. 516, 36 N. E. 44. It has, however, been held erroneous to override a general verdict for the plaintiff, merely on

The extent to which the defense of assumption of risks is a bar to an action where the negligence consists in the breach of a statutory duty is discussed in chapter xxxv., *post*.

274a. Judicial statements of this doctrine.—“This doctrine has probably been enunciated more frequently by courts than any other in the law of employers’ liability, not excepting that which relates to the defense of coservice, and many pages might be filled with statements illustrative of the variations of phraseology which have resulted from considering it under different aspects and from different points of view. Of these statements the passages quoted below will serve as sufficiently representative specimens.

“When a servant enters on an employment, from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or if he thinks proper to accept an employment on machinery defective from its construction or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment.”¹

“Before the employers’ liability act there was this condition in the contract of hiring, that if there was a defect in the premises or machinery which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk.”²

“A servant cannot continue to use a machine which he knows to be dangerous, at the risk of his employer.”³

“If a servant, in the face of a manifest danger, chooses to go on with his work, he does so at his own risk, and not at the risk of his master.”⁴

“If the employee knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger rea-

a special finding that he was old and experienced enough to know the nature of his employment and the working of the machine, there being no finding that he knew or ought to have known of the defect which caused the injury. *Quaid v. Cornwall* (1878) 13 Bush. 601.

¹Cockburn, Ch. J., in *Clarke v. Hobbs* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, quoted with approval in *Gibson v. Erie R. Co.* (1875) 63 N. Y. 449, 20 Am. Rep. 552.

²*Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 36 Week. Rep. 281, 57 L. J. Q. B. N. S. 7, per Lord Esher.

³*Dunne v. Leach* (1857) 26 L. J. Exch. N. S. 221, per Pollock, C. J.

⁴*Crichton v. Keir* (1863) 1 Sc. Sess. Cas. 3d Series, 407, per Inglis, J. (all the judges concurred). Compare Lord Shand’s language in *McGee v. Eglinton Iron Co.* (1883) 10 Sc. Sess. Cas. 4th series, 955.

sonably to be apprehended from such use, and is entitled to no recovery."⁵

"An employee having knowledge cannot claim indemnity except under particular circumstances. He is not secretly or involuntarily exposed, and likewise is paid for the exact position and hazard he assumes."⁶

"Though it is a part of the implied contract between master and servant (where there is only an implied contract) that the master shall provide suitable instruments for the servant with which to do his work, and a suitable place where, when exercising due care himself, he may perform it with safety, or subject only to such hazards as are necessarily incident to the business, yet it is in the power of the servant to dispense with this obligation. When he assents, therefore, to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected."⁷

"It is now settled law in this state that, if a servant continues in the service of his employer after he has knowledge of any unsuitable appliances in connection with which he is required to labor, and it appears that he fully comprehends and appreciates the nature and extent of the danger to which he is thereby exposed, he will be deemed to have waived the performance of the employer's obligation to furnish suitable appliances, and to have voluntarily assumed all risks incident to the service under these circumstances."⁸

"If a servant has knowledge of the circumstances under which the employer carries on his business, and chooses to accept the employment, or continue in it, he assumes such risks incident to the discharge of his duties as are open or obvious. In such cases it is not a question whether the place prepared for him to occupy, and which

⁵ *Washington & G. R. Co. v. McDade* *herring Co.* (1889) 18 Or. 205, 22 Pac. (1890) 135 U. S. 554, 34 L. ed. 235, 10 842.
Sup. Ct. Rep. 1044.

⁶ *Hayden v. Smithville Mfg. Co.* 87 Me. 352, 32 Atl. 965. See also for similar language, *Cunningham v. Butte Iron Works* (1899) 92 Me. 501, 43 Atl. 106.

⁷ *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 390. Similar language is found in *Roth v. Northern Pacific Lum-*

he assents to accept, might, with reasonable care, have been made more safe. His assent dispenses with the performance on the part of the master of the duty to make it so."⁹

"If the servant sustaining an injury through the unskillfulness or inefficiency, in numbers or otherwise, of his fellow laborers, or defects in the machinery or conveniences furnished by his employer, has the same knowledge or means of knowledge of the unskillfulness and deficiencies referred to as his employer, he cannot sustain an action for the injury, but will be held to have voluntarily assumed all the risks of the employment, incurred, as they were, by the want of skill and incompetency of those employed with him, or the defective machinery used in the work."¹⁰

If the servant accepts service with knowledge of the character and position of structures from which employees might be liable to receive injury, he cannot call upon his master to make alterations, or, in case of injury from risks which were apparent, call upon him for indemnity.¹¹

A servant "assumes, not only all the risks incident to such employment, but all dangers which are obvious and apparent. . . . If he voluntarily enters into or continues in the service without objection or complaint, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risk, and to waive any claim for damages against the master in case of personal injury to him."¹²

"It is, as a general rule, true that a servant entering into employment which is hazardous assumes the usual risks of the service, and those which are apparent to ordinary observation; and when he accepts or continues in the service, with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazards incident to the situation."¹³

"If the employee had knowledge of the nature and degree of the peril when he entered the service, or continued in the service after such knowledge without protest and promise of amendment, the case is different [*i. e.*, from one where the servant was ignorant]. The employer has no right to subject his employee to an unnecessary peril without his consent; but it is well settled in the courts of this country and in England that, if a servant chooses to enter into an employ-

⁹ *Wood v. Bridges* (1896) 83 Md. 257, 34 A.1. 872.

¹⁰ *Crown v. Orr* (1893) 140 N. Y. 450, 35 N. E. 648.

¹¹ *Wright v. New York C. R. Co.* (1862) 25 N. Y. 562.

¹² *Davidson v. Cornell* (1892) 132 N. Y. 234, 30 N. E. 573.

¹³ *Gibson v. Erie R. Co.* (1875) 63 N. Y. 449, 20 Am. Rep. 552.

ment involving danger of personal injury which the master has not had time to have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service, and which he had no reason to expect would be obviated or removed."¹⁴

"If an employee, after having a full and fair opportunity to become acquainted with the risk of his situation, makes no complaint whatever to his employer, as to the machinery which he knows to be wanting in appliances for safety, takes no precaution to guard against danger, but, accepting the risks, voluntarily continues in the performance of his duties, he cannot complain if he is subsequently injured by such exposure."¹⁵

"When a servant . . . plainly perceives the risks which he runs, and nevertheless remains performing the same services without complaint and without suggesting how his employment could be made less hazardous, he will be deemed to have undertaken to run the risks incident thereto."¹⁶

"If an employee knows that another employee is incompetent or habitually negligent, or that the materials with which he works are defective, and he continues his work without objection and without being induced by his employer to believe that a change will be made, he will be deemed to have assumed the risk of such incompetency, negligence, or defects, and cannot recover for an injury resulting therefrom."¹⁷

"If a servant before he enters a service knows, or afterwards discovers, that the instrumentalities furnished for his use are defective, and understands, or by exercise of ordinary observation ought to understand, the risks to which he is thereby exposed, and if, notwithstanding such knowledge, he, without objection and without any promise on the part of the employer that such defects will be remedied, enters or continues in such service, he cannot recover for injuries resulting therefrom, but will be deemed to have assumed all the risks of the employment thus known."¹⁸

"Where a party works with or in the vicinity of a piece of machinery insufficient for the purposes for which it is employed . . . with a knowledge or means of knowledge of its condition, he takes

¹⁴ *Brossman v. Lehigh Valley R. Co.* 34 Kan. 472, 8 Pac. 780. See also, to the same effect, *Atchison, T. & S. F. R. Co. v. Schroeder* (1891) 47 Kan. 315.

¹⁵ *Kumrell v. Dilworth* (1886) 111 Pa. 343, 349, 2 Atl. 355.

¹⁶ *Runsey v. Delaware, L. & W. R. Co.* (1885) 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. 378.

¹⁷ *Kansas P. R. Co. v. Pearcey* (1885)

the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained, arising out of accidents resulting from the defective condition of the machinery."¹⁹

"If the servant knows before he enters service, or discovers afterwards, that an instrument is unsafe or unfit in any particular, and, notwithstanding such knowledge voluntarily enters into or continues the employment without objection or complaint, he is deemed to assume the risk of the danger thus known, and to waive any claim for damages against the master in case it shall result in injury to him."²⁰

Where an employee, "when he enters upon his employment, knows or afterwards discovers that the machinery or the appliances he is called upon to use are defective or dangerous, and continues his employment without objection or complaint, he is deemed to have assumed the risk of the danger then known or discovered, and waives any claim for damage against his employer in case it shall result in injury to him."²¹

"The doctrine . . . that, where one enters into the employ of another, he assumes, and he is presumed to have contracted with reference to, all the hazards and risks ordinarily incident to the employment, . . . applies also to perils and risks not incident to the service, of which the servant has notice."²²

¹⁹ *McGlynn v. Brodie* (1866) 31 Cal. 376, followed in *Stone v. Oregon City Mfg. Co.* (1870) 4 Or. 52.

²⁰ *East Tennessee, V. & G. R. Co. v. Dufield* (1883) 12 Lea, 63, 47 Am. Rep. 319.

²¹ *Sweet v. Ohio Coal Co.* (1890) 78 Wis. 127, 9 L. R. A. 861, 47 N. W. 182.

²² *Little Rock & Ft. S. R. Co. v. Duffey* (1880) 35 Ark. 602. The following statements, which are not verbatim extracts, but follow the judicial language quite closely in all essential respects, may also be referred to as illustrative of some other points of view besides those exemplified in the above extracts.

An intelligent man, with full knowledge of the character and quality of an implement furnished him for use, and all of the facts and physical laws which render its use dangerous, after having voluntarily accepted employment in a hazardous business involving the use of such implements, cannot be heard to say that he did not know it was dangerous, but assumes the risk of injury from its use, as hazard of the employment. *King v. Morgan* (1901) 48 C. C. A. 507, 109 Fed. 446. A servant is under no obligation to continue working in a dan-

gerous place or employment, and, if he does so, assumes the risk. *Rees v. Clark* (1892) 146 Pa. 465, 23 Atl. 246.

Where an employee sues his master for injuries alleged to have been sustained by reason of the master's negligence, and the evidence shows that, if the master was negligent at all, the plaintiff knew of such negligence, and took the resulting risk, it is not error to grant a nonsuit. *Porter v. Ocean S. S. Co.* (1901) 113 Ga. 1007, 39 S. E. 470. The rule that the master is bound to use reasonable care to furnish a reasonably safe place for his servant to work in is qualified by another rule that if the master fails in this respect, and the servant, being fully advised of the dangers, continues to work voluntarily in the unsafe place, he takes the chances of the obvious danger. *Pioneer Fireproof Constr. Co. v. Howell* (1901) 189 Ill. 123, 59 N. E. 535, Aff. 90 Ill. App. 122. An employee who knows of defects, and attempts an act rendered dangerous thereby, assumes the risk of such danger. *Louisville & N. R. Co. v. Kemper* (1897) 147 Ind. 561, 47 N. E. 214. A servant assumes the risk of the known dangers or of obviously defective

275. Doctrine considered with reference to the comparative knowledge possessed by the master and servant.—The servant is frequently said to be incapable of maintaining the action where his knowledge of the risk which caused his injury was, as compared with the master's knowledge, either equal,¹ or superior.² But this form of expression is obviously of no special significance in a logical point of view. If the servant knew of and appreciated the risk in such a sense and to such an extent that he must be deemed to have accepted it as one of those incident to the employment, his inability to maintain the action is a necessary inference, irrespective of whether his master possessed the same or a less amount of information in regard to the subject-matter. As it is the knowledge of the servant which withholds from him a right of action, it is immaterial that the master also knows of the conditions which produce the injury.³

275a. Instructions should be conformable to the doctrine.—The doctrine, when considered with reference to the propriety of instructions in cases where there is evidence tending to show that the servant comprehended the risk to which an injury was due, involves the following consequences: that an instruction which correctly embodies the doctrine in language based upon any of the general statements quoted in § 274, *supra*, is not open to exception¹; that it is error to give an instruction which by its express terms contravenes the doctrine;² that, where an instruction is given which purports to include

implements, where the method of the use is within his control. *Jenny Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 566, 18 N. E. 30. The risks arising from defective appliances or from the manner in which a business is conducted are assumed by an employee when he knows of them or they are apparent and obvious to persons of his experience and understanding. *Union Stock-Yards Co. v. Goodwin* (1898) 57 Neb. 138, 77 N. W. 357; *Chicago, B. & Q. R. Co. v. McGinnis* (1896) 49 Neb. 649, 68 N. W. 1057. The master is exempt from responsibility "in all cases where the risks are apparent and are voluntarily assumed by a person capable of understanding and appreciating them." *Diamond State Iron Co. v. Giles* (1887) 7 Houst. (Del.) 557, 11 Atl. 189.

¹ *Cameron v. New York C. & H. R. R. Co.* (1895) 145 N. Y. 400, 40 N. E. 1; *Farley v. Pieard* (1894) 78 Hun. 560, 29 N. Y. Supp. 802; *Smith v. Troman-hauser* (1895) 63 Minn. 98, 65 N. W. 144; *Pennsylvania Co. v. Lynch* (1878)

90 Ill. 333; *Epperson v. Postal Telegraph Cable Co.* (1899) 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050; *Lumley v. G. Co.* (1877) 47 Iowa, 159; *Fletcher v. Louisville & N. R. Co.* (1899) 102 Tenn. 1, 49 S. W. 739; *Davis v. Detroit & J. R. Co.* (1870) 20 Mich. 105, 4 Am. Rep. 364; *Bonnet v. Galveston, H. & S. A. R. Co.* (1895) Tex. Civ. App. 31 S. W. 525; *Eddy v. Rogers* (1894) Tex. Civ. App. 27 S. W. 295.

² *Jungmitch v. Michigan Malting Iron Co.* (1895) 105 Mich. 270, 63 N. W. 296; *McGilly v. Brodie* (1866) 31 Cal. 376; *Acme Coal Min. Co. v. McIver* (1894) 5 Colo. App. 267, 38 Pac. 596; *Stiles v. Richie* (1896) 8 Colo. App. 393, 46 Pac. 694; *Weekland v. Southern Oregon Co.* (1891) 20 Or. 594, 27 Pac. 260.

³ *Green & C. Street Pass. R. Co. v. Bresmer* (1881) 97 Pa. 103; *Fletcher v. Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467.

¹ *Fletcher v. Louisville & N. R. Co.* (1898) 102 Tenn. 1, 49 S. W. 739.

² As, where the jury is told that the

of the elements necessary to be proved in order to warrant a recovery, is erroneous if it leaves the jury in ignorance as to the effect of the doctrine; as, where it is laid down that the action is maintainable under such circumstances if the servant was injured without fault on his part;³ or where no reference is made to the consequences of the servant's knowledge as a circumstance which, if proved, prevents his maintaining the action.⁴ But in determining whether the jury was or was not misled, the whole charge will be considered together, and reversible error will not be predicated if it appears that, although the effect of the doctrine of assumption of risks was not specifically stated, the language of the trial judge indicated with sufficient clearness that no recovery could be had if the risk in question was appreciated.⁵

employee does not assume the risk of a cat-guard or other danger, even though known to him, unless it has been properly constructed. *Parson, D. & E. R. Co. v. Puckett* (1893) 52 Ill. App. 222.

Chicago, I. & L. R. Co. v. Glover (1900) 154 Ind. 581, 57 N. E. 244; *Morris v. Gleason* (1877) 1 Ill. App. 510; *T. & H. Co. v. R. Co. v. Pratt* (1900) 25 Ind. App. 227, 57 N. E. 949; *Chicago, R. I. & P. R. Co. v. Cleveland* (1900) 92 Ill. App. 308.

Andrews v. Tannock Win. Co. (1897) 114 Mich. 375, 72 N. W. 242; *Cann Pond Mfg. Co. v. Ballou* (1874) 71 Ill. 417; *St. Louis & S. E. R. Co. v. Reitz* (1874) 72 Ill. 250; *William Glover Tank Works v. McGee* (1895) 58 Ill. App. 251; *Money v. Lower Vin Coal Co.* (1881) 55 Iowa, 671, 8 N. W. 652; *Lundey v. Caswell* (1877) 47 Iowa, 159; *Quinn v. Chicago, R. I. & P. R. Co.* (1898) 107 Iowa, 710, 77 N. W. 104; *Albridge v. Midland Blast Furnace Co.* (1883) 78 Mo. 539; *Planters' Oil Co. v. Mansell* (1897) Tex. Civ. App. 418 S. W. 913; *Galt, C. & S. F. R. Co. v. Williams* (1897) Tex. Civ. App. 39 S. W. 967; *Somfield v. Mayton* (1897) Tex. Civ. App. 33 S. W. 160; *Texas Midland R. Co. v. Taylor* (1898) Tex. Civ. App. 44 S. W. 892; *Fl. Worth & D. C. R. Co. v. Gilstrap* (1901) Tex. Civ. App. 61 S. W. 351. It is not error to give an instruction that, unless plaintiff did not know, and by the use of ordinary care could not have known, of the defect in question, he could not recover. Logically such an instruction is equivalent to one declaring that he could not recover if he knew, or could by the exercise of ordinary care have known, of the defect. *De La Vergue*

Refrigeration Mach. Co. v. Stahl (1900) 24 Tex. Civ. App. 471, 60 S. W. 319.

In *Bethlehem Iron Co. v. Weiss* (1900) 40 C. C. A. 270, 100 Fed. 45, the court, in upholding such an instruction, said: "It is true that the learned judge did submit to the jury the question whether or not the defendant had furnished a reasonably safe place for the plaintiff to work in. If this had been the substance of the charge, without qualification or explanation, it would have been reversible error. But this was not the case. This question was inseparably connected by the learned judge with the question whether or not the plaintiff had received adequate instruction from his employer as to the peculiar risks of his employment, and with the further question whether, if such instruction had not been given, the risks were obvious ones and such as were appreciated, or as ought to have been appreciated, by the plaintiff. The effect of the whole was that the jury were given to understand by the court that if the plaintiff had received full instructions as to the perils of his employment, or if those perils were obvious to the discernment of an average man, and such as were, or ought to have been, appreciated by the plaintiff, he could not recover, no matter how unsafe the work or its surroundings might have been."

In *Paris, M. & S. P. R. Co. v. Stokes* (1897) Tex. Civ. App. 41 S. W. 484, it was held that an independent paragraph of a charge, stating without qualification that plaintiff would be entitled to recover if the defect existed and was known to the defendant, was reversible error, although the jury were also told in the following paragraph that plain-

As the inability to maintain an action is deducible from the mere fact that the servant knew of the extraordinary risk from which his injury resulted, it is a misdirection to charge the jury in words which may convey the impression that recovery is not barred unless there has been a special assumption of that risk.²

276. Rationale of the doctrine of the assumption of extraordinary risks.—As will be shown in chapter xx., *post*, there is some judicial authority for the theory that the doctrine of a servant's assumption of extraordinary risks which he comprehends is an application of the maxim, *Volenti non fit injuria*. But in view of the accepted principle that the rights and liabilities of the master and servant are, as between themselves, regulated entirely by the express or implied terms of their contract,¹ the more correct theory would seem to be that his acceptance of or continuance in an employment with a full comprehension of an extraordinary risk justifies the inference of an implied agreement, voluntarily entered into at the time he attained a comprehension of the risk, that it was thenceforth to be included among those which were covered by the stipulated compensation.²

tiff could not recover if he knew, or by the exercise of ordinary care could have known, of the defect. But in view of the principle stated in the text, it seems questionable whether the ruling is correct.

"Thus an instruction that if the plaintiff knew the hazards of his employment as the business was conducted, and was injured while engaged therein, he cannot maintain an action against the defendant for the injury merely on the ground that there was a safer mode in which the business might have been conducted, the adoption of which would have prevented the injury, is correct, but is rendered erroneous by inserting after the word 'therein' the words, 'and by means of some risk or danger assumed under the instructions herein.'" *Guaranty Constr. Co. v. Broker* (1900) 93 Ill. App. 272.

¹*Farwell v. Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339.

²"The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself." *Priestley v. Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987.

"If a servant enters into an employment knowing there is danger, and is satisfied to take the risk, it becomes part of the contract between him and

his employer that the servant shall expose himself to such risks as he knows are consistent with the employment." The servant "was aware of it [the risk], and took his wages on that footing, and it has been held that he has, under those circumstances, no more claim than the soldier who takes the Queen's shilling for danger in the service." *Sutton v. Hawksworth* (1872) 26 L. T. N. S. 851, per Willes J.

"It is a rule of good sense that, if a man voluntarily undertakes a risk for a reward which is adequate to induce him, he shall not, if he suffers from the risk, have a compensation for which he did not stipulate." Lord Bramwell in *Smith v. Baker* [1891] A. C. 325, 344, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392.

"Except in regard to the danger of injuries from the negligence of fellow servants in certain cases, under the statute of 1887, chap. 270, and possibly some other dangers under the same statute, a servant impliedly agrees to assume the obvious risks of the business in which he engages; and his implied agreement, except as it may be affected by that statute, which we are not now considering, includes not only the risks which are ordinarily incident to that kind of business, but also those which grow out of the peculiar way in which his employer is conducting it, so far as

In other words, the increased danger caused by the master's negligence becomes, when it is known, one of the ordinary incidents of the service, so far as the servant is concerned.

The conception of the relinquishment of an inchoate right of

that way and those risks are obvious when he makes his contract. If he agrees to work in a business which he knows is carried on with machinery much more dangerous than that commonly used in that kind of business, he assumes the obvious risks incident to the use of that machinery. By making a contract to serve for pay where such dangers surround him, he exposes himself to the danger voluntarily." *Ma*

Donner v. Dove (1892) 155 Mass. 518, 30 N. E. 366.
"The reason of the rule that the servant cannot recover damages if he continues to work with defective tools, of his full knowledge of the defects, is that, being a free agent, the law presumes that he will refuse to work with dangerous implements unless his compensation is proportioned to the risk." *East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 68, 47 Am. Rep. 319.

"Much of the work of the country is done without the employment of the best machinery or the most competent men, and it would be disastrous if those prosecuting it were held to insure the safety of all who enter their service. If persons are induced to engage, in ignorance of such neglect, and are injured in consequence, they should be entitled to compensation; but if advised of it, they assume its risk. They contract with reference to things as they are known to be, and no contract is violated and no wrong is done if they suffer from a neglect whose risk they assumed." *Deritt v. Pacific R. Co.* (1872) 50 Mo. 302.

The servant "engages to bear the special perils which he knows actually to exist in his particular service, as well as the dangers generally appertaining to such business. . . . If he would have the visible or known risks borne by his employer, he should insist upon an express stipulation to that effect in the contract; no such stipulation can reasonably be inferred." *Fifield v. Northern R. Co.* (1860) 42 N. H. 225.

"The doctrine of the foregoing cases [to the effect that the servant assumes all risks which he appreciates] rests on the legal presumption that the servant is at liberty to engage in the work or

not, as he sees proper; and, having voluntarily elected to enter the employment, he will be presumed to have contracted in reference to obvious conditions. This presumption, as a practical and every day question, is a mere fiction, for the reason that a great majority of workers have no choice in the matter. Courts, however, ought to act on the legal presumption; for to ignore it would produce confusion and uncertainty in the administration of the law." *Moore v. St. Louis Wire Mill Co.* (1893) 55 Mo. App. 491, 494.

For similar language see *Mellors v. Shaw* (1861) 1 Best & S. 435, 446, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, per Blackburn, J.; *Farnell v. Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339; *Long v. Colorado R. Co.* (1892) 96 Cal. 269, 31 Pac. 170; *Foss v. Baker* (1882) 62 N. H. 247.

The following passage is apparently inconsistent with the cases above cited, in so far as it seems to exclude the theory of a contractual assumption of extraordinary risks. "When a person enters upon a dangerous employment, he not only assumes the risks ordinarily incident thereto, but also the risk he may incur from manifest perils. The former are the risks which enter into his contract of employment; the latter are those which he voluntarily accepts when he knows of their existence." *Gaffney v. New York & N. E. R. Co.* (1887) 15 R. I. 456, 7 Atl. 284. But perhaps the expressions used should not be taken too literally.

"The master 'is exonerated because the employee himself assumes the danger as increased, and, as he voluntarily assumes it, the master is relieved. The parties change positions; the employee assumes the risk that, if it were not for his knowledge, his employer would be compelled to assume.'" *Louisville, N. & C. R. Co. v. Sandford* (1888) 117 Ind. 267, 19 N. E. 770.

Where the servant knows of the extraordinary risks, they "may assume in legal effect the shape and proportions of only ordinary and incidental perils, adding nothing to the liability of the master, and affording the servant no additional grounds for recovery in the event of injuries received." *Alcorn v.*

action, which is involved in this theory, finds expression in the comments, so frequently found in the reports, that the servant who accepts or continues in an employment with knowledge of an abnormal condition dispenses with the duty of the master to take the precautions which were neglected;⁴ or that he waives his right to exact damages from the master;⁵ or that he acquiesces in the conditions of danger produced by the master's negligence.⁶

277. Application of doctrine in cases where the injury is caused by a defective instrumentality.—In the subjoined note are collected numerous decisions in which the doctrine now under discussion has been affirmed in relation to injuries caused by the abnormally dangerous qualities of the instrumentalities themselves. The nature of the accident is indicated by a brief memorandum wherever it seems desirable, for any reason, to specify the facts more particularly than is done by the headings themselves. In chapter XXI., *infra*, will be found a large number of other decisions which assume the existence of the doctrine, and deal merely with the question whether the risk was comprehended by the servant.¹

- Chicago & A. R. Co.* (1891) 108 Mo. 81, 18 S. W. 188, per Sherwood, Ch. J.
 To the same effect: *Carbone v. Bennington & R. R. Co.* (1891) 61 Vt. 348, 17 Atl. 491, *unquibled*.
⁴*Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396, 398; *Combs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506; *Laury v. Boston & L. R. Co.* (1885) 139 Mass. 580, 584, 52 Am. Rep. 733, 2 N. E. 115; *Fitzgerald v. Connecticut River Paper Co.* (1891) 155 Mass. 161, 29 N. E. 464; *Wood v. Heiges* (1896) 83 Md. 257, 34 Atl. 872; *Emma Cotton Seed Oil Co. v. Hale* (1892) 56 Ark. 232, 19 S. W. 600.
⁵*Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 465; *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521; *Long v. Coronado R. Co.* (1892) 96 Cal. 269, 31 Pac. 170; *Illinois C. R. Co. v. Swisher* (1893) 53 Ill. App. 411; *Louisville, N. A. & C. R. Co. v. Sandford* (1888) 117 Ind. 267, 19 N. E. 770; *Chicago & E. R. Co. v. Lee* (1897) 17 Ind. App. 215, 46 N. E. 513; *Youll v. Sioux City & P. R. Co.* (1885) 66 Iowa, 346, 23 N. W. 736; *Gorman v. Des Moines Brick Mfg. Co.* (1896) 99 Iowa, 257, 68 N. W. 674; *Bogenschutz v. Smith* (1886) 84 Ky. 330, 1 S. W. 578; *Burns v. Chicago, M. & St. P. R. Co.* (1886) 69 Iowa, 450, 58 Am. Rep. 227, 30 N. W. 25; *Mundle v. Hill Mfg. Co.* (1891) 86 Me. 406, 30 Atl. 16, 6 Me. 2d 10; *Lin v. Patten & S. R. Co.* (1899) 93 Vt. 80, 44 Atl. 361; *Clark v. St. Paul & N. City R. Co.* (1881) 28 Minn. 131, 9 N. W. 581; *Shields v. Robins* (1896) 3 App. Div. 582, 38 N. Y. Supp. 214; *Parter v. Western N. C. R. Co.* (1887) 97 N. C. 63, 2 S. E. 580; *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312; *Lake & M. S. R. Co. v. Knittel* (1878) 13 Ohio St. 468; *Brossman v. Lehigh Valley R. Co.* (1886) 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226; *South Florida R. Co. v. Weiss* (1893) 32 Fla. 212, 231 13 So. 436; *Kelley v. Silver Spring Bleaching & Dyeing Co.* (1878) 12 B. 1 112, 34 Am. Rep. 615; *Fordyce v. Leeman* (1893) 57 Ark. 160, 20 S. W. 1090.
⁶*Baltimore & O. R. Co. v. Casey* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952; *Chicago, B. & Q. R. Co. v. Merckes* (1889) 36 Ill. App. 195.
¹(a) *Railway track unsafe for travel*.—*Moss v. Johnson* (1859) 22 Ill. 633; *Little Rock, M. R. & T. R. Co. v. Leverett* (1886) 48 Ark. 333, 3 S. W. 50; *Indianapolis & C. R. Co. v. Lee* (1858) 10 Ind. 554; *Chicago & E. R. Co. v. Lee* (1897) 17 Ind. App. 215, 46 N. E. 543; *McCauley v. Springfield Street R. Co.* (1897) 169 Mass. 301, 47 N. E. 1006 (conductor of trolley car thrown off by jolt); *Hewitt v. Flint &*

278. Application of doctrine in cases where the injury is caused by a faulty system of work.—In a large number of decisions recovery has

P. W. R. Co. (1887) 67 Mich. 60, 34 N. W. 659 (side track so constructed on a grade that cars were liable to run away and escape onto the main track); *Baltimore & P. R. Co. v. State* (1892) 75 Md. 152, 23 Atl. 310 (tunnel not properly ventilated).

b) *Railway track not properly protected against trespassing animals.*—*Johnson v. Texas & P. R. Co.* (1892) 41 La. Ann. 93, 10 So. 400 (conductor killed by the overturning of an engine which came into collision with a cow caught in a trestle, while the train was running, under orders of despatcher, at a dangerous rate, he being fully aware of the order and the condition of the track); *Mauce v. North Pacific Coast R. Co.* (1889) 78 Cal. 430, 21 Pac. 114 (fence out of repair); *Sweeney v. Central P. R. Co.* (1880) 57 Cal. 15 (fence out of repair); *Fleming v. St. Paul & D. R. Co.* (1880) 27 Minn. 111, 6 N. W. 449 (breach of statutory duty to build fence); *Quill v. Houston & T. C. R. Co.* (1900) 93 Tex. 616, 57 S. W. 948, 11 affirming (1900) Tex. Civ. App. 55 S. W. 1126 (fence out of repair). By some courts the failure to build fences is held not to be negligence at common law. See § 72, *ante*.

c) *Railway track unsafe as a foot way for servants handling cars.*—*Coxley v. Chicago, R. I. & P. R. Co.* (1897) 102 Iowa, 507, 71 N. W. 580 (turntable with hole in it); *Needham v. Louisville & N. R. Co.* (1887) 85 Ky. 123, 3 S. W. 797, 11 S. W. 306 (hole in path used by switchman); *Arnold v. Louisville & N. R. Co.* (1900) 22 Ky. L. Rep. 511, 58 S. W. 370 (defective rail caught brakeman's foot); *West v. Southern P. Co.* (1898) 29 C. C. A. 219, 56 U. S. App. 323, 85 Fed. 392 (uncovered culvert); *Ragon v. Toledo, L. A. & N. W. R. Co.* (1892) 91 Mich. 379, 51 N. W. 1004 (hole in side track); *Wray v. Chicago & N. W. R. Co.* (1888) 76 Iowa, 393, 41 N. W. 51 (fence allowed to accumulate where car repairers work); *Chicago & W. I. R. Co. v. Massig* (1893) 50 Ill. App. 666 (planking on track defective); *Henderson v. Coons* (1888) 31 Ill. App. 75 (brakeman fell into dangerously placed cattle guard); *Missouri, K. & T. R. Co. v. Wood* (1896) Tex. Civ. App. 35 S. W. 579 (brakeman fell while coupling cars).

In the following cases the injury was

caused by want of blocking at frogs and guard rails: *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582; *Rice v. New York C. & H. R. R. Co.* (1900) 55 App. Div. 339, 67 N. Y. Supp. 136; *Shocks v. Chicago & T. Coal R. Co.* (1894) 139 Ind. 682, 30 N. E. 154; *Missouri P. R. Co. v. Butler* (1894) 42 Neb. 793, 60 N. W. 1044; *Honour C. R. Co. v. Morrissey* (1891) 45 Ill. App. 127. Many courts consider that this condition of the track does not import negligence, and therefore creates a risk which belongs to the ordinary class. See §§ 69, *c*, and 264, *ante*.

(d) *Railway track unsafe for other employees.* *South Florida R. Co. v. Woods* (1893) 32 Fla. 212, 13 So. 436 (no ash pit); *Seldomridge v. Chesapeake & O. R. Co.* (1893) 46 W. Va. 909, 33 S. E. 264 (no ash pit).

(e) *Dangerous objects close to railway tracks.* *Kelly v. Baltimore & O. R. Co.* (1887) Pa. 10 Cent. Rep. 56, 11 Atl. 659; *Gibson v. Erie R. Co.* (1875) 63 N. Y. 449, 20 Am. Rep. 552 (projecting roof); *Clark v. St. Paul & S. C. R. Co.* (1881) 28 Minn. 129, 9 S. W. 581 (roof or awning projecting from an elevator over a side track); *Perigo v. Chicago, R. I. & P. R. Co.* (1879) 52 Iowa, 276, 3 N. W. 43 (platform only a few inches from cars); *Satterly v. Morgan* (1883) 35 La. Ann. 1166 (piling was placed near track); *Woodell v. West Virginia Improv. Co.* (1893) 38 W. Va. 23, 17 S. E. 386 (projecting bough of tree). Many cases of this type have been decided against the servant on the ground that the risk imported no negligence on the master's part. See § 70, *b*, *ante*.

(f) *Dangerous objects above railway tracks.* *Williams v. Delaware, L. & W. R. Co.* (1889) 116 N. Y. 628, 22 N. E. 1117; *Owen v. New York C. R. Co.* (1869) 1 Laus. 108; *Pittsburgh & C. R. Co. v. Sentenier* (1879) 92 Pa. 276, 37 Am. Rep. 684; *Broxman v. Lehigh Valley R. Co.* (1886) 113 Pa. 491, 57 Am. Rep. 179, 6 Atl. 226; *Derott v. Pacific R. Co.* (1872) 50 Mo. 302; *Rains v. St. Louis, I. M. & S. R. Co.* (1879) 71 Mo. 164, 36 Am. Rep. 459; *Carbine v. Bennington & R. R. Co.* (1889) 61 Vt. 348, 17 Atl. 491; *Clark v. Richmond & D. R. Co.* (1884) 78 Va. 709, 49 Am. Rep. 394; *Chesapeake & O. R. Co. v. Hafner* (1894) 90 Va. 621, 19 S. E. 166; *Williamson v. Newport News & M. Valley*

been denied on the assumption that abnormal risks caused by the improper manner in which the instrumentalities are used, are much within the scope of the general doctrine enunciated in *S. & O. Ry. Co. v. R. A.*

Co. (1891) 34 W. Va. 637, 12 L. R. A. 297, 12 S. E. 821. For cases in which the maintenance of low overhead bridges has been held not to be evidence of negligence, see § 71, *h. ante*.

(2) *Defective locomotives.*—*New York, L. E. & W. R. Co. v. Evans* (1888) 119 Pa. 324, 13 Atl. 205 (step of locomotive was unusually high and dangerous for trainmen having occasion to use it); *Moughan v. New York C. & H. R. R. Co.* (1887) 45 Hun. 113 (leaking throttle and valve and defective brake); *Walash, St. L. & P. R. Co. v. Koster* (1898) 80 Ill. App. 572 (no handhold); *Chicago & G. W. R. Co. v. Travis* (1892) 44 Ill. App. 466 (no handrail); *Pipich v. Northern R. Co.* (1860) 42 N. H. 225 (engine exploded).

(3) *Defective railway cars.*—*Creswell v. Wilmington & A. R. Co.* (1899) 2 Penn. (Del.) 210, 43 Atl. 629 (single pocket drawhead; brakeman caught between drawhead and drawbar); *Bor v. Chicago, R. I. & P. R. Co.* (1899) 107 Iowa, 604, 78 N. W. 694 (drawbars of discarded type); *Shuckleton v. Manistota & V. E. R. Co.* (1895) 107 Mich. 16, 64 N. W. 728 (freight conductor injured through want of handrail); *McLaren v. Williston* (1892) 48 Minn. 299, 51 N. W. 373 (drawbar of cars so low as to pass under the engine); *Thompson v. Missouri P. R. Co.* (1897) 51 Neb. 527, 71 N. W. 61 (combination of ordinary and Miller couplings); *Arnold v. Delaware & H. Canal Co.* (1890) 125 N. Y. 15, 25 N. E. 1064 (tear out of repair); *Windover v. Troy City R. Co.* (1896) 4 App. Div. 202, 38 N. Y. Supp. 591 (defective brake); *Missouri, K. & T. R. Co. v. Wood* (1896) Tex. Civ. App. 35 S. W. 879 (defective couplings); *McDonald v. Norfolk & W. R. Co.* (1897) 95 Va. 98, 27 S. E. 821 (mismatched couplings).

(4) *Defective hand cars.*—*Burlington & C. R. Co. v. Liche* (1892) 17 Colo. 280, 29 Pac. 175 (section hand injured by the breaking of an iron rod which communicated motion from the lever to the wheels of a handcar); *McGhee v. Bell* (1897) 19 Ky. L. Rep. 267, 39 S. W. 823 (Reversing on Rebearing 1897) 38 S. W. 702 (lever of handcar was worm eaten); *Norton v. Louisville & V. R. Co.* (1895) 16 Ky. L. Rep. 846, 30 S. W. 599 (section hand injured by

(5) *Defective structures.*—*Pease & Marsh* (1871) 25 Ma. 659 (a man fell in which the servant was doing some work on a furnace); *Louisville Bridge Co.* (1872) 81 (laborer on railway car work injured by fall of temporary bridge due to defective timbering); *Am. Exp. Co.* (1890) 352, 32 Atl. 963 (slipping down a house stuck when pushed back); *Ill. v. H. H. Mfg. Co.* (1894) 86 Mo. 39, 30 Atl. 16 (defective floor); *Quacken* (1897) 75 Ill. App. 41 (of horse's stall broke and caused to fall under the feet of a horse); *son v. West* (1886) 78 Me. 253 (servant injured by the collapse of the arch of an oven which he was climbing out); *Russ v. American Coal Co.* (1900) 110 Iowa, 743, 81 N. W. 1 (servant fell through a trap door slipped, owing to its hinges being fastened); *Healey v. Smith* (1892) 4 N. Y. S. 804, 17 N. Y. Supp. 8 (chute for removal of debris from building under demolition fell).

(6) *Want of safeguards to prevent servant from falling into dangerous places.*—*Anthony v. T. Co.* (1887) 105 N. Y. 591, 12 N. E. 106 (trap door left open; employee killed by location and the arrangements for protection of persons having occasion to pass over it); *Kelly v. Sandusky & Twp. Co.* (1890) 36 Ill. App. 419 (servant killed by falling through trap door the position of which he was not understood was as a door as not to open at any time of the day); *Wantedaker v. Burke* (1886) 111 Mo. 423, 2 Atl. 500 (hole in floor where plaintiff was working); *S. v. Cornell* (1891) 36 N. Y. S. 106, 13 N. Y. Supp. 355 (servant in position for work near an opening in the floor and fell into it); *Bell v. H. Mfg. Co.* (1889) 73 Mo. 218, 11 N. W. 216 (servant thrown through rough stumbling against a wall); *Kinnare v. Chicago* (1890) 111 Ill. App. 106, affirmed in (1898) 17 Ill. 332, 49 N. E. 536 (want of fence to

project falling from roof of house: *Whitely v. Plack* (1894) 93 Ga. 15, 21 S. E. 287 (climber fell without fault); "In some jurisdictions, fact of injury sustained in these cases are held not to import negligence at all." See §§ 80 and 264, *ante*.

(b) *Defective machinery.* *Benton v. Pettit* (1892) 21 D. C. 209 (miner exploded); *Berry v. Chicago & N. W. R. Co.* (1893) 98 Mich. 222, 51 N. W. 118 (emery wheel burst); *Chapman v. Min. Co. v. Bolton* (1874) 71 Ill. 417 (emery stone burst owing to imperfection in the governor); *Hatch v. A. York Co. & H. R. Co.* (1888) 49 N. E. 450, 3 N. Y. Supp. 483 (emery wheel not truly balanced); *Bicker v. Besantier* (1892) 5 Ind. App. 576, 42 N. E. 786 (want of shifter for a belt); *Slattery v. Walker & P. Mfg. Co.* (1901) 179 Mass. 307, 69 N. E. 782 (check valve of air hoist was too weak to withstand the pressure put upon it); *Ginn v. Willingham* (1900) 111 Ga. 427, 36 S. E. 804 (derrick gave way owing to the fact that the stay ropes were too small and had been corroded by being left in a cellar where there was an accumulation of acid); *Hammer v. Leonsac & L. C. Gold & S. Min. Co.* (1884) 3 N. M. 255, 3 Pac. 735 (hoisting machinery in a mine); *Morris v. Gleason* (1879) 4 Ill. App. 395 (explosion of boiler); *Scott v. Darby Coal Co.* (1894) 90 Iowa, 689, 57 N. W. 619 (employee familiar with the fact that an engine used by his employer used to get "on centre," and that the engineer employed to operate did not keep it "on centre" as well as some other engineers, was injured by its being moved in the direction opposite to that ordered by him, as a preliminary to starting it); *Poll v. Hewitt* (1893) 23 Ont. Rep. 619 (injury caused by the giving way of a string by which a brake was applied automatically to a machine).

(c) *Unguarded machinery.*—*The Mahanah* (1891) 1 C. C. A. 181, 1 U. S. App. 20, 49 Fed. 111 (hand caught in cog of winch); *Sorobada v. Ward* (1879) 40 Mich. 420; *Schroeder v. Michigan Car Co.* (1885) 56 Mich. 132, 22 N. W. 220; *King v. Ford River Lumber Co.* (1892) 93 Mich. 172, 53 N. W. 10; *Kelley v. Silver Spring Bleaching & Dyeing Co.* (1878) 12 R. I. 112, 34 Am. Rep. 615; *Roth v. Northern Pacific Lumbering Co.* (1889) 18 Or. 205, 22 Pac. 812. In many jurisdictions the want of guards does not import negligence. See §§ 76 and 264, *ante*.

(d) *Want of care in use of machinery.*—*Ward v. H. R. Co.* (1881) 44 N. X. C. 296, 8 S. E. 460; *Harvey v. H. R. Co.* (1896) 109 Mich. 246, 6 N. W. 118.

(e) *Defective machinery used in a dangerous place.*—*Kearney v. Missouri Pacific R. Co.* (1901) 48 C. C. A. 307, 109 Fed. 416; *supra*; *Decker v. Chicago & N. W. R. Co.* (1896) 41 W. Va. 120, 24 S. E. 644 (standing on a defective beam); *McDonald v. Memphis* (1891) 18 Ky. Rep. 915, 38 S. W. 700 (roof of depot).

(f) *Failure to use proper appliances.*—*Ward v. H. R. Co.* (1881) 44 Mich. 361, 50 N. W. 214 (want of means to signal engineer when miners are about to cross the shaft in which a cable car is being run); *Ward v. Kan.* (1896) 38 C. C. A. 644, 98 Fed. 40 (no chocks furnished to prevent piles which were being loaded on cars by means of skids from slipping back in case the tackle broke); *Southern Kansas R. Co. v. Moore* (1892) 49 Kan. 646, 31 Pac. 138 (employee's foot crushed by a rail which a gang adjoining his own while unloading, he being aware of the want of the usual appliances for securing safety in such work, and also of the absence of the foreman); *Morris v. W. C. DePanne Co.* (1894) 138 Ind. 590, 38 N. E. 37 (no gratings furnished for handling glass).

An employee injured by the fall, through lack of bracing, of a large frame which such employee and others were raising by hand cannot recover on the ground that it was usual to leave work of that kind done by a rigger with derrick and appliances, as he assumed the risk of raising it in the manner employed. *McLennan v. Canadian Iron Works* (1897) 60 N. J. Eq. 67, 38 Atl. 677.

(g) *Incompetent servants.*—*McPhee v. Central Vermont R. Co.* (1897) 25 C. C. A. 110, 50 U. S. App. 27, 79 Fed. 590 (servants of a certain train habitually omitted to give proper notice of its approach at the crossing where the injured servant, a section foreman, was run over); *Thomas v. Steel Co. v. Paschke* (1893) 51 Ill. App. 456; *St. Louis Press Brick Co. v. Keenan* (1894) 57 Ill. App. 649; *Lake Shore & M. S. R. Co. v. St. Paul* (1886) 108 Ind. 1, 8 N. E. 630; *Chicago & N. W. R. Co. v. Barry* (1895) 13 Ind. App. 604, 40 N. E. 753, 42 N. E. 284; *Kearney v. P. R. Co. v. Pearson* (1885) 34 Kan. 472, 8 Pac. 780; *Hutt*

275, *ante*, as those caused by the defective quality or attributes of the instrumentalities themselves.¹

- v. Aug* (1887) 144 Mass. 186, 10 N. E. 807; *Davis v. Detroit & M. R. Co.* (1870) 20 Mich. 165, 4 Am. Rep. 364; *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285; *Huskin v. New York C. & H. R. R. Co.* (1873) 65 Barb. 10; *Aliumed* (1874) in 56 N. Y. 608; *Gulf, C. & S. F. R. Co. v. Schrabbe* (1892) 1 Tex. Civ. App. 573, 21 S. W. 706; *B. Lantry Sons v. Lowrie* (1900) Tex. Civ. App. 58 S. W. 837; *McCharles v. Horn Silver Min. & Smelting Co.* (1894) 10 Utah, 470, 37 Pac. 733; *Latremouille v. Bennington & R. R. Co.* (1891) 63 Vt. 336, 22 Atl. 656; *McTernan v. White* (1890) 17 Se. Sess. Cas. 4th Series, 368.
- In *Chambers v. Willey* (1872) 3 Viet. L. Rep. (L.) 17, the court drew a distinction between an incompetent and a careless servant, holding that a fellow servant who remained at work with the former kind of servant, knowing his incompetency, did so at his own peril, but that, in the case of a careless servant, such continuance of work was not a bar to his action. No authorities are cited for this distinction, which is clearly quite illogical.
- (t) *Insufficient number of servants.*—*Skipp v. Eastern Counties R. Co.* (1853) 9 Exch. 223, 23 L. J. Exch. N. S. 23, 3 C. L. Rep. 185; *Stanton v. Hackworth* (1872) 26 L. T. N. S. 851; *Slavens v. Northern P. R. Co.* (1899) 38 C. C. A. 151, 97 Fed. 255; *Texas & P. R. Co. v. Minnick* (1893) 6 C. C. A. 387, 13 U. S. App. 520, 57 Fed. 362 (engineer knew there were no track walkers or night watchmen at a bridge); *Long v. Colorado R. Co.* (1892) 96 Cal. 269, 31 Pac. 170; *Creswell v. Wilmington & N. R. Co.* (1899) 2 Penn. (Del.) 210, 43 Atl. 629; *Richmond & D. R. Co. v. Mitchell* (1893) 92 Ga. 77, 18 S. E. 290; *Schnibbe v. Central R. & Bly. Co.* (1890) 85 Ga. 592, 11 S. E. 876; *Swift & Co. v. Rutkowski* (1897) 167 Ill. 156, 47 N. E. 362, Reversing (1896) 67 Ill. App. 209; *Pointon v. St. Louis, A. & T. R. Co.* (1900) 90 Ill. App. 623 (train without a conductor); *Way v. Chicago & N. W. R. Co.* (1888) 76 Iowa, 393, 41 N. W. 51; *Atchison, T. & S. F. R. Co. v. Schroeder* (1891) 47 Kan. 315, 27 Pac. 965; *Southern Kansas R. Co. v. Drake* (1894) 53 Kan. 1, 35 Pac. 825; *Baltimore & O. R. Co. v. State* (1874) 41 Md. 268; *Lake Shore & M. & R. Co. v. Fitzpatrick* (1877) 31 Ohio St. 17 (want of watchman to prevent collision of engines at turntable); *Mal R. Co. v. Barber* (1856) 50 St. 562, 67 Am. Dec. 312; *Rogers v. Delaware, L. & W. R. Co.* (1892) 1 Pa. 74, 25 Atl. 37 (crossing not protected by watchman); *Gulf, C. & S. F. R. Co. v. Harriett* (1891) 80 Tex. 753, 1 S. W. 556; *Robinson v. Houston & T. R. Co.* (1877) 46 Tex. 540; *Robinson v. Houston & T. R. Co.* (1894) Tex. Civ. App. 27 S. W. 295; *Latremouille v. Bennington & R. R. Co.* (1891) 63 Vt. 336, 22 Atl. 656 (want of watchman to guard engine repair). Where the servant himself was the agent of the master in going to seeing that a sufficient number of servants was provided under the given circumstances, his failure to perform that duty properly is an additional reason for declaring the action not to be maintainable. *Texas & P. R. Co. v. S.* (1895) 31 L. R. A. 321, 14 C. C. A. 500, 30 U. S. App. 176, 67 Fed. 524 (train on which railway official charged with care of bridges fell through a burning bridge. Held that, as he knew there was no watchman at the bridge, there could be no recovery for his death, because he assumed the risk and was at fault in not stationing a watchman at the bridge).
- (u) *Vicious or otherwise dangerous animals.*—*Farley v. Picard* (1891) 78 Hun, 560, 29 N. Y. Supp. 802 (servant bitten by vicious dog); *Fraser v. Hood* (1887) 15 Se. Sess. Cas. 4th Series, 178 (servant kicked by vicious horse); *Green & C. Street Pass. R. Co. v. Bosmer* (1881) 97 Pa. 103 (same facts); *Crichton v. Keir* (1863) 1 Se. Sess. Cas. 3d Series, 407 (cold and worn-out horse); *Wilson v. Boyle* (1890) 17 Se. Sess. Cas. 4th Series, 62 (horse insulted and trained).
- (v) *Breach of statutory duty.* *Wheeler v. Wittenmann Lithographic Co.* (1892) 131 N. Y. 631, 30 N. E. 236 (unusual machinery).
- ¹An employee of one who conducts his business in a way more hazardous than other ways adopted by other employers assumes the risk of a more hazardous method, when he knows the danger attendant upon such manner of prosecuting the work. *Red v. Schreyer* (1896) 20 C. C. A. 381, 31 U. S. App. 727, 74 Fed. 186; *Bonnett v. Gay*

279. Limits of the doctrine.—(See also §§ 284-289, *infra*.)—It is obvious that the appropriate domain of the doctrine, as applied in cases of a class discussed in § 278, *supra*, may often be extremely difficult to define with reference to the area of facts within which the principle that a servant does not assume the risk of any given

reston, H. & S. A. R. Co. (1895) 89 Tex. 72, 33 S. W. 334 (stone inside which servant was drilling fell on him because of seams therein and the hammering upon the wedges at the top).

On this ground the action has been held not warrantable under the following circumstances:

(a) *Habitual violation of statutory duty.*—*Bengtson v. Chicago, St. P. M. & O. R. Co.* (1891) 47 Minn. 486, 50 N. W. 531 (trackman aware of the habitual transgression of an ordinance as to speed of trains).

(b) *Defective or improper rules.*—*Georgia R. & Bkg. Co. v. Rhodes* (1876) 56 Ga. 645; *Wright v. New York C. R. Co.* (1862) 25 N. Y. 562; *Baltimore & O. R. Co. v. State* (1874) 41 Md. 268 (conductor injured by a collision due to regulations which provided for an inadequate number of men on trains of a particular class); *McGrath v. New York & N. E. R. Co.* (1881) 14 R. I. 358 (1885) 15 R. I. 95, 22 Atl. 927 (section hand got on a hand car without objection, knowing that no flags had been sent out to signal coming trains, and that under the rules of the company a train might be expected in either direction without signals being shown for it); *Penrin, D. & E. R. Co. v. Puckett* (1892) 42 Ill. App. 642 (rules requiring brakeman to disconnect cars in a dangerous manner).

(c) *Habitual violation of rules.*—*Lake Shore & M. S. R. Co. v. Knittel* (1878) 33 Ohio St. 468; *Louisville & V. R. Co. v. Bryant* (1893) 15 Ky. L. Rep. 181, 22 S. W. 606 (see, however, § 232). But although the long acquiescence of a servant in a departure from rules is competent evidence to prove an assumption of the additional risk thereby incurred, a compliance with an exceptional order which is suddenly made, and which merely constitutes a departure *pro hac vice* from the rule, does not constitute such acquiescence. *Baltimore & O. R. Co. v. Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. Rep. 952.

(d) *Want of rules to meet the emergency in question.*—*Haskin v. New*
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York C. & H. R. Co. (1873) 65 Barb. 129. Affirmed: (1874) 56 N. Y. 608 (no provisions protect servants in freight yards against moving trains); *Little Rock & M. P. Co. v. Barry* (1898) 43 L. R. A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944 (rules did not provide for notice to trainmen of the movements of other trains; risk of meeting trains assumed); *Illinois C. R. Co. v. Veer* (1887) 26 Ill. App. 356 (1889) 31 Ill. App. 126 (general practice of company was not to notify engineers as to the position of trains ahead of them); *Gulf, C. & S. F. R. Co. v. Williams* (1897; Tex. Civ. App.) 39 S. W. 967.

(e) *Dangerous methods of moving railway cars.*—*Kelley v. Chicago, M. & St. P. R. Co.* (1881) 53 Wis. 74, 9 N. W. 816 (custom of permitting cars to run on the tracks of a yard without a brakeman on them); *Fordue v. Lowman* (1893) 57 Ark. 160, 20 S. W. 1090 (injury caused by known custom of pushing flat cars ahead of the engine); *Carr v. North River Constr. Co.* (1888) 48 Hun. 266 (injury caused by fact that the cars of a construction train had no check chains, and that the train was backed); *Kennedy v. Pennsylvania R. Co.* (1889) 1 Monaghan, 271, 17 Atl. 7 (trackman struck by gravel train which, like many others he had seen, was pushed with engine reversed); *Lake Shore & M. S. R. Co. v. Knittel* (1878) 33 Ohio St. 468 (custom of making "flying switches"); *Youll v. Stone City & P. R. Co.* (1885) 66 Iowa, 346, 23 N. W. 736 (same risk; brakeman injured by sudden jerk).

A switchman does not, by voluntarily making a coupling which is unusually dangerous, assume the risk attending the making of it without signals, merely because he has the right to reduce the danger to a minimum by giving signals to the engineer, where he gives the proper signals and they are not heeded. *Houston & T. C. R. Co. v. Kelley* (1896) 13 Tex. Civ. App. 1, 34 S. W. 809. Rehearing Denied in (1896) 13 Tex. Civ. App. 25, 46 S. W. 863 (charge to opposite effect held erroneous).

defect of which he has no knowledge, actual or constructive, shall be treated as controlling. The cases bearing upon the question thus indicated are not harmonious.

There is not, and can scarcely be, any dispute as to the correctness of the position that the rule laid down as to the effect of the servant's

(f) *Arrangements creating a risk of collisions between trains and vehicles at crossings.*—*Bancroft v. Boston & M. R. Co.* (1893) 67 N. H. 466, 30 Atl. 409 (freight cars were left, as was customary, on a siding in such a position as to obstruct the view of a crossing, the result being that a switchman while riding on an engine came into collision with a cart which had stopped on the crossing); *Rumsey v. Delaware, L. & W. R. Co.* (1892) 151 Pa. 74, 25 Atl. 37 (same accident).

(g) *Lack of cautionary signals to protect employees working on railway tracks.*—*Worke v. Union P. R. Co.* (1884) 22 Fed. 189 (no flag set; section man on truck injured); *Marsan v. New York, S. & W. R. Co.* (1895) 167 Pa. 220, 31 Atl. 562 (no signals furnished to protect car inspector).

(h) *Custom of leaving cars on sidings without stop blocks.*—*Hewitt v. Flint & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 659.

(i) *Dangerous customs in regard to coupling cars.*—*Kroy v. Chicago, R. I. & P. R. Co.* (1871) 32 Iowa, 357 (plaintiff had himself actively contributed to the establishment of the custom of coupling cars in motion). The fact that the plaintiff was not furnished, as required by the rules of the company, with a coupling stick, will not entitle him to recover for an injury received in making a coupling by hand, where that is the ordinary practice of the employees. *Louisville & N. R. Co. v. Bryant* (1893) 15 Ky. L. Rep. 181, 22 S. W. 606.

(j) *Custom of allowing loose objects to remain on a railway track.*—An assumption of the risk is inferred where a brakeman who knew that it was the custom to leave ashes upon the track for some time before clearing them away stumbled on them. *Hughes v. Winona & St. P. R. Co.* (1880) 27 Minn. 137, 6 N. W. 553 (evidence, however, was here held not to justify inference of such assumption). See also *Williams v. St. Louis & S. F. R. Co.* (1893) 119 Mo. 316, 24 S. W. 782 (car repairer had worked in the particular yard for some years, and knew that, in repairing cars, small pieces of wood and iron were apt

to fall upon the roadbed and become concealed in the grass).

(k) *Dangerous objects deposited near railway tracks.*—*Gaffney v. New York & V. E. R. Co.* (1887) 15 R. I. 456, 7 Atl. 284 (pile of lumber); *Bengtson v. Chicago, St. P. M. & O. R. Co.* (1891) 47 Minn. 486, 50 N. W. 531 (pile of logs prevented trackman's getting out of way of train).

(l) *Improper methods of getting loads onto railway cars.*—*Illinois C. R. Co. v. Reardon* (1894) 56 Ill. App. 542. *Claybaugh v. Kansas City, Ft. S. & M. R. Co.* (1894) 56 Mo. App. 630 (unusual and extra-hazardous method of loading ties); *Cleveland, C. C. & C. R. Co. v. Carr* (1901) 95 Ill. App. (rails loaded on moving car).

(m) *Improper method of arming loads on railway cars.*—*Larkin v. New York C. & H. R. R. Co.* (1891) 150 Mass. 110, 44 N. E. 122 (tank against lumber near its end, and crushed the hand of a servant who had entire charge of the car); *Schultz v. Chicago & N. W. R. Co.* (1887) 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321 (trackman injured by piece of coal which fell from an overloaded tender, where he knew that it was customary so to load it).

(n) *Heavy objects left in a position where they are likely to be knocked down.*—*Assop v. Yates* (1858) 2 Harl. & N. 768, 27 L. J. Exch. N. S. 156 (machine left where it was likely to be struck down by passing vehicles).

(o) *Heavy objects carelessly piled.*—*Brinkley Car Works & Mfg. Co. v. Lewis* (1900) 68 Ark. 316, 57 S. W. 1108 (plaintiff himself had testified that he knew the danger of the method of piling adopted by the employer); *McFadden v. Campbell* (1895) 13 Misc. 158, 34 N. Y. Supp. 136 (plaintiff himself testified that he knew that the manner in which a tier of bales of rope had been piled was unsafe); *Sonnetsold v. Mayton* (1897) Tex. Civ. App. 39 S. W. 166 (lumber negligently piled).

(p) *Improper methods of excavating banks of earth, etc.*—*Simmons v. Chicago & T. R. Co.* (1884) 110 Ill. 349 (dangerous method of taking down a

knowledge of the methods of work does not govern the case, merely because it is shown that the master or his representative had previously been, to the servant's knowledge, guilty of several acts of negligence similar to that which caused the injury, and that to entail a disability to recover on this ground the acts must, at all events, have been repeated so often and under such circumstances as to establish what may reasonably be described as a customary method of doing business, and the servant must have had notice of such customary method.²

bank): *Naylor v. Chicago & N. W. R. Co.* (1881) 53 Wis. 601, 11 N. W. 24 (similar facts); *Larson v. McClure* (1897) 95 Wis. 533, 70 N. W. 662 (experienced employee excavating at the bottom of a frozen sand bank assumes the risk of injury by its falling down upon him, where he knows that blasting has been resorted to, to break down the bank, and has witnessed and understands the effect produced by such blasting in shattering the bank). For other decisions involving similar facts, but denying the right of recovery on a different ground, see § 269, ante.

(q) *Trenches not shored.*—*Regan v. Palo* (1898) 62 N. J. L. 39, 41 Atl. 364 (soil was of a kind likely to slip, if not shored).

A laborer employed in digging a sewer trench through made ground, which was shored up by the workmen to keep it from falling, cannot recover for injuries sustained by a cave-in and the falling on him of a large stone projecting from the side of the trench, due to the failure to drive piling down to the bottom of the trench, because of the stone, which might have been removed, where he continued to work with knowledge of the facts. *Golden v. Sieghardt* (1898) 33 App. Div. 161, 53 N. Y. Supp. 460.

(r) *Careless methods of doing work which requires the use of explosives.*—*Allard v. Hildreth* (1899) 173 Mass. 26, 52 N. E. 1061 (unexploded charge left when laborer went back to work).

(s) *Custom of certain employees to leave their work temporarily to substitutes.*—*Louisville & N. R. Co. v. Killa* (1894) 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407 (brakeman knowing of a prevailing custom of engineers to leave the firemen in charge of their engines when switching or similar work is to be done, held entitled to recover from the company for injury by a fireman's incompetent management, only when his fitness was below what ought to be

required of firemen, and when his unfitness was known, or should reasonably have been known, to the representative of the company).

(t) *System exposing servant to injury from falling or flying objects.*—*Planters' Oil Co. v. Mansell* (1897: Tex. Civ. App.) 43 S. W. 913 (servant injured by a bale of cotton thrown from an upper door); *Wood v. Heiges* (1896) 83 Md. 257, 34 Atl. 872 (servant injured by the want of a guard to arrest flying pieces of iron around a place where iron castings were broken by the fall of a heavy weight).

(u) *Custom of leaving hatches open on ships.*—A longshoreman who knows that it is customary to leave the hatches of ships open when they are coaling takes the risk of being injured by that open condition. *The Saratoga* (1898) 87 Fed. 349, Reversed in 36 C. C. A. 208, 94 Fed. 221, but not on this point.

² See *Chicago & N. W. R. Co. v. Kane* (1897) 70 Ill. App. 676.

In *Gulf, C. & S. F. R. Co. v. Brentford* (1891) 79 Tex. 619, 15 S. W. 561 (vice principal made so much noise that workmen could not hear the signals which were necessary for the safe performance of their work of loading iron), the court said: "When the cause of the injury is the direct act of the master, or his representative, it cannot be said that the servant's remaining in the employment is the proximate cause of the injury, even though the master may have known that the master or his representative had frequently done the same or similar acts which imperiled his safety; for the act which in such case causes the injury is the wrongful act of the master or of his representative, the result of the exercise of the will of the one or the other, and hence the proximate cause of the effect from which the master ought not to be permitted to go free from liability on the ground that

But even in cases where such a customary method is deducible from the evidence, it seems necessary, in order to prevent a dangerous interference with the operation of the generic principle which imposes upon the master the duty of providing and maintaining proper instrumentalities, to hold that an action founded on the existence of a defect which constantly remains as a possible source of injury to certain servants, as long as the conditions which constitute the defect are left unremedied, cannot be barred by showing that the master had habitually failed to exercise a proper supervision over the class of instrumentalities to which the one in question belongs. For this position there is the high authority of the Supreme Court of the United States, which has emphatically declared that "no reason can be found for, and no authority exists supporting, the contention that an employee, either from his knowledge of the employer's methods of business, or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished which contain defects that might have been discovered by reasonable inspection."³ Similarly, it has been denied that a servant's assump-

the servant knew he had, before the happening of the injury, done acts such as that from which the injury resulted, but still remained in his service."

In *Sherman v. Chicago, M. & St. P. R. Co.* (1885) 34 Minn. 259, 25 N. W. 593, where an instruction inconsistent with this principle was held to have been rightfully refused in the case of a brakeman injured by the want of blocking in one of the frogs in a particular yard, the court said: "If the defendant's habit, custom, or mode of doing business at that yard was to protect the frogs by blocks,—if that was the rule of its conduct,—Sherman had a right to assume, where he had not notice to the contrary, that such mode or custom had been followed in respect to any particular frog. He had a right to assume, in the absence of such notice, that the defendant had acted according to the general rule adopted by it for its business, although he may have known some instances in which it had not done so. The omission at that yard to put in the blocks, not as a general rule, but in isolated instances, would not make out a case like that of the *Hughes Case* [(1880) 27 Minn. 137, 6 N. W. 553, (see not 1, subd. (j) *supra*)], of an unsafe and careless custom or habit of doing business, known, or which by the use of his senses ought to be known, to an employee; in which case the em-

ployee, by continuing in the employment without objection on his part, or promise on the part of the master to change it, is held to assume the risk incident to that mode of doing the business. A single instance, or any number of instances, not amounting to a custom or mode of business, of culpable negligence on the part of the master, will not cast on the employee the risk of subsequent or other similar acts of negligence."

³*Texas & P. R. Co. v. Archibald* (1898) 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777. The court said: "The employee . . . has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects, because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employee is not compelled to pass judgment on the employer's methods of business, or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe, and to deal with those furnished relying on this fact, subject, of course, to the exception which we have already

tion of the risk of a latent defect is a necessary inference from the fact that he knew that the defective appliance had not been inspected.⁴

On the other hand, the supreme court of New Hampshire has not shrunk from facing the consequences of the opposite view, and has recently denied recovery on the specific ground that the servant must be taken to have assumed the risk of a certain defect, for the reason that he was familiar with the employer's system of inspection, and understood the danger arising from such a defect as that which existed as a result of the failure to inspect the appliance in question

stated, by which, where an appliance is furnished an employee, in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues to use it. In assuming the risks of the particular service in which he engages, the employee may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfil his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and whilst this does not justify an employee in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances. . . . In deed, the ultimate result of the argument of the plaintiff in error is to entirely absolve the employer from the duty of employing or supplying safe appliances, since, as stated, it is an employee to all risks arising from unsafe ones, if the business be carried on by the employer without reasonable care, and the employee knew, or by diligence could have known, not of the dangers incident to the business, but of the harm possibly to result from the employer's neglectful method." It was accordingly deemed to be proper to strike out the italicised words from a requested instruction to the effect that if the jury believed "it was the custom of defendant company not to inspect or repair [foreign] cars when thus brought over to be loaded and returned, and the plaintiff knew this custom, or could have known it by the exercise of ordinary care, then he assumed the risk of being injured by any defect in said car."

In Texas it has been held proper to refuse a requested instruction that the servant—a car repairer—took the position subject to all risks pertaining to the service, and, if he knew of the custom or manner in which entry was made upon the repair tracks, he assumed all risks incident to that custom. *Texas & P. R. Co. v. Eberheart* (1897) 91 Tex. 321, 43 S. W. 510, Affirming (1897; Tex. Civ. App.) 40 S. W. 1060. Compare the decisions that a brakeman does not assume the risks incident to the negligent inspection of cars, even though he may know that such is the manner of inspection (*Missouri, K. & T. R. Co. v. Chambers* [1897] 17 Tex. Civ. App. 487, 43 S. W. 1090); and that the fact that the injured servant knew that a railroad company had no car inspector in a large town does not charge him with an assumption of the risks arising from the want of inspection (*Missouri, K. & T. R. Co. v. Crowder* [1899; Tex. Civ. App.] 55 S. W. 380). Where a railroad employee was injured by reason of a defect in a car, which would have been discovered if a proper inspection had been made, an instruction on the theory of assumed risk, which excluded his recovery if he knew that the car had been inspected in the same manner in which the cars of other roads were inspected, regardless of whether or not such inspection was sufficient, was properly refused. *Galveston, H. & S. A. R. Co. v. Vase* (1900; Tex. Civ. App.) 57 S. W. 910.

Union Stock-Yards Co. v. Goodwin (1898) 57 Neb. 138, 77 N. W. 357 (brakeman here was not under any duty to inspect the defective brake which caused his injury). The court distinguished *Arnold v. Delaware & H. Canal Co.* (1890) 125 N. Y. 15, 25 N. E. 1064, on the ground that the defect (a broken drawhead) was obvious, and that the plaintiff's business was to handle damaged cars.

with sufficient closeness.⁵ This conclusion was arrived at without any consideration, so far as the report shows, of the authorities which look in the opposite direction. The present writer regards the case as one of very pernicious tendency, which should not be followed.

There is some authority for the view that a mere knowledge of the existence of certain dangerous conditions will not prevent recovery where the servant had no reason to anticipate that he would ever be brought into such local relations with them as to be exposed to the risk of injury;⁶ or where the occurrence which eventually caused the injury was one which was so unlikely that he was under no obligation to anticipate it.⁷

The only logical ground on which these decisions seem to be sustainable is that it could not be said, as a matter of law, that the

⁵ *Leazotte v. Boston & M. R. Co.* (1899) 70 N. H. 5, 45 Atl. 1084 (defective brake rod on foreign car; defect was not easily discoverable by servant, who knew that the inspectors only examined brakes on foreign cars to the extent of seeing that the chains were attached to the rods).

⁶ A miner is not prevented from recovering for injuries from props not properly set and fastened, and knocked down by an unruly and vicious mule coming in contact with them, by continuing to work in the place, with knowledge of the character of the mule, without objection or complaint, where he had no charge or care of the mule. *Western Coal & Min. Co. v. Ingraham* (1895) 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. Rep. 219. The court said: "It would require a great stretch of the rule [as to assumption of known risks] . . . to say the plaintiff should have anticipated that this mule might at some time be brought to the room in the mine where the plaintiff was at work, and that while there the mule would come in contact with the timbers which supported the roof of the mine, and knock them down because they were insecurely set, and that as a result of all this the roof would fall and he might be injured, and that, anticipating all this, he ought to have quit the defendant's service. The case does not call for any discussion of what is a primary, proximate, or remote cause. Here all the causes of the accident, whether remote or proximate, were the result of the defendant's negligence, which the plaintiff was not required to anticipate."

It has been held by the Texas court of appeals that a section hand who,

after learning of a defect in the brake of a hand car, has himself changed to another, does not, as matter of law, assume the risk of injury upon the latter car from being run into by the former because of such defect. *International & G. N. R. Co. v. Williams* (1896; Tex. Civ. App.) 34 S. W. 161. This appears to be rather a dubious application of the principle of the case last cited, if we suppose that the servant knew that the hand car still remained in use. This decision seems to be inconsistent with another rendered by the same court in the same year, — *Texas & P. R. Co. v. Johnson* (1896; Tex. Civ. App.) 34 S. W. 186, where it was held error to instruct a jury that a freight conductor who continued in the service of the company after learning of the incompetency of an extra freight conductor did not assume the risk of colliding with a train in charge of the latter following his own, provided he did not know, act of or constructively, that such extra conductor was in charge of such train. The judgment was reversed in (1896) 89 Tex. 519, 35 S. W. 1042. But the ground assigned for the reversal was merely that there was no evidence to show that the servant was aware of the incompetency, and that for this reason the error of the trial judge, if there was any, was immaterial.

⁷ Though a trackman knows that a track is so rough as to cause a swaying of the cars, he is not bound to anticipate the contingency of being struck by a piece of coal which drops from an overloaded tender. *Croft v. Atchison, T. & S. F. R. Co.* (1896) 57 Kan. 548, 46 Pac. 972. Reversing (1896) 3 Kan. App. 242, 45 Pac. 112.

servant possessed that full comprehension of the risk which must be established in order to let in the defense that it was assumed.

279a. Assumption of risk not predicable from knowledge of the conditions alone.—(Compare § 241, *ante*, and §§ 296-298a, 319, 320, 372, *post*.)—To bring a case within the scope of the doctrine now under discussion, it must be shown that the servant possessed a sufficiently exact appreciation of the nature and extent of the danger in question to enable him to estimate the possibilities of his environment in so far as they affected his bodily safety. The absence of that appreciation is logically incompatible with the hypothesis that, in undertaking or continuing in the employment, he exercised that intelligent and deliberate consent which is one of the essential elements involved in the conception of an assumption of a risk.¹

The first step in the process of establishing this appreciation is to show that the servant was chargeable with a knowledge of the material conditions which were the immediate cause of his injury. Manifestly, he cannot be held to have assumed a risk where he was ignorant of the facts on which a proper appreciation of the risk depended.²

"When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right." *McKee v. Tourtellotte* (1896) 167 Mass. 69, 48 L. R. A. 542, 44 N. E. 1071.

"One does not voluntarily assume a risk, within the meaning of the rule that debars a recovery, when he merely knows there is some danger, without appreciating the danger. Nor does he, on the other hand, necessarily fail to appreciate the danger because he hopes, and even expects, to encounter it without injury. If he comprehends the nature and the degree of the danger, and voluntarily takes his chance, he must abide the consequences, whether he is fortunate or unfortunate in the result of his venture." *Mundle v. Hill Mfg. Co.* (1894) 86 Me. 405, 30 Atl. 16.

¹*Breen v. Field* (1892) 157 Mass. 277, 31 N. E. 1075 (trench had recently become unsafe owing to a washout); *Texas & P. R. Co. v. Crow* (1893) 3 Tex. Civ. App. 266, 22 S. W. 928 (spout of railway tank out of repair; nature of servant's work rendered it doubtful whether he should have known of it).

A railroad brakeman does not, by failure to object to the substitution of the fireman for the engineer, assume additional hazards on account of such substitution, where there is no evidence to show that the plaintiff had reason to

believe the fireman to be incompetent. *Nichols v. Chicago, R. I. & P. R. Co.* (1894) 90 Iowa, 85, 57 N. W. 694. An employee who does not know of the existence of a trap door in the floor of a building in which she works does not assume the risk from the door being left open without notice or warning to her. *Hogarth v. Pocasset Mfg. Co.* (1897) 167 Mass. 225, 45 N. E. 629. Where a telegraph pole on which an employee was engaged fell from a cause which could not have been reasonably anticipated by the plaintiff, a contention that the rule as to the employer's furnishing a safe place was inapplicable, because, the line being decayed, the employee was engaged in a known dangerous work, cannot prevail. *Riker v. New York, O. & W. R. Co.* (1901) 64 App. Div. 357, 72 N. Y. Supp. 168. A locomotive engineer does not assume the risk of the fall of a sufficient amount of shale from an overhanging bluff to derail the train, because he knows that small quantities not sufficient to endanger the train sometimes fall on the track; and he has the right to assume that the company performs its duty with reference to inspecting the bluff, in the absence of knowledge to the contrary. *True v. Lehigh Valley R. Co.* (1897) 22 App. Div. 588, 48 N. Y. Supp. 86.

In *Windover v. Troy City R. Co.* (1896) 4 App. Div. 202, 38 N. Y. Supp.

If the conditions are such as to show more than one distinct breach of duty on the master's part, and consequently the existence of more than one *prima facie* cause of action, his knowledge of each and all the abnormal conditions must be established in order to bar the servant's claim. A servant does not, because he knows of one defect, take the risk of another of which he has no knowledge, and if both concur in producing his injury, he is entitled to recover if the accident would not have happened but for the unknown defect.³

591, where a motorman did not know that the reversal of the motor and the application of the brakes were insufficient to prevent an electric car from running away, it was held error to reject evidence showing that a "sandman" was not supplied, and that the motorman was not aware of the risk arising from this circumstance.

¹*Packer v. Thomson-Houston Electric Co.* (1900) 175 Mass. 496, 56 N. E. 704; *Missouri P. R. Co. v. Somers* (1890) 78 Tex. 439, 14 S. W. 779 (*arguendo*); *Thompson v. Missouri P. R. Co.* (1897) 51 Neb. 527, 71 N. W. 61 (known danger of attaching ordinary car to one with Miller coupling increased by projecting bolt not known to servant); *Coughlan v. Cambridge* (1896) 166 Mass. 268, 44 N. E. 218 (workman employed on a railroad track which is, to his knowledge, in a rough condition, does not assume the risk caused by running the train at an unreasonable speed); *Lawhorn v. Millen & S. R. Co.* (1895) 97 Ga. 742, 25 S. E. 492 (similar decision as to brakeman); *W. C. De Pauc Co. v. Stubblefield* (1892) 132 Ind. 182, 31 N. E. 796 (heavy truck which servant was wheeling broke through the cover of a pit; servant knew of the pit; he did not know of the weakness of the cover); *Moran v. Harris* (1884) 63 Iowa, 390, 19 N. W. 278 (assumption of the risk of defects in machinery does not necessarily imply an assumption of the risk of carelessness in its operation).

A workman assisting in raising a bridge span by means of loops of track steel assumes the risk of one of them breaking by reason of its insufficient strength, where he has already seen two of them break, but does not assume the risk of its breaking by reason of a specific defect in its material. *American C. R. Co. v. Murray* (1900) 42 C. C. A. 334, 102 Fed. 264. The defense of assumption of risks is not a bar to an action for injuries caused partly by the

imperfect action of the slide of a coal chute, and partly by a defect in the apron, where there is no evidence that the servant had knowledge of the latter defect. *Great Northern R. Co. v. Kasischke* (1900) 43 C. C. A. 626, 104 Fed. 440. Knowledge of a railway employee run over by cars switched in upon a side track where he was painting cars, that such switching would probably be done, will not preclude recovery for injuries inflicted, unless he also knew that adequate warning of their approach would not be given. *International & G. N. R. Co. v. Hinzie* (1891) 82 Tex. 623, 18 S. W. 681. A railroad brakeman's knowledge of a custom to load cars with machinery without providing footboards to pass over them does not charge him with an assumption of the risk therefrom, where it is not usual to place such cars in a position in the train where brakemen are required to pass over them. *Hosie v. Chicago, R. I. & P. R. Co.* (1888) 75 Iowa, 683, 37 N. W. 963. A section hand familiar with the fact that trains are habitually run at an unlawful speed at a certain place assumes the risks resulting from that rate of speed; but he does not assume the risk due to the failure of the engineer to give him a signal which peculiar circumstances may require. *Schultz v. Chicago, M. & St. P. R. Co.* (1894) 57 Minn. 271, 59 N. W. 192. There it was held to be error to take the case from the jury, where there was another train approaching on a parallel track, the noise of which might have prevented the injured servant from hearing the approach of that which struck him, and it was therefore an open question whether the persons operating the latter train, if they had been using due care, would not have discovered that the deceased was unaware of its approach.

An injury received by a section hand in helping a fellow workman to lift a car off the track when a train suddenly appeared around a curve a short dis-

The second step in the demonstrative process is to establish the servant's appreciation of the danger produced by the abnormal condi-

tance away is not due to an assumed risk, where the accident occurred by reason of the fact that the collaborer became frightened and let go his hold. That he should thus take fright was not an event which the injured servant was bound to anticipate. *International & G. N. R. Co. v. Newburn* (1900) Tex. Civ. App. 58 S. W. 542. Judgment affirmed (1901) 94 Tex. 310, 60 S. W. 429 (only questions of practice discussed). It is a question for the jury whether a brakeman, killed while the train was passing under a bridge, relied upon the bridge guard to warn him, and therefore did not assume the risk as an incident of his employment, where the jury might find from the evidence that he mounted the car before reaching the bridge guard, and, receiving no warning from it, did not change his position prior to the accident. *Hardy v. Boston & M. R. Co.* (1896) 68 N. H. 523, 41 Atl. 179. The court pointed out that the risk assumed by the servant was not that of passing under the bridge without any means for reminding him of its proximity, but that of passing under the bridge protected by a guard such as he knew the one in question to be. A railroad brakeman does not assume the risk of coming in contact with an overhead bridge while his back is turned toward it, in applying the brakes in discharge of his duty in an effort to stop the train, where the train would stop before it reached the bridge if the brakes were in good order, and he is ignorant of their inefficiency. *Boord v. Chesapeake & O. R. Co.* (1893) 90 Va. 351, 18 S. E. 559. The fact that a lineman knew that a pole which he was about to use did not belong to the telephone company by which he was employed did not relieve the company from liability for defects in such pole, where the lineman was not chargeable with notice of an arrangement by which his employer did not have the right to inspect or repair the poles. *McGuire v. Bell Teleph. Co.* (1901) 167 N. Y. 208, 52 L. R. A. 437, 60 N. E. 433. Affirming (1900) 66 N. Y. Supp. 1137. Although a servant may understand and assume the danger of a collapse of the sides of a trench, owing to the weakness of underlying strata, he does not assume the danger of such collapse at a particular place where there are deposits of quicksand

the existence of which he has no opportunity to ascertain. *Banks v. Effingham* (1895) 63 Ill. App. 223. A servant who is unable to recover, because of his knowledge of the animal's disposition, for injuries caused by a vicious horse, may recover on the theory that a proper harness to drive such a horse was not supplied, and that he did not know that the harness actually supplied was unsafe and unsuitable. *Cooper v. Partner Breeding Co.* (1900) 112 Ga. 894, 38 S. E. 91.

An employee killed while at work in a shaft, by the fall of a car from above, was not chargeable with knowledge of the danger, although he may have known that the track leading to the mouth of the shaft was down grade, that the car was not locked when not in use, and that the stop block at the end of the track was insufficient, when it is not shown that he knew that children frequently rode down the grade on the car, which was the cause of the accident. *Knight v. Sadtler Lead & Zinc Co.* (1898) 75 Mo. App. 541. Where an employee's eye was injured by a twig projecting from debris loaded on a truck in a dark hall through which he had to pass in going from his work, and such employee knew that trucks were placed in the hall, but did not know that they were loaded with debris every evening, and never had seen them at the place of the accident, and employees were forbidden to bring matches into the building, or to leave before dismissal bell rang, before which the lights in the hall were usually turned out, the evidence was not sufficient to show an assumption of risk by the servant, as a matter of law. *Dorney v. O'Neill* (1901) 60 App. Div. 19, 69 N. Y. Supp. 729. In *Freeman v. Glens Falls Paper Mill Co.* (1891) 61 Hun. 125, 15 N. Y. Supp. 657, it was held that a servant who went on working with knowledge that there were no automatic doors to an elevator in the building did not, as a matter of law, assume the risk of barrels being left, without his knowledge, on the upper floor in such a position that they were liable to be loosened and precipitated down the elevator shaft. The case was sent back for trial, and on the second appeal—(1893) 70 Hun. 530, 53 N. Y. Supp. 78; (1894) 142 N. Y. 639, 37 N. E. 567—judgment was en-

tions in question. That this is the alternative and crucial element upon which the defense depends is sufficiently apparent from the terminology by which it is described.⁴ In the subjoined note are cited a large number of cases in which the courts have applied or recognized the principle that the servant's knowledge of a defect is a bar to his action only when it also appears that he understood the risk created by that defect.⁵ Others which are virtually based upon

entered for the defendant on the ground simply of the plaintiff's knowledge of the want of doors. The ruling on the first appeal was not referred to.

In *Beetlesley v. Minneapolis Street R. Co.* (1893) 54 Minn. 504, 56 N. W. 170, where a car "bucked" and threw the driver over the dashboard, it was contended by defendant's counsel that the trial judge erred in refusing to charge that, in determining the question of defendant's negligence, all evidence regarding the height of the dashboard should be disregarded, the argument being that the driver was aware of its height. But the court said: "The vice in the instruction asked for was that it left out of account the defective condition of the car which caused it to buck, or, if not, assumed that the deceased knew of that condition, and of the risk incident thereto. The driver might have been of sufficient height had the car not bucked, and the deceased might have assumed any risk incident thereto with the car otherwise in order, and yet not have assumed a risk incident to that in conjunction with a defect which alone rendered the height of the dashboard unsafe and exceedingly dangerous. It was not claimed that the height of the dashboard of itself caused the accident, but that it was caused by its insufficiency, coupled with the bucking of the car."

In *Rummell v. Dilworth* (1885) 111 Pa. 343, 2 Atl. 355, 363, the plaintiff had to close a gate by reaching over cogwheels in rapid motion. The court pointed out that the danger to be apprehended did not depend wholly upon the patent fact that the cogwheels had to be reached over under these circumstances, but upon the degree of exertion which it might be necessary to put forth in closing the gate; and, as this would vary according to circumstances, it was only by actual experiment that the servant could ascertain the degree of peril which he assumed.

"A servant knowing the facts may

be utterly ignorant of the risks," *Hyde, J.*, in *Clarke v. Holmes* (1902) 7 Harv. & N. 937, 31 L. J. Exch. N. S. 101, 8 Jur. N. S. 992, 10 Week. Rep. 405.

"A servant is chargeable with notice of what is apparent, but not necessarily that the apparent is dangerous," *Pennsylvania Coal Co. v. Kelly* (1894) 54 Ill. App. 626.

"The difference is between going into the service, or continuing in it, knowing that the instrumentalities employed are unsafe and dangerous, and knowing that defects exist, but not that they necessarily render the employment of a perilous character," *Gulfeaton, H. & S. L. R. Co. v. Lempe* (1883) 59 Tex. 19.

"It does not necessarily follow that knowledge that a master is not discharging his duty in making safe the place where he requires his employees to work will defeat a recovery by an employee injured by the master's neglect of duty; to produce this result it must be also inferable that the breach of duty augmented the dangers of the service. An employee may know that the employer is not performing his duty, yet not know that the perils of his office are augmented. It is not, it is necessary that the fact that the perils of the service were increased should be established by direct evidence; it is sufficient if there be evidence from which that fact can be reasonably inferred," *Rogers v. Leyden* (1890) 127 Ind. 50, 26 N. E. 210.

"The general rule undoubtedly is that a person cannot be said to take a risk unless he knows not only the condition of things, but also that danger exists in such condition," *Anderson v. Clark* (1892) 155 Mass. 368, 29 N. E. 589.

⁴ *Union P. R. Co. v. Juri* (1892) 4 C. C. A. 433, 10 U. S. App. 43, 53 Fed. 65; *Blumenthal v. Craig* (1897) 26 C. C. A. 427, 55 U. S. App. 8, 81 Fed. 329; *Davis v. St. Louis, I. M. & S. R. Co.* (1890) 53 Ark. 117, 7 L. R. A. 283, 14 S. W. 801; *Magee v. North Pacific Coast*

the same conception have been cited in discussing the circumstances under which a master is bound to instruct a servant. See § 241, *infra*.

- R. Co.* (1889) 78 Cal. 430, 21 Pac. 114; *Pitts v. Florida C. & P. Co.* (1896) 98 Ga. 655, 27 S. E. 189; *Faren v. Sellers* (1887) 30 La. Ann. 1011, 3 So. 363; *Hoban v. Louisiana Electric Light & P. Co.* (1889) 41 La. Ann. 964, 7 L. R. A. 172, 6 So. 799; *Fine v. Bath Gas & Electric Co.* (1900) 94 Me. 17, 46 Atl. 804; *Doyle v. St. Paul, M. & M. R. Co.* (1889) 42 Minn. 83, 43 N. W. 787; *Seda v. Libera* (1896) 65 Minn. 337, 68 N. W. 36; *Stiller v. Bohn Mfg. Co.* (1900) 80 Minn. 1, 82 N. W. 981; *Roth v. Northern Pacific Lumbering Co.* (1889) 18 Or. 213, 22 Pac. 842; *Schall v. Cole* (1884) 107 Pa. 1; *Bonner v. Moore* (1893) 3 Tex. Civ. App. 416, 22 S. W. 272; *Stonnie v. Hanford Produce Co.* (1899) 108 Iowa, 137, 78 N. W. 841; *Lee v. Southern P. R. Co.* (1894) 101 Cal. 118, 35 Pac. 572 (jolting caused by uneven side track shock brackman's foot off the pilot of an engine where he was standing to make a coupling, and, the space between the ties being unballasted, he was caught by his foot and thrown off and run over); *St. Louis & S. F. R. Co. v. McChin* (1891) 80 Tex. 85, 15 S. W. 789 (fireman did not anticipate any danger from a defect in the flange of a wheel); *Goina v. Chicago, R. I. & P. R. Co.* (1889) 37 Mo. App. 221 (inexperienced youth injured in handling a defective car coupling); *Griffin v. Ithaca Street R. Co.* (1901) 62 App. Div. 551, 71 N. Y. Supp. 140 (motorman directed to take a light passenger car and draw a heavily loaded car which, as he was aware, had no brakes, to a place where it was necessary to stop on a steep grade; accident caused by the fact that the setting of the brakes on the passenger car would not prevent the other car from sliding); *Johnston v. Oregon Short Line R. Co.* (1892) 23 Or. 94, 31 Pac. 283 (switch target known to be near the track); *Gulf, C. & S. F. R. Co. v. Harriett* (1891) 80 Tex. 73, 15 S. W. 556 (risk of working with insufficient number of fellow servants not assumed unless danger of doing so is understood); *Demars v. Glen Mfg. Co.* (1892) 67 N. H. 404, 40 Atl. 902 (inexperienced servant injured while attempting to push with a stick an old and badly worn belt upon a driving pulley); *Hudleston v. Lowell Machine Shop* (1871) 106 Mass. 282 (servant knew that floor was decayed, but could not have ascertained the existence of actual danger without examining the under side); *Sanborn v. Madero Lumber & Trading Co.* (1886) 70 Cal. 261, 11 Pac. 740 (servant in sawmill injured by a defective appliance which caused the saw to throw a heavy object against him while working in a part of the mill some considerable distance from the saw, not necessarily debarred from recovery); *Union Shoe Case Co. v. Blindner* (1898) 75 Ill. App. 359, affirmed in 175 Ill. 325, 51 N. E. 709 (error to charge jury that the plaintiff should have stopped his elevator on discovering that the brake was out of order); *Wootilla v. Duluth Lumber Co.* (1887) 37 Minn. 153, 33 N. W. 551 (danger of working near unboxed gearing not, as matter of law, comprehended by common laborer); *Christianson v. Northwestern Compo-Round Co.* (1901) 83 Minn. 25, 85 N. W. 826 (servant attending a saw for three days lost his balance and fell against another saw close by); *Chilton v. Lansing Wagon Works* (1901) 128 Mich. 43, 87 N. W. 79 (single saw replaced by double saw, the dangerous character of which the servant did not know).
- The fact that a street car conductor knew that the brake would not properly control the motion of the car without applying unusual force did not conclusively charge him with notice that injury might be expected from use of the brake. *Newhart v. St. Paul City R. Co.* (1892) 51 Minn. 42, 52 N. W. 983. In a case where a brakeman is injured by slipping on ice which has formed on the end gate of a coal car as it lies on an incline, an instruction to the effect that he assumed, among other risks of the service, those arising from ice and snow, should not be given without a modification making such assumption depend on the plaintiff's knowledge of the danger resulting from the ice and snow in that particular situation. *McDermott v. Iowa Falls & S. C. R. Co.* (1891; Iowa) 47 N. W. 1037. The mere fact that an employee injured in digging a trench for a sewer knew the manner in which the trench was braced will not prevent a recovery for an injury to him because of the insufficient bracing of the trench,

Any charge which may lead the jury to suppose that the defendant's assumption of risks is available to the master if the servant

unless he also knew that it was dangerous, and continued to work the cutter. *Donahue v. Kansas City* (1897) 136 Mo. 657, 38 S. W. 371. The court said that an employee in a paper mill knew that there was some danger in working in a blowpit while there was a fire burning in the blowpipe will not be held to have appreciated the danger for his action. *Fickett v. Live Oak Lumber Co.* (1898) 91 Mo. 268, 33 Atl. 100. The general knowledge of the danger of using a machine while it is running is possessed by an inexperienced employee after several years, does not make it a personal injury for recovery for personal injuries sustained by him while employed in obedience to the directions of his master, as such knowledge is not necessarily inconsistent with the failure to appreciate and realize the danger of obeying the master's order. *B. F. Avery & Son v. Meek* (1899) Ky. 45 S. W. 355, former appeal (1904) 96 Ky. 192, 28 S. W. 337. An experienced employee does not, as a matter of law, assume the risk of using a "bolting saw" without a carriage attachment, by using the saw for three weeks without such an attachment, where none has been on it at any time while he has used the same. *Olmstead v. Nelson-Tenny Lumber Co.* (1896) 66 Minn. 61, 68 N. W. 605.

A stone cutter may recover for personal injuries received from the falling of an arm of a derrick under which he was working, after the lowering of a stone by it, although he knew of its defective condition, where he did not know or anticipate that there was any danger that the arm would fall after the stone had reached the ground and the derrick was no longer in operation. *Julian v. Stony Creek Red Granite Co.* (1899) 71 Conn. 632, 42 Atl. 994.

In *Russell v. Minneapolis & St. L. R. Co.* (1884) 32 Minn. 230, 20 N. W. 147, where a brakeman was injured in attaching a car with a "Miller" coupling to one with an ordinary coupling, the court said: "In this case plaintiff undoubtedly knew the character of these two couplers. He knew that one was a Miller and the other a common one. He also knew that the former had a certain amount of lateral motion; also that there was no goose neck or wooden buffers on the tender. But conceding this, and assuming that he must be held to

the ordinary skill and experience of brakemen, it does not appear—conclusively—that he by the exercise of ordinary observation could have understood the risks to which he was exposed by using such couplers. He was not bound to be an expert car chime or car builder. It does not appear that he knew, or by the exercise of ordinary observation ought to have known, that the lateral motion of the Miller's coupler was sufficient to cause it to slip past the end of the derrick. It does not appear that either of these two kinds of couplers was used in this way as a matter of course so that brakemen generally should understand fully the danger attendant to such a practice. In the evidence, it is to be presumed that prudent railroad companies would ordinarily adopt any such practice. Plaintiff had been using them on the train for some time, and it does not appear that he had ever seen the couplers slip past each other before. The fact which distinguishes this case from *Toledo, W. & W. R. Co. v. Lester* (1877) 84 Ill. 429, cited by defendant, is that neither does it appear that such a thing would be likely to occur under peculiar circumstances; as, for example, where, as in this case, the coupling was being made on a curve. A general verdict for the plaintiff will not be set aside as inconsistent with the special verdict, where the latter verdict, although it states that the plaintiff was acquainted with the operation of the appliance, does not show that he knew, or by the exercise of ordinary care might have known, that it was defective. *Quaid v. Cornwall* (1878) 43 Bush, 601.

A complaint alleging that a hand car used by plaintiff was defective, and unsafe for use, which was known to defendant, but that he did not know, with his limited experience, that such defects would cause the car to jump the track, but believed that by the use of ordinary care it could be used with safety, is not insufficient, as showing conclusively that plaintiff had assumed the risk. *Crappan v. Omaha, K. C. & E. R. Co.* (1900) 82 Mo. App. 175.

No recovery, of course, can be had where the servant has himself admitted in his testimony that he knew himself

aware merely of the existence of certain abnormal conditions is a misdirection.⁶

The inference that the danger was not appreciated is sometimes deemed an allowable inference from the fact that the servant had been assured by his superiors that there was no danger.⁷

If the servant understood, or ought to have understood, that the existence of certain abnormal conditions exposed him to the risk of injury, he cannot recover damages for an injury actually received, although he did not fully realize the extent or character of the injury which might be sustained,⁸ or did not appreciate every particular of the risk,⁹ or all the possible consequences of the risk.¹⁰

to be in danger from the existence of the conditions complained of. *Mielke v. Chicago & N. W. R. Co.* (1899) 103 Wis. 1, 79 N. W. 22; *McFadden v. Campbell* (1895) 13 Misc. 158, 34 N. Y. Supp. 136.

⁶ *Vofsiinger v. Goldman* (1898) 122 Cal. 609, 55 Pac. 425; *Galveston, H. & S. A. R. Co. v. Smith* (1900) 24 Tex. Civ. App. 127, 57 S. W. 999; *Galveston, H. & S. A. R. Co. v. Hughes* (1899) 22 Tex. Civ. App. 134, 34 S. W. 204 (unlocked frog).

A request to instruct in substance that when a party works with or in the vicinity of machinery insufficient for the purpose for which it is employed, for any reason unsafe, and with knowledge, or the means of knowledge, of its condition, he assumes the risk incident to the employment, and cannot maintain an action for injuries, is properly refused. *Sauborn v. Undera Flame & Trading Co.* (1890) 70 Cal. 261, 11 Pac. 710.

⁷ *Stonnie v. Hanford Produce Co.* (1899) 108 Iowa, 137, 78 N. W. 841. See, generally, chapter XXIV., *post*.

⁸ *Detroit Crude-Oil Co. v. Grable* (1899) 36 C. C. A. 94, 94 Fed. 73, where one of several bolts which projected from a fly wheel struck a water pipe which the vibration of the machinery was shaking so violently as to bring it within reach of the bolts, and broke off a fragment which struck the engine.

The other cases exemplifying the doctrine in the text are *Foley v. Pearson Cordage Co.* (1891) 161 Mass. 426, 35 N. E. 368 (servant fell into well near place of work); *Dorsey v. Sawyer* (1892) 157 Mass. 418, 32 N. E. 654 (boy injured in putting a belt on a shaft near a gearing, he having testified that he dreaded performing this work be-

cause of the possibility of having his arm caught).

⁹ *Connelly v. Hamilton Woollen Co.* (1895) 163 Mass. 156, 39 N. E. 787, where it was held that a workman who voluntarily undertakes the dangerous work of whitewashing the ceiling of a card room in a mill while the machinery is in motion, and who has been specially cautioned to look out for the pulleys and sharting, cannot recover for injuries received by coming in contact with a revolving shaft, apparently as a result of losing his balance and falling from the scaffold on which he was working, although he may not have known of the existence of a keyway on the shaft, which increased the probability of his clothes being caught if he should come in contact with the shaft.

Stuart v. West End Street R. Co. (1895) 163 Mass. 391, 40 N. E. 180, where it was held that the jury should have been directed to return a verdict for the defendant in an action for injuries caused by the plaintiff's allowing his hand to be drawn into the knives of a hay-cutting machine which he was feeding. "It may be," said the court, "that no one could tell the exact degree of the force with which the hay would move forward with the traction of the knives, nor just how great the danger was until ascertained by actual experiment, but anybody could see at once that there was danger in doing the work unless care was used to avoid letting the fingers be drawn forward to the knives."

The risks involved in turning a switch under any circumstances that are reasonably likely to occur in the course of a brakeman's duties are presumed to be appreciated by him, when he is familiar with its position and

279b. Comprehension of risk usually inferable from knowledge of conditions.—The practical importance of the principle stated in the last section is considerably diminished by a fact which is sufficient, obvious, *viz.*, that circumstances which would justify a jury in finding that a servant, although aware of the abnormal conditions, did not comprehend the risks resulting therefrom, are of much more rare occurrence than circumstances in which his comprehension of the risks is an unavoidable inference as soon as it is established that he knew of the abnormal conditions. In the majority of instances, therefore, it will be found that the courts treat the servant's assumption of the risk as an immediate consequence of his knowledge of the conditions of which that risk was an incident. The rationale of these decisions is not that proof of the servant's comprehension of the risk is unnecessary, but simply that, upon the facts in evidence, any person of average intelligence who was aware of the conditions must either have understood, or have been chargeable with negligence in not understanding, the hazards to which these conditions exposed him.¹ But although one step of the deductive process is thus taken

other elements of danger. *Connors v. Fitchburg R. Co.* (1892) 156 Mass. 200, 30 N. E. 1140, where it was denied that an action could be maintained by a brakeman familiar with flying switches, who was injured while making one at a switch which he had frequently turned, though not for a flying switch, and which from its proximity to an abutment required him to stand between the track and the switch.

A railroad employee assumes the risk of coupling cars while an iron rail is projecting from one of the cars to his knowledge, although the danger therefrom is increased by an inequality in the height of the two cars to be coupled, of which he had no knowledge at the time. *Ely v. San Antonio & A. P. R. Co.* (1897) 15 Tex. Civ. App. 511, 40 S. W. 174.

¹*Pratt v. Prouty* (1891) 153 Mass. 333, 26 N. E. 1002 (boy's hand drawn into a machine and against a knife, he having been warned that he would be hurt if he got his fingers in); *De Souza v. Stafford Mills* (1892) 155 Mass. 476, 30 N. E. 81 (servant's hand drawn between two rollers from which he was removing cotton which had clogged them, and maimed by a rapidly revolving beater behind the rollers, which he had seen at rest, and which he knew revolved in close proximity to the rollers).

²If the danger is obvious, knowledge of the condition of things need only

be shown." *Anderson v. Clark* (1892) 155 Mass. 368, 29 N. E. 589; *Watson v. Kansas & T. Coal Co.* (1893) 52 Mo. App. 366.

In *Appel v. Buffalo, N. Y. & P. R. Co.* (1888) 111 N. Y. 553, 19 N. E. 93, the court said: "We feel quite sure that one who worked among these rails daily for months and years necessarily was familiar with their shape and general construction, and must have known of the difficulty of removing a foot caught in the space between the rails, and the danger of the situation arising therefrom. We cannot believe that anyone could thus work and yet, while familiar with the frog, its purpose, and use, and with its apparent form and condition, and that it was unblocked (with all of which knowledge the learned court below correctly charged the deceased), could still be ignorant that there was danger to be apprehended by getting his foot caught between the rails, and that there was a liability to have it thus caught. Such liability is seen upon the slightest inspection of the frog, when coupled with knowledge (which we believe is in the possession of every man) that the rail of a railroad as it rests upon the ground is wider at the top and bottom than in the center."

In *Scharenbroich v. St. Cloud & W. Co.* (1894) 59 Minn. 116, 69 N. W. 1093, the court said: "It is thoroughly established in the law that a

without the aid of any specific testimony, there is a manifest impropriety in giving an abstract statement of the rule as to assumption of risks in terms which ignore the circumstance that this step must be accounted for.² It can scarcely be doubted that instructions such as those pronounced in the last section to be incorrect (see note 6) are often explicable as being simply an indiscriminating reproduction of incautiously broad language of this tenor.

In order to exemplify the circumstances under which courts will treat the servant's knowledge of abnormal conditions as a situation involving the consequence that he is chargeable with an assumption of the risk incident to those conditions, a number of cases have been collected in the subjoined note.³ That this consequence is assumed

servant does not necessarily assume the risks incident to the use of unsafe machinery because he knows its character and condition. He must also have understood, or by the exercise of ordinary observation ought to have understood, the risks to which he is exposed by its use. In this case it is undisputed that the plaintiff knew the exact nature of the situation. He knew that the floor was wet; that this made the floor slippery; that there was nothing except the smooth floor against which to brace his feet when turning the lever; that if his foot slipped there was nothing to prevent it from coming in contact with, and being caught by, the revolving pinion; and that if it did it would be injured. It required no special skill to understand these things, as they were patent to the sense upon the most ordinary observation. Indeed, he admits that he was aware of all this. His only excuse is that he did not think of his foot slipping. But in view of the situation—the floor being wet, and he in the act of applying force to turn the lever—he must, or ought in the exercise of ordinary intelligence, to have understood that there was increased liability of his foot slipping, as this was a matter of ordinary experience and in accordance with the most simple and familiar laws of nature. It is impossible to conceive of anything which anyone could have told him, about either the situation or the risks incident to it, which was not perfectly patent to the senses in the exercise of common observation by an adult of ordinary intelligence."

²Such statements as the following are wanting in logical precision and completeness: "It is a doctrine as well established as any in the books, that an

employee may contract to use defective machinery; and where he knows of the defect, and uses the machinery voluntarily, the law warrants the inference that he assumes the incident risks." *Ragon v. Toledo, A. & N. W. R. Co.* (1893) 97 Mich. 265, 56 N. W. 612. "While the servant is not bound to search for latent defects, he must take notice of those which are open to his observation and of which he has knowledge; and if, with such information, he continues to use the implement, he does so at his own risk as to injuries arising from such known defects." *Carney v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 635.

But a statement that the servant assumes the risks of using appliances that are "obviously defective and dangerous" satisfies every logical requirement. *Kearney Electric Co. v. Laughlin* (1895) 45 Neb. 390, 63 N. W. 941.

³In *Yates v. McCullough Iron Co.* (1888) 69 Md. 370, 16 Atl. 280, the court, while conceding that, in cases where a knowledge of defects does not necessarily carry with it knowledge of the resulting dangers, it is proper to instruct the jury as to the distinction between the consequences of the two kinds of knowledge, declared that the case under review was clearly one in which knowledge of the defects necessarily and in legal contemplation carried with it knowledge of the risk, and not one in which knowledge of the defects could possibly warrant any other conclusion than that the risk was voluntarily incurred. It was accordingly held that there could be no recovery where a man employed in handling charcoal by using a bucket attached to a yoke hanging on a wheel which ran on an overhead track uneven

to follow in many other instances will be apparent from an examination of the cases which deal with the subject of the servant's constructive knowledge of a danger. See chapter XXI., *infra*. As will be seen, the inquiry in those cases is usually directed merely to the settlement of the question whether the servant knew or ought to have known of the conditions which caused his injury. Many of the cases cited in §§ 277, 278, *supra*, may also be referred to as illustrations of the manner in which a knowledge of the conditions is viewed as carrying with it a knowledge of the attendant risks.

280. Doctrine that the servant's knowledge of an extraordinary risk does not charge him, as a matter of law, with its assumption.—(Compare § 241, *ante*, and §§ 297, 320, *post*.)—In all the English cases decided before the passage of the employers' liability act of

and depressed at the joints of the rails, which wheel was not secured so it could not leave the track, and who knew the difficulty of pushing the wheel over the joints, was injured by its fall occasioned by the wheel running off the track.

The risk of slipping into a tank unguarded by a railing is presumed to be understood by a servant who knows that it is unguarded. *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. Where noxious gases in a still house are apparent, a servant employed therein assumes the risk therefrom. *Murray v. Standard Oil Co.* (1900; N. J. L.) 47 Atl. 803. A locomotive engineer is presumed to know that a defective boiler may explode. *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 243, 14 Am. Rep. 598. A brakeman cannot recover for an injury caused by brakes of a peculiar construction, where the differences were open and obvious, and any perils arising from their use were such as the brakeman knew, or, by reason of his experience, ought to have known. *Philadelphia & R. R. Co. v. Hughes* (1888) 119 Pa. 301, 13 Atl. 286. A servant who has observed that the fastenings of a belt have partially given way assumes the risk of its breaking apart. *Anderson v. H. C. Akeley Lumber Co.* (1891) 47 Minn. 128, 49 N. W. 664. The risk arising from the closeness of a structure to a railway track is presumed to be understood by a brakeman who knows of such closeness. *Dorsey v. Phillips & C. Constr. Co.* (1877) 42 Wis. 583 (cattle chute); *Peira v. Chavin* (1897) 27 C. C. A. 227, 53 U. S.

App. 492, 82 Fed. 550 (hand hold of switch was so twisted that it rested on the end of a tie); *Chicago, B. & Q. R. Co. v. McGinnis* (1896) 49 Neb. 649, 68 N. W. 1057 (brakeman crushed by building near spur track, while he was riding on a side ladder); *Kelly v. Baltimore & O. R. Co.* (1887; Pa.) 10 Cent. Rep. 56, 11 Atl. 659 (brakeman while coming down from a car was caught between it and a building near the track).

A brakeman assumes the risk of injury from a defective coupling on a car which he has habitually handled for a long time with knowledge of the defect. *Thompson v. Missouri P. R. Co.* (1890) 51 Neb. 527, 71 N. W. 61. A servant injured while working at the bottom of an unguarded elevator shaft, by a plank which fell out upon him, cannot recover. *Alford v. Metcalf Bros. & Co.* (1880) 74 Mich. 369, 42 N. W. 52. The servant's knowledge of a defective system has been considered to require the inference that the resulting risk was assumed. *Little Rock & M. R. Co. v. Barry* (1898) 43 L. R. A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944. An experienced brakeman is presumed to understand the danger incident to coupling cars with projecting loads. *Utican C. R. Co. v. Shean* (1891; Tex.) 18 S. W. 151. A laborer who, seeing that the horses in a team drawing a wagon load of bricks to a building where he is working for a contractor are restless, sets planks across the gap between the wagon and the platform over which the bricks are to be passed into the building, and proceeds, while standing on the planks, to receive the bricks as they are tossed to him by the teamster, is

1880 (see § 274, note 1, *supra*), the courts proceeded upon the hypothesis that an assumption of an extraordinary risk was properly inferred, as a matter of law, from the mere fact that the servant accepted or continued in his employment with a knowledge of its existence and a full comprehension of the enhanced danger to which he was exposed. Some of these cases rely upon the theory of an implied stipulation on the servant's part to assume the risk, as explained in § 276, *supra*. In others the decision was based explicitly upon the principle embodied in the maxim, *Volenti non fit injuria*. But so far as appears from the language of the judges, it was regarded as a matter of indifference whether the servant's rights were referred to the one or to the other of these conceptions. In either case his inability to maintain the action was regarded as a necessary inference as soon as his knowledge, actual or constructive, was established.

As will be explained in chapters xxxv., xxxvii. *post*, the employers' liability act of 1880 was so worded as to preclude the master from putting forward the plea of a contractual assumption of a risk; the result being that it soon became a practical question whether, in actions brought under the act, the servant's consent to take the risk, within the meaning of the maxim, was or was not an inference of law to be drawn by a court upon satisfactory proof given it. After some wavering of opinion (see chapters xx., xxxv., *post*) it has been definitely settled that such proof is not enough to bar the servant's action, and that his consent to assume the risk must be established as an independent conclusion of fact. This doctrine is also held, as will be shown in the same chapters, to be applicable not only to those statutory actions with regard to which the question was first noticed,

charged with a full appreciation of the risk that as the team starts suddenly he will be thrown to the ground, and cannot recover from the teamster's master for injuries caused by such an accident. *Goddard v. McIntosh* (1894) 161 Mass. 253, 37 N. E. 169 (Knowlton, J., dissented on the special ground that the evidence did not, as matter of law, show that the danger was fully appreciated in all its elements; that there was nothing to show that he understood the temper of the horses or that the restlessness was more than momentary).

See also *Powers v. New York, L. E. & W. R. Co.* (1885) 98 N. Y. 274 (plaintiff used a crowbar as a substitute for the broken handle of the walking beam of a hand car, the result being that the beam was broken off by the increased leverage, and the plaintiff was thrown

from the car); *Crawford v. Detroit, O. R. & W. R. Co.* (1901) 127 Mich. 312, 86 N. W. 817 (danger of climbing over the end of a tender on which there is a hook for supporting the hose of the air brake); *El. Wayne, J. & N. R. Co. v. Gilderleeve* (1876) 33 Mich. 133 (car obviously too low to be coupled safely to another); *Marcan v. New York, N. & W. R. Co.* (1895) 167 Pa. 220, 31 Atl. 562 (car inspector went to work without fog signals being provided); *Natress v. Philadelphia & R. R. Co.* (1892) 150 Pa. 527, 21 Atl. 753 (plaintiff fell asleep, while operating a locomotive, from over-fatigue); *Cunningham v. Merrimac Paper Co.* (1895) 163 Mass. 89, 39 N. E. 774 (danger that sliding door will fall if the weights are off the ropes); *Wojciechowski v. Spreckels' Sugar Ref. Co.* (1896) 177 Pa. 57, 35

but also to common-law actions.¹ To this extent, accordingly, the earlier cases to the contrary effect, which have just been mentioned, are necessarily overruled.

In view of the result thus arrived at, it seems to be extremely doubtful whether the alternative doctrine of a contractual assumption of risks, which is still available in common-law actions, would now be applied by the English courts in the same form as in the earlier cases. The evidential elements from which the assumption of the risk is deduced, as a matter of implied agreement, are essentially identical with those which are considered when the propriety of admitting the maxim as a defense is in question. It seems, therefore, to be a reasonable argument from analogy that a court which holds that the servant's knowledge and appreciation of a risk do not necessarily require the conclusion that he consented to assume it, within the meaning of the maxim, cannot consistently hold that this consent is a peremptory inference where that knowledge and appreciation are established in actions in which the master relies upon the theory of a contractual assumption of the risk. So far as the writer is aware, however, this precise point has not been discussed in any reported decision in England. In North Carolina the doctrine of the English cases which turned upon the effect of the maxim has been applied in a case where the phrase "assumption of risk" is possibly used in its ordinary sense of a contractual assumption.² On the other hand, that doctrine has been rejected by a Federal court of appeal.³ In

Atl. 596 (servant put his foot on the bars of a gate, and it went through and was struck by the machinery which he knew to be underneath): *Berning v. Medart* (1894) 56 Mo. App. 443 (danger from the bursting of an inadequately guarded emery wheel).

In *Texas & P. R. Co. v. Rogers* (1893) 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378, it was said that the insufficiency of the number of servants was a "patent defect," the risk of which was assumed by any servant who engaged in the work. *St. Louis, A. & T. R. Co. v. Lemon* (1892) 83 Tex. 143, 18 S. W. 331; *Southern Kansas R. Co. v. Drake* (1894) 53 Kan. 1, 35 Pac. 825; *Atchison, T. & S. F. R. Co. v. Schroeder* (1891) 47 Kan. 315, 27 Pac. 965; *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312.

It is not amiss to mention that, where the injured person is a stranger, the fact that he has knowledge of a danger that he will encounter if he pursues his way does not always necessarily pre-

clude a recovery, but it is in every case an important factor. *Lake Shore & M. S. R. Co. v. Pinchin* (1887) 112 Ind. 592, 13 N. E. 677, citing a large number of cases.

² *Lloyd v. Hones* (1900) 126 N. C. 359, 35 S. E. 611 ("assumption of risk" not implied merely because an employee is operating a machine which he knows is lacking in safety appliances, if such have come into general use). *Smith v. Baker* (1891) A. C. 32, 601 J. Q. B. N. S. 683, 40 Week. R. 652, 65 L. T. N. S. 467, 55 J. P. 669.

³ *McPeck v. Central Vermont R. Co.* (1897) 25 C. C. A. 110, 50 U. S. App. 27, 79 Fed. 599. There, however, the court seems not to have appreciated the limited scope of the English decisions under the employers' liability act, as it enters into an elaborate statement designed to show that the doctrine of the cases is not that which is assumed by the American courts. As shown in § 276, *supra*, the actual doctrine of these courts is one which predicates a con-

one Virginia case the court disapproved, in the most emphatic terms, of an instruction that an employer was released from liability, if the injured servant continued to work after he had ascertained the negligent and dangerous manner in which the business was conducted.⁴ But it is not very clear from the report whether the theory of the instruction was that the servant had assumed the risk, or that he was negligent. If the former is the correct construction, the decision is in conflict with others in this state. See § 274, note 1, *supra*.

In New York a decision has been rendered which draws a distinction between the defective quality of appliances used by the plaintiff for the purposes of his work, and those in other parts of the employer's establishment; the knowledge of the servant that appliances of the latter class are defective being declared not to involve, as a matter of law, the conclusion that he has assumed the resulting risks.⁵ This distinction does not seem to have been recognized by any other court, and has apparently no logical basis. The phrase "assumption of risk," however, may have been used to express the predicament to which the description of contributory negligence is more usually and more properly applied. See chapter xviii., *post*.

In some jurisdictions the doctrine that known risks are assumed, as matter of law, has been abrogated by statutes. See chapter xxx., *post*.

281. Temporary forgetfulness of a known danger at the time of the accident.—It would clearly be inconsistent with the rationale of the defense of assumption of risks to regard it as being applicable in cases where, through mere inadvertence at the time of the accident, the servant failed to recollect or to observe the existence of a risk previously known to and appreciated by him. Accordingly, forgetfulness of and inattention to such a risk, when they are not brought

tractual assumption of risks, and not an assumption based upon a maxim which is independent of the existence of contractual relations. If it was intended to argue on the hypothesis that the servant's rights are determinable by the same standard, whether the maxim or an implied contract be relied upon,—a position which the present writer believes to be the correct one,—so important an element should have been explicitly mentioned. Having omitted to refer to it, the court has laid itself open to the charge that, in thus repudiating a doctrine formulated as to the effect of the maxim, for the reason that that doctrine is in conflict with one formulated with reference to the theory of an im-

plied contract, it has failed to understand the true significance of the English decisions.

A similar remark is applicable to doubts expressed as to the correctness of the English decisions in *Valk v. B. F. Sturtevant Co.* (1900) 43 C. C. A. 527, 104 Fed. 276.

⁴ *Richmond & D. R. Co. v. Norment* (1887) 84 Va. 167, 4 S. E. 211 (car repairer injured by lack of proper signaling system).

⁵ *Schwandner v. Birge* (1884) 33 Hun, 186 (boy of nineteen employed in an upper story of a factory from which, as he knew, the means of escape were insufficient in case of fire).

about by any cause which the average man would consider adequate to justify the mental states thus designated, are universally regarded as insufficient reasons for excluding the defense. A lapse of memory, or the inaction of the faculties of observation, under such circumstances, may fairly be regarded as a conclusive proof of negligence, the result being that the servant is incapacitated from recovering either on that ground or on the ground that he was constructively chargeable with a knowledge of the risk during the fatal period of forgetfulness or inattention, and that his responsibility for such injuries as might result from that risk was continuous and uninterrupted.¹ Even if the servant was entirely free from blame as regards the action which was the immediate occasion of his receiving the injury, he cannot recover if it appears that that action was due to an extrinsic cause for which the employer was in no wise responsible.²

A more difficult situation is presented when the servant's failure to recollect or observe a previously ascertained risk is due to the fact that he was engaged in some pressing duty; and the courts have arrived at different conclusions with regard to the juridical consequences of such a situation. Some reference to cases of this type was necessitated by the course of the discussions in an earlier part of this treatise (§ 63, *ante*), and it will now be requisite to revert to the subject once more in the present connection.

¹ In *Pingree v. Leyland* (1883) 135 Mass. 398, where a man who had for several hours run a winch with uncovered gearing, and was then injured by coming into contact with it, the doctrine was laid down that, where the servant is so fully cognizant of the character and condition of a machine that he feels it advisable to use more than ordinary care in operating it, he cannot recover for an injury which he receives, in a moment of inadvertence, from the very source of danger to which he sees himself to be exposed. In *Palmer v. Harrison* (1885) 57 Mich. 182, 23 N. W. 624, the action was held not to be maintainable where the plaintiff testified that he did not pay any attention to whether the pointer which injured him was going or not. In *Clark v. St. Paul & N. C. R. Co.* (1881) 28 Minn. 131, 9 N. W. 581, recovery was denied where a brakeman, after he had been struck by a projecting roof and knocked off a car, said in answer to the question whether he did not know the roof was there, "Yes; but I did not think of it at the time."

That a boy attending a machine having unguarded cogwheels allowed his hand to slip into them, because of his inadvertence or inattention caused by watching another boy who was near by, gives him no right of recovery against the employer. *E. S. Higgins Carpet Co. v. O'Keefe* (1897) 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900. In a case where a boy unnecessarily put his arm into a dangerous position with regard to moving machinery, it was laid down that the fact that a servant had forgotten about a previously known danger, and omitted to adopt the suggested precaution to avoid it, would not relieve him of the charge of contributory negligence. *Truntle v. North Star Woollen Mill Co.* (1894) 57 Minn. 52, 58 N. W. 832.

See also note 9, *infra*.

² *Cheney v. Middlesex Co.* (1894) 161 Mass. 296, 37 N. E. 175, where a servant, while passing through an alley between moving machines, suddenly dropped his hands upon bearing machinery, and was caught in the gears.

The effect of several New York decisions with regard to one particular class of accidents is that a railway servant cannot be declared negligent, as a matter of law, simply because the location of the structures above or alongside the track, and their relation to his own personal safety and that of the train which he is assisting to operate, are temporarily forgotten by him, owing to his absorption in his duties, or to some extrinsic event which suddenly diverts his attention at a critical moment.³ According to the supreme court, these decisions may be abstracted from the facts involved and treated as having established the general principle that "a servant is not bound at all times and under all circumstances to be mindful of the dangers

³A brakeman is not, as matter of law, guilty of negligence contributing to his being struck by a low bridge over the track and injured thereby, in failing to take notice of the fact that he is approaching the bridge, although he has been over the road many times and knows of the existence of the bridge, where at the time of the accident he is upon a long train, intent upon the discharge of his duty, with his face toward the rear, in a position most effectually to discharge such duty and has no warning of the bridge. *Wallace v. Central Vermont R. Co.* (1893) 138 N. Y. 302, 33 N. E. 1069, Reversing (1892) 43 N. Y. S. R. 639, 18 N. Y. Supp. 280. The decision in *Williams v. Delaware, L. & W. R. Co.* (1889) 116 N. Y. 628, 22 N. E. 1117, where the court uses language which is apparently susceptible of the construction that it intended to apply the doctrine that a brakeman is, as a matter of law, negligent if, in the absence of anything to divert his attention, he does not observe the proximity of a bridge, the position of which he has previously ascertained, was explained as having really decided no more than that contributory negligence is inferable, as matter of law, where a brakeman, knowing that he is approaching an overhead bridge, and that it is dangerously low, turns his back to it. It is worthy of observation that, on the facts, the *Wallace Case* is not inconsistent with those cited in the latter part of this section, as there were "tell-tales" placed at most of the bridges in accordance with the statutory requirement, and the warning signal at the particular bridge which caused the injury was out of repair. Clearly, therefore, the position might have been taken that, in view of the bridge being an exception to the general practice of the company, the servant's

constructive knowledge of the conditions was a question for the jury. The risk assumed was that of low bridges with an efficient warning signal, not that of bridges without them, unless his knowledge of this particular risk was established.

The *Wallace Case* was followed in *Fitzgerald v. New York C. & H. R. R. Co.* (1899) 37 App. Div. 127, 55 N. Y. Supp. 1124 (low overhead bridge); *Bentley v. New York C. & H. R. R. Co.* (1897) 24 App. Div. 303, 48 N. Y. Supp. 503 (telegraph pole near track); *Brown v. New York C. & H. R. R. Co.* (1899) 42 App. Div. 548, 59 N. Y. Supp. 672 (mail crane); *McGovern v. Standard Oil Co.* (1896) 11 App. Div. 588, 42 N. Y. Supp. 595 (brakeman struck by cross-bar extending across an opening in a fence through which a siding passed, held not to be, as matter of law, guilty of contributory negligence in failing to observe it, the evidence being that, although he had opportunities for ascertaining its position and the danger created by it, his attention, as he approached the bar, was drawn away by the cries of a person close by). In another case the court refused to say, as a matter of law, that when approaching a highway crossing an engineer must bear in mind the precise location and character of every switch in the immediate vicinity, while he is running an express train at 40 miles an hour. *Young v. Syracuse, B. & N. Y. R. Co.* (1899) 45 App. Div. 296, 61 N. Y. Supp. 202. There the engineer of a train ran into a switch unnecessarily placed behind a water tank, so that the danger signal on it could be seen only 60 feet away. The case was declared to be for the jury, though he knew of the switch, and though rules of the company, of which he knew, required engi-

which surround him while engaged in the performance of his duty, even though he may be well aware of their existence." The corollary of this rule is considered to be that, if a jury is justified in finding that the servant was not negligent in failing to observe the risk, it cannot be declared that the risk was assumed.^{3a}

A similar, though less pronounced, trend of judicial opinion is observable in some cases decided in other courts.⁴

To the present writer it seems that the doctrine embodied in the decisions cited is erroneous, except in so far as it may be considered merely an assertion of the narrow principle that, if an employer has elected under such circumstances as those presented to rely specifically upon the defense that the servant was negligent in failing to protect himself at the time of the accident, the case must be sent to the jury, for the reason that his forgetfulness of or inattention to the danger may possibly have been excusable owing to the engrossing nature of his duties. (See §§ 350, 440d, *post*.) But if the employer has taken his stand upon the defense of an assumption of the risk continuing from the time the servant ascertained its existence up to the time when he was injured, it is not easy to see on what logical grounds the temporary ignorance of the servant, resulting from his absorption in his work, can prevent that defense from operating as a bar to the action.⁵ The theory under which the

neers to approach switches with great care, having their trains, if possible, under such control as to be able to stop them from running into an open switch.

^{3a} *Young v. Syracuse, B. & N. Y. R. Co.* (1899) 45 App. Div. 296, 61 N. Y. Supp. 202.

⁴ In *West v. Southern P. Co.* (1898) 29 C. C. A. 219, 56 U. S. App. 323, 85 Fed. 392, the court recognizes, *arguendo*, the principle that a master may be liable to a brakeman for an injury caused by the proximity of an uncovered culvert to a switch, where its presence was unknown to him at the time of the accident, or, although it was exposed to view, so that if thoughtful and observant he might have seen and avoided it, yet by reason of his intentness upon the work in hand, his attention was for the moment diverted.

In another case, where it was contended that a brakeman assumed the risk of coupling by reason of his knowledge of the character and condition of the drawbar of a certain engine, and it appeared that he was ordered to make the coupling when a passenger train was due in a few moments, the court said that in

using the defective drawbar he did not waive his right of action for the injury received. He would not be justified in disobedience to orders at such a critical moment. *Strong v. Iowa C. R. Co.* (1895) 94 Iowa, 380, 62 N. W. 799. But see note 5, *infra*, as to the Iowa doctrine.

In another case, the absence of an emergency or unusual circumstances demanding the servant's exclusive attention, rapidity, or promptness of action was adverted to as evidence corroborating the conclusion that the servant had assumed obvious risks arising from certain permanent conditions on the master's premises. *Disano v. New England Steam Brick Co.* (1898) 20 R. I. 452, 40 Atl. 7.

The contrasted situations indicated in the text—which, it will be noticed, represent what is in most instances a mere accident of litigation, depending upon the theory of the facts which counsel may have happened to prefer—afford a basis upon which it is easy to reconcile two Iowa cases which seem at first sight to be somewhat inconsistent. In *Greenleaf v. Dubuque & S. C. R. Co.* (1871) 33 Iowa, 52, where a brakeman

servant's assumption of a risk superadded to his employment by the master's negligence is implied on the ground of a supposed stipulation not to hold the master responsible for such injuries as may subsequently result from the existence of that risk, and the theory that the servant's forgetfulness of the defective conditions at the time of the accident injects into the case a differentiating factor which will enable him to maintain an action, cannot stand together without the aid of the hypothesis that the contract into which the servant is thus supposed to have entered is suspended for the moment, whenever his thoughts and attention happen to be excusably diverted to such an extent that he fails to remember the danger to which the contract relates. Such a hypothesis introduces into the law of contracts a conception not admitted in any other class of cases, and no valid reason has ever been suggested why it should be admitted in the class now under discussion.⁶

was struck by the waterspot of a tank, the defense raised was contributory negligence. The court refused to say that this was available, as a matter of law, remarking that, if the service to be performed was of a character to require that his exclusive attention should be fixed on it, and that he should act with rapidity and promptness, it could hardly be expected that he should bear in mind the existence of the defect and be prepared at all times to avoid it. In *Perino v. Chicago, R. I. & P. R. Co.* (1879) 52 Iowa, 276, 3 N. W. 43 (1880) 55 Iowa, 326, 7 N. W. 627, the defense of waiver was explicitly relied upon, and the court accordingly held that the servant's absorption in his duties did not excuse his failure to remember the dangerous conditions. See note 9, *infra*. The latter case is, however, apparently inconsistent with the *Strong Case* (1895) 94 Iowa, 380, 62 N. W. 799 cited in note 4, *supra*.

As the defense of assumption of risks is an affirmative one, which must be raised by the employee, a complaint is not demurrable which alleges that the injury was received in consequence of its being impossible to stop the train as quickly with the defective brakes furnished as if they had been in good condition, and that the servant, while attempting to stop the train, was carried against a low overhead bridge which he failed to observe, owing to his being busily engaged in his duties. *Beard v. Chesapeake & C. R. Co.* (1893) 90 Va. 351, 18 S. E. 559.

⁶In *Young v. Syracuse, R. & V. Y. R. Co.* (1899) 45 App. Div. 296, 61 N. Y. Supp. 202, Smith, J., aptly remarks in his dissenting opinion: "If the doctrine of the assumption of obvious risks has any vital force, how can it matter whether or not the servant has in mind the danger? This fact clearly has significance if the question be one of contributory negligence. If it be one of the assumption of obvious risks, it is clearly immaterial. Under that doctrine the master is absolutely relieved from liability resulting from that risk. There is no question of the care or the negligence of the employee. It is a contract exemption absolute."

A similar doctrine is involved in a decision by the supreme court, of later date than this one, *Raban v. Metropolitan Street R. Co.* (1901) 59 App. Div. 250, 69 N. Y. Supp. 570, where an employee in a boiler room was injured by falling through a space which he knew to exist between the boilers and the end of a bridge along which he was making his way to shut off escaping steam after an explosion. The accident had filled the room with vapor, and there was a good deal of confusion and excitement. The circumstances, therefore, were manifestly such as would probably have caused a temporary forgetfulness of the conditions. But the point was not expressly noticed, either by counsel or by the court.

The attempt of the majority of the court in the *Young Case* to distinguish *Gibson v. Erie R. R. Co.* (1875) 63 N.

These considerations seem to be decisive in favor of the theory adopted by the courts of several states, that an action for an injury caused by the master's negligence is barred by evidence which shows that the servant had, before the accident, attained a full comprehension of the risk created by that negligence, although it may also be apparent that, at the time of the accident, he was giving such close attention to matters connected with his duties that he had temporarily forgotten or did not observe the existence of the risk. That is to say, the defense of an assumption of the risk operates as a bar to the action, irrespective of whether the servant was or was not negligent in the premises. (Compare §§ 306-308, *post.*) Or, as the situation is also stated, the question of the servant's waiver cannot be affected by the rapidity or promptness with which he may have been required to act when the risk was encountered.⁷ This result may be viewed as a simple deduction from the axiomatic principle that, if the facts of a case are such as to enable the person sued to rely on two or more defenses at his option, and one of those indisputably furnishes a perfect bar to the action, he cannot be precluded from availing himself of its protection, merely because the intervention of a jury is necessary to determine whether the other defense is also open to him. Or the conception may be entertained that the possibility of the servant's forgetting a risk which has been previously accepted is an incidental hazard embraced by the implied stipulation upon the subject.⁸

Y. 450, 20 Am. Rep. 552, on the ground that, when struck, the plaintiff was not engaged in any duty which distracted his attention from the danger which confronted him, is an attempt to perform the impossible by converting into a differentiating factor a detail which in the earlier decision was wholly immaterial.

⁷ *Bressman v. Lehigh Valley R. Co.* (1886) 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226 (low bridge; dark night); *Perigo v. Chicago, R. I. & P. R. Co.* (1879) 52 Iowa, 216, 3 N. W. 43 (1880) 55 Iowa, 326, 7 N. W. 627 (brakeman was injured by a structure near the track).

In *Baltimore & O. R. Co. v. Stricker* (1878) 51 Md. 47, 34 Am. Rep. 291, where the injury was caused by a low overhead bridge, the court in answer to the suggestion that, as the servant's attention might have been diverted to other duties, he might not have been wanting in due care, said that its decision against the right of recovery was

not based on this ground; that in his preoccupation with his other duties he might have been free from blame in losing sight of the danger which threatened him; but that his inability to maintain the action was a necessary result of the fact that the danger was obvious and therefore assumed by him.

A brakeman who knew that a spring attached to a drawhead to prevent the cars from coming dangerously close together had been lost, and who himself replaced the drawhead without the spring, and who was injured later during the run while coupling that car to another, by the cars being driven so close together as to crush him, cannot, on account of his having assumed the risk, recover of the company, although it was dark at the time and he did not know that the car he was coupling was the one without the spring. *Houston & T. C. R. Co. v. Barrager* (1890; Tex.) 14 S. W. 242.

See also the following notes:
⁸ The situation is thus stated in a

So far as regards its effect in barring the servant's action, this theory is virtually equivalent to one which is asserted more or less distinctly in several cases; *viz.*, that, when a servant has once obtained notice of an abnormal risk, his failure to observe it and protect himself on all subsequent occasions must be treated as negligence *per se*, and that he cannot claim any special indulgence on the ground that his attention was diverted by the necessity of attending closely to his duties at the particular moment when the injury was received.⁹

As to the conception that a master is guilty of negligence if his instrumentalities or methods are of such a nature that a momentary and excusable diversion of the servant's attention from his environment owing to his absorption in his duties is likely to cause injury, see §§ 31, 66, *ante*.

282. Failure of the servant to notify the master as to the existence of the dangerous conditions.— (Compare §§ 303, 303a, *post.*)— The failure of the servant to report to the master the existence of the dangerous conditions which caused the injury in suit is frequently referred to as a circumstance which corroborates the conclusion that the responsibility for any injuries which the servant might receive by

case where the confusion of mind resulting from being suddenly called upon to get out of the way of an approaching train caused a section man to forget the presence of a pile of lumber close to the track where he was working. The court considered that the possibility that the pile might prevent his escaping in time or cause him to stumble was one of the risks assumed by him, unless, as was suggested, the train was running at a rate greater than he had reason to anticipate. *Bongtson v. Chicago, St. P. M. & O. R. Co.* (1891) 47 Minn. 487, 50 N. W. 531. Similarly in *Baylor v. Delaware, L. & W. R. Co.* (1878) 40 N. J. L. 23, 29 Am. Rep. 268 (low bridge case) the court argued thus: "Nor does there seem any weight in the suggestion that the plaintiff was called upon suddenly to take part in the operation of switching off these cars at the time in question. There was nothing

usual in this act; it was part of the ordinary duty of the brakeman to perform it. As to the pretext that the call upon the plaintiff to perform this service was sudden, and that he was thrown off his guard, it is certainly a conclusive answer to say that it was a part of his bargain when he undertook this business, that he subjected himself to the

risk of such emergencies. He did not stipulate that there should be no exigencies or unexpected demands upon him for services, and in the ordinary course of things he was liable to be placed in these situations that were full of danger to a heedless person."

⁹In *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710, 6 So. 277, where the servant was injured by a low overhead bridge, the court said: "If, under the rules we have stated, the plaintiff was sufficiently notified or warned, and from inattention, indifference, absentmindedness, or forgetfulness, he failed to inform himself, or failed to take necessary steps to avoid the injury, this was proximate, contributory negligence, and is also a complete answer to the action. He must avail himself of the instructions given him or furnished for his use; and, taking into the account the surroundings and perils attendant upon the nature of the service he enters upon, he must bestow such care, watchfulness, and caution as ordinarily prudent men would usually exercise in reference to their own safety under like circumstances. There are perils in the very nature of such service, against which prudence cannot always guard. Of these the employee takes the

reason of those conditions was assumed by him.¹ The choice open to the servant is said to be that he may either notify the master or remain silent and take the risk.² The rule is declared to be founded on justice and good sense, for the reason that, in a majority of cases, employees are better informed than their employers as to the safety of machinery in use by them, as they have the means of information.³

It seems a reasonable inference from the language in which the servant's omission to report a defect is referred to in the cases cited, that he was considered to be subject to a specific duty in that regard, a breach of which would have rendered him guilty of contributory negligence, if there had been any object in mentioning the defense as an additional bar to the action. In fact, the failure to inform the master of an abnormal risk which has supervened is a

risk. He is guilty of contributory negligence if in his care, diligence, and watchfulness he falls below the standard stated above." For other decisions which, on the facts, virtually involve the assumption that trainmen can always, by taking adequate care, protect themselves from injury under these or similar circumstances, whether there is or is not some pressing duty to perform, see *Bayler v. Delaware, L. & W. R. Co.* (1878) 40 N. J. L. 23, 29 Am. Rep. 208 (low bridge); *Illick v. Flint & P. M. R. Co.* (1888) 67 Mich. 632, 35 N. W. 708 (side of bridge near track struck brakeman while climbing a car to set brakes which had been signated for); and the cases mentioned in notes 7 and 8, *supra*. Compare also the cases cited in § 30a, *ante*, some of which exhibit a similar standpoint, even though the servant's absorption in his duties may not have been explicitly adverted to. Some remarks on the absurdity and injustice of this assumption have been offered in § 63, note.

¹"It has been repeatedly held—in fact there is no conflict of authority upon this question—that where an employee has knowledge of machinery being defective and dangerous, and in the course of his employment continues to use it without notifying his employer of such defect and asking him to repair, he voluntarily accepts the risks, and cannot, in case of injury from such cause, recover damages." *Mansfield Coal & Coke Co. v. McInery* (1879) 91 Pa. 185, 36 Am. Rep. 662.

This omission on the servant's part is also mentioned as a material factor in numerous other cases, of which it will be sufficient to cite the following: *Washington & G. R. Co. v. M. H.* (1890) 135 U. S. 554, 34 L. ed. 121, 10 Sup. Ct. Rep. 1044; *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 35, 37 L. ed. 772, 13 Sup. Ct. Rep. 911; *Baugh v. Texas & P. R. Co.* (1879) 100 U. S. 213, 224, 25 L. ed. 612, 617; *Queen v. Central Branch Union P. R. Co.* (1883) 30 Kan. 691, 1 Pac. 179; *Pollich v. Sellers* (1890) 42 La. App. 623, 7 So. 786; *Lake Shore & M. S. R. Co. v. Conway* (1897) 169 Ill. 505, 43 N. E. 483; *Illinois C. R. Co. v. J.* (1882) 11 Ill. App. 324; *New York, L. E. & W. R. Co. v. Lyons* (1888) 119 Pa. 324, 13 Atl. 205; *Wanamaker v. B.* (1886) 111 Pa. 423, 2 Atl. 500; *Hess v. Kay* (1887) 144 Mass. 186, 10 N. E. 807; *Davis v. Detroit & M. R. Co.* (1870) 20 Mich. 165, 4 Am. Rep. 344; *Mad River & L. E. R. Co. v. Bailey* (1856) 5 Ohio St. 511, 67 Am. Dec. 312; *East Tennessee, V. & G. R. Co. v. Gurney* (1883) 12 Lea, 46; *K. v. S.* 5 S. W. 2d; *Litton v. Thornton* (1881) *Don Co. v. Smith* (1887) 86 Tenn. 45, 7 Viet. L. Rep. (12) 4.

²*The Antonio Zambrana* (1898) 89 Fed. 60 (seaman, knowing of the intoxication of the mate, concealed the fact from the master, and endeavored to come the intoxication before it came to the master's notice).

³*New York, L. E. & W. R. Co. v. Lyons* (1888) 119 Pa. 336, 13 Atl. 205.

ness adverted to as a circumstance furnishing such a bar.⁴ But there is high judicial authority for a different theory. In a leading English case Lord Watson expressed the opinion that the provision in the English employers' liability act of 1880 (see chapter XXXVII, *infra*), by which the servant is declared incapable of suing under the statute if he has failed to give his superiors notice of a defect known to him, but not to them, has put the servant in a more favorable position than he occupied under the common law;⁵ and his view has been adopted by the supreme court of Canada.⁶ But with all defer-

⁴ *Idle Show v. H. & R. Co.*, 8 Can. Sup. Ct. 108, 109, 110, 111, 6 N. E. 1007. The failure to report is treated as contributory negligence in *Thompson v. A. & W. Co.*, 11 L. E. & W. 77, 108 (1885), 108 N. E. 274.

All the employers are bound to be faithful to the interest of the employer, as well as careful of their own safety, and it is reasonable to say that they shall promptly report any defect likely to endanger their lives or the property under their control. If they make no such complaint, it is fair to infer that they regard the appliances as safe and sufficient or that they knowingly accept the risk involved in the service." *Illinois C. R. Co. v. Jones* (1882) 11 Ill. App. 324.

⁵ See *Smith v. Baker* (1891) A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 51 J. P. 600, where, in the course of his comments on the provision, he remarked: "I think the object and effect of the enactment is to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favor of the employer."

⁶ *Whitaker v. Foley* (1892) 21 Can. S. C. 580. In view of the paucity of direct authority respecting the point now under discussion, it is perhaps not amiss to offer a few criticisms upon the reasoning of this case. The exposition of principles appears to be singularly unsatisfactory,—more particularly when it is considered with reference to the special findings which are set out in the record. The answers of the jury to three of the questions propounded by the trial judge were to this effect: (1) That the plaintiff was injured by the

defect in the machinery, who appeared to be the person responsible for a complaint being made of the defect, and that the defendant did not know of the defect; (2) that the manager of the defendant firm was his own self-interested person, but to have been a competent one; (3) that in view of the first of these findings it is not apparent why the effect of the failure of the servant to notify the employer of the defect should have been a bar to recovery. The second finding is a material question in this case. There is no intimation that the evidence was insufficient to warrant the conclusion arrived at by the jury, nor that the master's position was inadequate to excuse the master with knowledge, for the reason that it was made to a mere fellow servant. So far as the report shows, it can have been made to the manager of the concern, who, as already stated, was one of the partners in the defendant firm. But even if we assume that this finding could not be treated as an element in the case for some reason, evidential or doctrinal, which is not disclosed, there still remains the difficulty that the jury also declared that this managing partner "ought to have been cognizant of the defect. That this finding was, so far as the defendant's liability was concerned, equivalent to a finding, is indisputable, both on principle and authority. See *Mellors v. Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 344, 7 Jur. N. S. 845, 9 Week. Rep. 748, where Blackburn, J., remarked during the argument of counsel that an allegation that an instrumentality was known by the defendant to be in an unsafe condition is established by proof that he "ought to have known" that it was in that condition. Other English cases which declare or assume that liability on the master's part is negatived by his ignorance of the defect only where it appears that such ignorance was excusable are: *Wells v. Matheson* (1861) 4 Macq. H. L. Cas. 215; *Kellham v. Eng-*

ence to this very distinguished jurist, it seems open to doubt whether this theory is correct. There is, it is true, no English decision which in terms lays down the rule that a servant who learns of a defect is bound to communicate his knowledge to his master, and that his failure to give such information constitutes a breach of a specific duty which of itself is enough to prevent his recovering for any injury that he may thereafter receive owing to the existence of the defect. But the reason for the lack of direct authority on the point is sufficiently obvious. In all the cases decided under common-law doctrines up to the time when Lord Watson delivered this opinion, the circumstances were necessarily such as to bring them within the scope of the principle that the servant's action was absolutely barred whenever it was shown that he went on working with a full appreciation of a risk resulting from the master's negligence. The natural result was that, although the failure of the servant to

land' (1866) L. R. 2 Q. B. 33, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151, 7 Best & S. 676; *Paterson v. Wallace* (1854) 1 Macq. H. L. Cas. 748; *Roberts v. Smith* (1857) 2 Hurlst. & N. 213, 26 L. J. Exch. N. S. 319, 3 Jur. N. S. 469; *Webb v. Renne* (1865) 4 East. & F. 608. For the American decisions to the same effect see chapter X., *ante*. In view of this doctrine, the finding in question manifestly put the master in the same position as if notice of the defect had actually been given by the servant, and rendered it a mere matter of supererogation to inquire whether or not he was relieved from liability by the servant's failure to give notice. The defendant firm was plainly answerable on the simple ground that one of its members had been personally negligent in not remedying a defect of which he had constructive knowledge. See *Mellers v. Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, 9 Week. Rep. 748; *Ashworth v. Stannix* (1861) 3 El. & El. 701, 30 L. J. Q. B. N. S. 183, 7 Jur. N. S. 407, 4 L. T. N. S. 85.

Thus far we have been discussing the case on the assumption that the court, in deciding that a judgment for the plaintiff should not be set aside for the mere reason that the defendant "had no notice" of the defect, used the phrase in the sense of "had received no notification from the servant." This is the construction put upon the decision in the reporter's headnote, and the reliance placed by Strong, J., upon the passage from Lord Watson's opinion, where this

is undoubtedly the import of the words shows that the court intended, in these events, to assert the doctrine that the servant did not forfeit his right of action by not giving notice of a defect which was known to him. But it may be desirable to advert, in passing, to the ambiguity of phrase "had no notice," which, so far as the words themselves are concerned, may also be taken to mean "had no actual knowledge." The significance of this fact when considered with reference to the substance of the findings above referred to is obvious. Such a construction of the phrase would render Mr. Justice Strong's remarks applicable to the second of those findings, and upon this circumstance, taken in connection with the further circumstance, already commented upon, that the findings as to the complaint made by the servant, and the master's possession of constructive knowledge of the defect, a plausible argument might be based, that the court also intended to stand upon or for the doctrine that it is the existence or absence of actual knowledge that determines whether a master is or is not liable. Such a doctrine, as is very plainly shown by the English cases cited above, would be inconsonant. But the inquiry is not worth pursuing in the present connection. We have merely drawn attention to the point, as being one of the obscure aspects of a case which, to say the very least, is neither a model of lucid statement nor a favorable exemplification of the manner in which a court of review

report or complain of a defect was mentioned in some of the cases,⁷ this fact was never treated as a material element in the case, the master's defense being regarded as complete without any reference to the question whether the servant had communicated his knowledge. In none of these cases was the evidential significance of the servant's silence considered in any other point of view than as a circumstance tending to show his acquiescence in the conditions,—that is to say as a circumstance corroborating a presumption, already absolute, that the risks in question had been accepted. Such being the state of the authorities, the mere fact that the existence of a duty on the servant's part to notify his master of a defect was never affirmed cannot fairly be adduced as a ground for denying that there was such a duty. When subjected to the test of general principles, the correctness of Lord Watson's theory seems to be equally disputable. It is impossible to adopt it without accepting the conclusion that if a jury has, in a common-law action, found that the servant was, under the particular circumstance of the case, guilty of contributory negligence in failing to give notice of the defect which caused his injury, and it is clear that the verdict was based on the hypothesis that there was a legal duty incumbent on the servant to give the notice, a court of review would be constrained to set the verdict aside. Such a proposition seems too preposterous to entertain. The extreme improbability of such a verdict's even being rendered may be readily conceded, but this practical consideration is immaterial in a discussion of the abstract point of law which is involved.

Inasmuch as a servant frequently finds himself relegated to his common-law rights, owing to his failure to give due notice that the injury was sustained, or to bring the action within the statutory period, the true doctrine on this subject is still a question of more than theoretical interest in England and her colonies, where it has not yet been determined how far the doctrine enunciated in *Smith v. Baker*⁸ may, when the question arises, be held to have modified, in common-law cases, the theory of the older decisions that the servant's acceptance of a risk is to be inferred, as a matter of law, from his continuance in work with a knowledge of its existence. (See § 280, *supra*.) In Massachusetts it seems to be immaterial, in this point of view, whether the action is brought at common law or under the statute, as the English doctrine that the servant's assumption of risks

should deal with the special findings of a jury in actions of this sort. * [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 167, 40 Week. Rep.

⁷ For example, *Slipp v. Eastern Cotton*, 392, 55 J. P. 669.

For R. Co. (1853) 9 Exch. 223, 3 C. 14.

Rep. 185, 23 L. J. Exch. N. S. 23.

is a question for the jury where the statute is relied upon has been definitely repudiated in recent decisions.⁹

A case in which there is obviously no obligation to notify the master as to a superadded risk is presented where that risk is created by a change in the position of the appliances by or under the authority of the master. Under such circumstances the master is charged with all the knowledge which the servant can impart to him.¹⁰

283. Servant's position the same whether the risk existed when he began work, or supervened afterwards.—(Compare the discussion of this element in § 384, *post*.)—It has never been questioned, and there are numerous cases expressly or impliedly deciding, that the doctrine of assumption of risks is a bar to the action whenever the abnormal danger was known, actually or constructively, to the servant at the time when he entered the employment.¹

⁹ *O'Maley v. South Boston Gaslight Co.* (1893) 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119; *Davis v. Forbes* (1898) 171 Mass. 543, 47 L. R. A. 170, 51 N. E. 20.

¹⁰ *Fairbank v. Harntzsche* (1874) 73 Ill. 236.

¹ If the servant "thinks proper to accept an employment on machinery defective from its construction or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment." *Clarke v. Holmes* (1862) 7 Hurlst. & N. 943, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, per Cockburn, Ch. J.

"If the servant enters into an employment knowing there is danger, and is satisfied to take the risk, it becomes part of the contract between him and his employer that the servant shall expose himself to such risks as he knows are consistent with the employment." *Saxton v. Hawksworth* (1872) 26 L. T. N. S. 851, 853, per Willes, J.

There is probably another exception to the rule that a master is liable for his negligence, *viz.*, "where [he] the master has furnished instruments or machinery which are dangerous, but the servant knows that they are dangerous, and the danger is so normal that it is in the ordinary course of the employment; in that case the servant cannot complain of an injury which he has sustained, because he undertook the employment with that risk." *Yellous v.*

Shaw (1861) 1 Best & S. 435, 116 L. J. Q. B. N. S. 333, 7 Jur. N. S. 887, 9 Week. Rep. 748, per Blackburn, J. (*arguendo*).

"The implied contract to have the machinery in such a safe and proper condition as not to expose the servant to unnecessary risk is the foundation of the master's liability. If the servant, being fully capable of choosing and contracting for himself, and with full notice of the risk which he assumes, chooses to undertake a hazardous employment, to put himself in a dangerous position, or to work with defective and unsuitable tools, machinery, or appliances, no such implied contract arises." *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 606 (uncovered cogs).

"Obvious imperfections in methods or machinery, existing at the time of the employment, cannot be made the basis of a liability in favor of an employee who suffers an injury in the course of his employment, for the reason that the employer has a right to have and use imperfect methods and tools, and to require others to enter his employ to aid in such use, and that in so doing he does not undertake to insure the employee." *Ragon v. Toledo, A. L. & V. M. R. Co.* (1893) 97 Mich. 265, 56 N. W. 962 (space between ties left unfastened).

"The servant assumes the danger of the employment to which he voluntarily and intelligently consents, and ordinarily he is to be subjected to the hazards necessarily incident to the employment, if he knows that such precautions have been neglected."

In some of the cases which exemplify this aspect of the rule the risks involved were created by a condition of the plant which was essentially permanent, and for that reason would doubtless be assigned by some courts to the ordinary class.² Compare §§ 55, 57, and 263, 264, *ante*. In others the risks arose from the imperfection of the arrangements and methods adopted in the conduct of the business.³

still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions." *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115 (jolt- ing of locomotive in passing over ill- constructed frogs threw servant off foot- board).

"It is well settled in the courts of this country and England that, if a servant chooses to enter into an employment involving dangers of personal injury which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service, and which he had no reason to expect would be obviated or removed." *Clark v. St. Paul & S. C. R. Co.* (1881) 28 Minn. 128, 9 N. W. 581.

² By the courts referred to, a considerable part of the subjoined decisions would be based upon the conception that there was no negligence on the master's part. *Anthony v. Levert* (1887) 105 N. Y. 591, 12 N. E. 561 (unguarded trap door in a passage); *De Forest v. Jewett* (1881) 23 Hun. 390, Affirmed (1882) 88 N. Y. 264 (switchman while coupling cars caught his foot in an open ditch or trench which had remained in the same condition while he had worked for the defendant, and was in plain sight, and had been passed by him day after day); *Clark v. St. Paul & S. C. R. Co.* (1881) 28 Minn. 128, 9 N. W. 581 (awning of elevator projected over railway track); *Gibson v. Erie R. Co.* (1875) 63 N. Y. 149, 20 Am. Rep. 552 (low overhead bridge); *Williams v. Delta Ice L. & W. R. Co.* (1889) 116 N. Y. 28, 22 N. E. 1117 (low overhead bridge); *Arizona Lumber & Lumber Co. v. Rooney* (1895) — Ariz. — 42 Pac. 952 (circular saw left without a hood); *Bell v. Detroit Leather Co.* (1889) 73 Mich. 158, 41 N. W. 216 (one who enters upon employment in a tannery, where he walks backwards, dragging hides from vats to a wash wheel, on a slippery floor, across a space about 16

inches wide along the edge of a vat, assumes the risk of falling into the vat); *French v. Columbia Spinning Co.* (1897) 160 Mass. 531, 48 N. E. 269 (plaintiff injured through stepping too near the end of a running board while reaching forward to clean a coupling); *St. Louis, I. M. & S. R. Co. v. Robbins* (1893) 57 Ark. 377, 21 S. W. 886 (ties exposed, and space between them not filled; plaintiff recovered only because the place where the injury was received was more than usually hazardous, the theory being that knowledge of this increased risk could not be imputed to him); *Sweeney v. Berlin & J. Envelope Co.* (1886) 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358 (old pattern of a machine wanting in a certain safety device); *Crichton v. Keir* (1863) 1 Sc. Sess. Cas. 3d Series, 407 (servant injured by reason of the age and feeble condition of a horse); *Loug v. Colorado R. Co.* (1892) 96 Cal. 269, 31 Pac. 170 (car so constructed that there was no space to go between it and the car to which it was to be coupled). For other cases which, as the facts stand, obviously involve the same principle, even though it may not be explicitly mentioned, see note to § 277, and chapter XVI., *passim*. Compare also the decisions absolving the master from liability under the theories discussed in chapters v., vii., *ante*.

Bancroft v. Boston & M. R. Co. (1893) 67 N. H. 466, 30 Atl. 409 (brakeman who knew that there was no gate and flagman at a certain crossing, and that the view of the crossing was liable to be obstructed by cars standing on an adjacent siding, held unable to recover for injuries while he was on a switch engine, by a collision with a car on the crossing); *Lake Shore & M. S. R. Co. v. Fitzpatrick* (1877) 31 Ohio St. 479 (no servant stationed at a place where he was required); *Chicago & E. I. R. Co. v. Geary* (1884) 110 Ill. 383 (night watchman in yard run down by backing train, owing, as he alleged, to the want of a man on the rear end of the train, the number of trainmen hav-

The fact that the dangerous conditions arose after the plaintiff entered the employment is considered to be immaterial, where it is shown that he had continued to work after the change, with a full appreciation of the increased risk.⁴ Plainly, no other position is logically tenable, consistently with the retention of the theory of an implied contract in regard to every risk of which the servant obtains a knowledge before his injury is received. The doctrine thus applied is, however, felt to be a severe one, and various attempts have been made, with more or less success, to modify its operation in certain directions. In one of the earlier cases Blackburn, J., suggested that the assumption of a risk added by the master's negligence after the beginning of the service ought to be inferred only where the risk was normal in such a sense as to have become a regular incident of

ing been the same all the time he had been employed): *Lake Shore & M. S. R. Co. v. Knittel* (1878) 33 Ohio St. 468 (customary disregard of rule). For other cases of a similar type, see § 277, *supra*.

Curran v. Washburn & M. Mfg. Co. (1898) 170 Mass. 79, 48 N. E. 1079; *Rogers v. Leyden* (1890) 127 Ind. 50, 26 N. E. 210; *Norton v. Louisville & N. R. Co.* (1895) 16 Ky. L. Rep. 846, 30 S. W. 599; *Johnson v. Devco Snuff Co.* (1898) 62 N. J. L. 417, 41 Atl. 936; *Dillenburger v. Weingartner* (1900) 64 N. J. L. 292, 45 Atl. 639; *Davis v. Forbes* (1898) 171 Mass. 548, 47 L. R. A. 170, 51 N. E. 20; *Dymen v. Leach* (1857) 26 L. J. Exch. N. S. 221 (plaintiff worked several months after a less safe device had been substituted for the one formerly used); *Powers v. New York, L. E. & W. R. Co.* (1885) 98 N. Y. 274 (handle of hand car on which plaintiff rode out of repair for three weeks before the accident); *East Tennessee, V. & G. R. Co. v. Smith* (1882) 9 Lea, 685 (unsound handle of hand car in use one month); *Atchison, T. & S. F. R. Co. v. Schroeder* (1891) 47 Kan. 315, 27 Pac. 965 (conductor injured by insufficiency of crew of train, force having been reduced about one year before the accident); *Mundle v. Hill Mfg. Co.* (1894) 86 Me. 400, 30 Atl. 16 (servant tripped over splinter in floor; danger known for three months).

Other decisions taking this principle for granted will be found in §§ 277, 278, *supra*, and chapter XXI., *post*.

In *Souden v. Idaho Quartz Min. Co.* (1880) 55 Cal. 443, the court at the request of the plaintiff instructed the jury that "the servant assumes no risks

except such as existed at the beginning of the employment, and such as are incident to the business." It was held that words equivalent to, "or which existed during the course of the employment, of which the employee had knowledge or was bound to have knowledge," should have been added. An instruction which limits the risks assumed by an employee to those known to him, or which were discernible by a person of his age and capacity in the exercise of ordinary care at the time he entered the employment, is prejudicially erroneous, where the evidence tends to show that he became aware of the risk during his employment. *Norfolk & Boston Sugar Co. v. Hight* (1898) 56 Neb. 62, 76 N. W. 566.

Compare also the cases in which a servant in the permanent employ of a master finds himself obliged to do what he will undertake duties which require him to deal with particular agencies which he has never handled before, but which unquestionably belong to a category which brings them within the scope of his contract. If he cannot recover if he proceeds to perform the work with a full appreciation of the risk. *Goldthwait v. Harlow & G. Street R. Co.* (1894) 160 Mass. 551, 36 N. E. 486 (where the risk was the obvious one that new street cars with projecting steps would, when passing round a curve, swing close to a certain wall than cars without projecting steps, and the servant had known of altered conditions a month before the accident); *Progre v. Latham* (1881) 135 Mass. 398 (expert machinist in employ of stevedore ordered to use ineffective winch on a particular vessel).

the employment.⁵ But this suggestion has borne no fruit. In the following year, however, the exchequer chamber made the important concession that an agreement by the servant to take a risk of this kind would not be implied, as a matter of law, where the master had induced the servant to go on working in reliance upon the master's promise to remedy the conditions from which the risk resulted.⁶ See chapter XXII., *post*. The decision thus rendered has also been regarded as an authority for the doctrine that, independently of the element of a promise, there is no necessary implication of a contract to assume a super-added risk, where it is caused by the master's breach of a statutory duty.⁷ But this position is certainly not accepted in the American courts, and, as it would seem, not by all English judges. See chapter XXXV., *post*.

284. Length of time during which work was continued after notice of the risk was received.—It will be shown in § 302, *post*, that a servant does not necessarily become chargeable with contributory negligence because he does not leave the employment immediately after he ascertains the existence of a dangerous defect.

That equity and common sense point very decidedly to the propriety of admitting the operation of a similar principle where the defense of an assumption of the risk is relied upon seems to be unquestionable. Nor can it be reasonably disputed that the master himself would often be benefited rather than prejudiced by the servant's knowledge that he would not lose his right of action by continuing to work for a short period in cases where a sudden abandonment of his duties would inflict appreciable damage upon the business. A strong argument in favor of this relaxation of the general rule was made by Mr. Justice Brewer in a case which came

Curry v. Boston & M. R. Co. (1893) 158 Mass. 228, 33 N. E. 512 (projecting screw on handle of hand car caught clothes of section hand, and threw him off, several days after the car was furnished in place of another one); *Hale v. Cheney* (1893) 159 Mass. 268, 34 N. E. 255 (injury caused by slippery condition of floor of room to which plaintiff had been transferred three weeks before accident).

⁵ *Mellors v. Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, 9 Week. Rep. 748. In *Ladd v. New Bedford R. Co.* (1876) 119 Mass. 412, 20 Am. Rep. 331, the court distinguished between the position of a servant who continues to work with knowledge of a permanent imperfection in an agency of the master's business

(there the check chains on its cars), and the position of a servant who goes on with his duties, where the premises or instruments upon which or by which the business is carried on are temporarily defective, and remarked that, although the employer was never liable in the former case, he might be liable in the latter case, especially if he had promised the servant to remedy the dangerous conditions and failed to do so.

But the writer is not aware of any decision in the state in which the principle thus outlined has been applied in the absence of the element of a promise.

⁶ *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 105.

⁷ See the opinion of Bowen, L. J., in *Thomas v. Quartermaine* (1857) L. R.

before him, while sitting as a circuit judge.¹ The weight of the argument, however, is considerably impaired by the fact that, as will be shown in § 310, note 6, *post*, the defense of waiver was regarded by him, at the time when he rendered this decision, as being merely one form of the defense of contributory negligence. Another case indicative of a disposition to break away, to some extent, from the doctrine which throws the responsibility for injury upon the servant from the time that he becomes aware of the increased danger, is one which embodies the doctrine that, where a servant is exposed to a new danger by a change in the position of some fixed appliance, he is not bound at his peril to leave the service immediately, if it is reasonable to suppose that the danger will presently be removed. He may, it was declared, remain in the employment a short time in

18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 310, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516.

¹ *O'Rourke v. Union P. R. Co.* (1884) 22 Fed. 189. Section man had worked seven or eight months without any flag to protect him from trains. The decision was, as might be expected, against the plaintiff on the facts; but the following remarks are rendered something more than mere *obiter dicta* by the reference to the case mentioned at the end of this note: "This doctrine of waiver has been carried by some courts to a great extent. They have affirmed that an employee, whenever he finds suitable precautions have not been taken for his safety, ought to stop at once, and, if he continues on, he assumes all the risks. I do not think that can be held to be law. . . . I do not think that the urgency can be forced upon an employee so quickly as that for deciding; that he cannot be called upon at the instant to stop work if he sees there is danger. Suppose an engineer running a train between the point of departure and the point of terminus finds that his engine is out of order, can he stop right there and say he will stop until the injury is mended? It would not be safe to do this. He must carry the defective engine to its point of destination. No other rule would be safe. And so, generally, a man cannot be called upon at the moment to say, There is a defect, or there is danger, and I will stop. He has a right to wait a reasonable time, to consider the circumstances of the case, and to give notice to his employers that he is in danger; time enough to see whether the employer means to have the defect remedied; time enough to

see the general way in which he conducts his business; and if he finds that the employer intends to use machinery in a dangerous manner, finds that is his habit; finds that, after he has been notified, he still intends to conduct his business in that way, and then goes on and continues in the work,—it is for him to assume that he takes the risks. Of course, there can be no question where it is expressly agreed upon. Suppose, for instance, that I own a mill; suppose the machinery in it is clearly defective, and I say to an employee: I am running a mill in which there is defective machinery—and I point out to him the defect,—are you willing to work for me and take the risks? If he says yes, he cannot afterwards recover if he is injured. And so, in order that there should be an implied agreement, the facts should exist for so long a time that the employee has opportunity to see that his employer means to let the machinery remain in that condition, to carry on his business in that way, as a general rule; and if he then continues at work, he may be presumed to consider the compensation sufficient to satisfy him in taking the risk. I have learned judge referred to a similar decision in a previous (unnamed) case, in which he had refused to apply the doctrine of waiver against a laborer injured while loading rails on a flat car. The evidence showed that, on the day of the accident, two gangs of laborers on opposite sides of a train were engaged in loading rails on flat cars, so that, as the day went on, the number coming more and more increased in their work, were prompted by the fact

the expectation that the hazardous conditions will be remedied.² But the value of this case also is somewhat doubtful, as it emanates from a state in which the defenses of assumption of risks and contributory negligence are not always properly distinguished; and it is uncertain whether the court, when it rendered the decision, had that distinction clearly in view.

It must be admitted, however, that the rationale of the doctrine of assumption of risks militates very strongly against the correctness of the views propounded in these cases, and imperatively requires the conclusion that, as the servant is entitled to quit the employment as soon as he ascertains that the master is guilty of a breach of contract in exposing him to an abnormal danger, he must avail himself at once of this right, or suffer the consequences of an imputed acceptance of the responsibility for any injury which he may thenceforth receive, owing to the existence of that danger. And this seems to be the effect of all the authorities except those already referred to.³ All that can be safely affirmed, therefore, with regard to the evidential import of a somewhat extended period of continuance in the employment is that,—if such a paradox is permissible—what was certain apart from this element is rendered still more indisputable. In the subjoined note several rulings are given to which this remark is applicable.⁴

of emulation to perform their share of it more and more expeditiously. The consequence was that less and less care was taken in securing the rails. Finally at about 3 o'clock in the afternoon one of them fell on the plaintiff. The contention of the defendant, that he should have refused to work any longer as soon as he observed the increased dangers to which the methods of work were subjecting him, was rejected.

²*Fairbank v. Haentzsch* (1874) 73 Ill. 236 (servant caught on revolving shaft which projected into the room where she worked; the employer, owing to a press of business, had omitted to shorten it after it had been placed in position).

³In *The Maharajah* (1891) 1 C. C. A. 181, 1 U. S. App. 20, 49 Fed. 111, the fact that a defective winch had been used for nearly a whole day by a man familiar with such machinery was held to disable him from recovering.

In an action by a trainman to recover damages for an injury caused by his striking against a switch stand, it is error to instruct a jury in language from which they might infer that his

knowledge of its position would be material only if it had been acquired before the trip on which the accident occurred. *Union P. R. Co. v. Madden* (1893) 50 Kan. 539, 31 Pac. 1002.

The language used in *Rogers v. Leaden* (1890) 127 Ind. 50, 26 N. E. 210, seems to amount to an explicit recognition of the principle that a servant who does not abandon the employment the moment extraordinary risk comes to his knowledge is presumed to have accepted it.

⁴*Stapp v. Eastern Counties R. Co.* (1853) 9 Exch. 223, 3 C. L. Rep. 185, 23 L. J. Exch. N. S. 23 (insufficiency of staff known for several months); *Chicago & A. R. Co. v. Munroe* (1877) 85 Ill. 25 (drawbar of locomotive known for several years to be dangerous); *Chicago & W. I. R. Co. v. Massie* (1893) 50 Ill. App. 666 (defect in railway track known for two years); *Perigo v. Chicago, R. I. & P. R. Co.* (1879) 52 Iowa, 276, 3 N. W. 43 (position of platform with relation to the track known for two years by railway servant); *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582 (switchman injured by an

285. Servant induced by master's promise to continue work.—

In chapter XXII., *post*, it will be shown that a servant may, without being necessarily chargeable with assumption of an abnormal risk, remain at work for a period varying according to circumstances, if the master has promised to remedy the conditions from which the risk arises. The existence of this qualification of the rule is not infrequently recognized in the statements which refer to the absence of a promise as an element corroborating the inference that the risk was assumed.¹

286. Fact that injury was received in obeying a special order given *ad hanc vicem*: significance of.—Every injury which constitutes a cause of action must, *ex hypothesi*, have been received in doing some-

unblocked frog after he had worked two and a half months in its vicinity); *Weld v. Missouri P. R. Co.* (1888) 39 Kan. 63, 17 Pac. 306 (held not to be prejudicial error to exclude evidence of the unsafe condition of a bridge, the conceded facts being that the plaintiff had crossed it daily in the performance of his duties for two years, and had spoken to his coemployees in terms which showed that he was well aware of its dangerous condition); *Louisville & N. R. Co. v. Bryant* (1893) 15 Ky. L. Rep. 181, 22 S. W. 606 (brakeman injured after one month of service by the want of a coupling stick which should have been furnished under the rules of the road); *Chicago & N. W. R. Co. v. Donahue* (1874) 75 Ill. 106 (switchman had known for five or six weeks that no watchmen were stationed on the rear end of backing trains); *Baltimore & O. R. Co. v. State* (1874) 41 Md. 268 (conductor injured by a collision after he had worked eight or nine months with a knowledge of rules prescribing a certain number of train hands for each train); *Huffman v. Michigan C. R. Co.* (1896) 109 Mich. 251, 67 N. W. 118 (brakeman injured in coupling cars by night, owing to the poor quality of the oil furnished for his lantern, he having been aware of its quality for several months); *Bancroft v. Boston & M. R. Co.* (1893) 67 N. H. 466, 30 Atl. 409 (risk of collision with team at crossing held to have been assumed after three years' service with knowledge of conditions); *Wilkinson v. H. W. Johns Mfg. Co.* (1901) 198 Pa. 634, 48 Atl. 810 (laborer injured after seven months of service, by the slipping of a gang plank leading to a wagon); *Kelley v. Silver Spring Bleaching & Dyeing Co.* (1878)

12 R. I. 112, 34 Am. Rep. 615 (servant operated machinery for several weeks after the boxing had been broken).

See also memoranda of facts appended to cases in § 283, note 4, *supra*.

¹ *Stafford v. Chicago, B. & Q. R. Co.* (1885) 114 Ill. 244, 2 N. E. 185; *Chicago & A. R. Co. v. Munroe* (1877) 85 Ill. 25; *Little Rock & Ft. S. R. Co. v. Duffey* (1880) 35 Ark. 602; *Illinois C. R. Co. v. Morrissey* (1891) 45 Ill. App. 127; *McQueen v. Central Branch Union P. R. Co.* (1883) 30 Kan. 689, 1 Pac. 139; *Money v. Lower Vein Coal Co.* (1881) 55 Iowa, 671, 8 N. W. 652; *Greenleaf v. Illinois C. R. Co.* (1876) 29 Iowa, 14, 4 Am. Rep. 181; *Sweet v. Ohio Coal Co.* (1890) 78 Wis. 127, 9 L. R. A. 861, 47 N. W. 182; *Goldthaus v. Haverhill & G. Street R. Co.* (1894) 160 Mass. 554, 36 N. E. 486; *Fecher v. Pearson Cordage Co.* (1894) 161 Mass. 426, 37 N. E. 368; *Indianapolis & St. L. R. Co. v. Watson* (1887) 114 Ind. 20, 14 N. E. 721, 15 N. E. 824; *Wicks v. W. C. De Pauw Co.* (1894) 138 Ind. 590, 38 N. E. 37; *Nugent v. Kauffm. Milling Co.* (1895) 131 Mo. 241, 33 S. W. 428; *Foster v. Pusey* (1888) 8 Houst. (Del.) 168, 14 Atl. 545; *Coches v. Chicago, R. I. & P. R. Co.* (1897) 102 Iowa, 567, 71 N. W. 580; *Kroy v. Chicago, R. I. & P. R. Co.* (1871) 32 Iowa, 357; *Foley v. Jersey City Electric Light Co.* (1892) 54 N. J. L. 411, 24 Atl. 487; *Atchison, T. & S. P. R. Co. v. Schrock* (1891) 47 Kan. 315, 27 Pac. 265; *Thompson v. Missouri P. R. Co.* (1895) 51 Neb. 527, 71 N. W. 61; *Kell v. Silver Spring Bleaching & Dyeing Co.* (1878) 12 R. I. 112, 34 Am. Rep. 615; *The Saratoga* (1898) 87 Fed. 349; *Missouri P. R. Co. v. Barker* (1894) 42 Neb. 793, 60 N. W. 1044.

thing under the authority of the master or his representative; otherwise the servant must have been a mere volunteer. See chapter XXIII., *post*. As the necessary authority can be conferred only by general or special directions, it follows that such directions cannot be regarded as differentiating factors tending to negative the servant's assumption of a risk, unless so far as they may supply a ground for inferring the absence of one or more of the essential elements which must be established before that assumption can be predicated. In certain cases it is clear such an inference may be drawn with respect to the elements of voluntary action and complete appreciation of the risk. The effect of an order in both these connections will be discussed in chapter XXIII., *post*.

287. Assurance by master or vice principal that the conditions were safe; effect of.—If the circumstances were such that the servant was justified in relying upon the assurance of the master or his representative that the work which was being done when the injury was received involved no special risk, it is clear that the essential element of appreciation of the risk must have been lacking, and that the master cannot successfully invoke the defense of an assumption of that risk, or any other of the defenses based on the servant's knowledge. This situation is discussed in chapter XXIV., *post*.

288. Servant's acceptance of a known risk usually presumed to be voluntary.—(See also § 466, *post*.)—The rationale of the servant's assumption of a given risk being an implied agreement to include it among those which he undertakes, it is clear that, in order to entitle the master to avail himself of this defense, it must be shown that the undertaking of the servant was voluntary.¹

For practical purposes, however, this requirement is of very slight utility to a servant, owing to the general adoption of the theory that, as regards the abandonment of an employment which imperils his safety, he is presumptively a free agent.² The mere fact that the

¹"An employer has no right to subject an employee to an unnecessary peril without his consent." *Brossman v. Lehigh Valley R. Co.* (1886) 113 Pa. 491, 57 Am. Rep. 479, 6 Atl. 226.

In many statements of the doctrine, the servant's assumption of a risk is expressly referred to as being conditional upon the servant's having "voluntarily" or "willingly" encountered the given risk. See, for example, the following passage: "If, however, a person specially undertake to perform a peculiarly perilous work by operating a machine obviously wanting in suitable appliances

for safety, knowingly and voluntarily, he cannot afterwards complain, in case of injury in consequence thereof, that the machinery was of a dangerous kind, and that it was wanting in appliances reasonably necessary to render it safe." *Rummell v. Dilworth* (1885) 111 Pa. 343, 2 Atl. 355. Compare also the language used in *Born v. Gaston Gas Coal Co.* (1885) 27 W. Va. 285, 55 Am. Rep. 304.

²A servant "is not bound to risk his safety in the service of his master, and he may, if he thinks fit, decline to do that which exposes him to imminent

servant exposed himself to an abnormal risk because he feared that if he did not do this, he would lose his position, is not considered to be evidence of legal constraint.³

peril." *Rummell v. Dilworth* (1885) 111 Pa. 343, 2 Atl. 355.

Compare the language used in *Priestly v. Forster* (1853,) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987; *Woolter v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143; *Buzzell v. Indiana Mfg. Co.* (1861) 48 Me. 113, 77 Am. Dec. 212; *Little Rock, M. R. & T. R. Co. v. Leverett* (1886) 48 Ark. 333, 3 S. W. 50; *Indianapolis & C. R. Co. v. Lott* (1858) 10 Ind. 554; *Chicago & T. R. Co. v. Simmons* (1882) 11 Ill. App. 147.

"Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible. . . . The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury." Cockburn, Ch. J., in *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 389, 46 L. J. Exch. N. S. 521.

This case was approved in *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 550, 52 Am. Rep. 733, 2 N. E. 115, where it was held that the plaintiff assumed the risk of acting as fireman on an engine, though the duty was not within his original contract. The court said: "The plaintiff did this, it is true, rather than lose the position which he had, and which he desired to retain; but by so doing he ingrafted this duty on his original contract, of which he made it a part. Morally, to coerce a servant to an employment the risks of which he does not wish to encounter, by threatening otherwise to deprive him of an employment he can readily and safely perform, may sometimes be harsh; but when one has assumed an employment, if an additional and more dangerous duty is added to his original labor, he may accept or refuse it. If he has an executory contract for the original service, he may refuse the additional and more dangerous service; and if for that reason he is discharged he may avail

himself of his remedy on his contract. If he has no such contract, and knowingly, although unwillingly, accepts an additional and more dangerous employment, he accepts its incidental risks; and, while he may require of the employer to perform his duty, he cannot recover for an injury which occurs only from his own inexperience. The employer is not necessarily unjust, because he will be in his employment a servant who, from time to time, relieve a skilled workman, while his ordinary duties will be those of a mere laborer. It must certainly be his right to engage a servant who, while his ordinary duties will be simple and expose him to no danger, is willing, as a part of his service, from time to time to assume duties which, in order to be safely performed, require a higher degree of skill, and which expose him to a certain degree of danger."

Where an employee complained of an appliance as unsafe, and was told that he might either continue to use it or leave, and he continued thereafter to use the same rather than lose his place, he will be held to have assumed the risk, and cannot recover for resulting injuries. *Lamson v. American Axe & Tool Co.* (1900) 177 Mass. 144, 58 N. E. 585.

So, also it has been laid down that a threat to discharge a servant if he refuses to work with appliances which are in the same condition as when he began work is not coercion. *Sweeney v. Burt & J. Envelope Co.* (1886) 161 N. Y. 529, 54 Am. Rep. 722, 5 N. E. 358; *Pratt v. Wellsville* (1893) 50 N. Y. S. R. 557, 21 N. Y. Supp. 820. See also to same effect *Westcott v. New York & V. E. R. Co.* (1891) 153 Mass. 460, 27 N. E. 10; *Worlds v. Georgia R. Co.* (1896) 99 Ga. 283, 25 S. E. 646; *Atchison, T. & S. F. R. Co. v. Schroeder* (1891) 47 Kan. 315, 27 Pac. 965; *Southern Kan. R. Co. v. Moore* (1892) 49 Kan. 616, 31 Pac. 138 (servant undertook to lift ties which he knew were too heavy for him); *Dougherty v. West Superior Iron & Steel Co.* (1894) 88 Wis. 343, 60 N. W. 274.

In *Shearm. & Redf. Neg.* 5th ed. § 211 (a), it is stated that in the long-named decision the court relied on cases since overruled. Those cited are *Le*

In taking this position, as will be observed from the passages quoted, the courts have frankly conceded that it furnishes a protection to employers whose conduct may be described as immoral and inhuman. See § 61, *ante*, and note 3 to this section. But setting aside these expressions of opinion, which, in any event, are not strictly pertinent when the subject of voluntary action as an element of an implied contract is under discussion, it would seem that no disposition to soften the rigor of the generally received doctrine has ever been evinced by any court, speaking as a whole, except by that of Virginia; and even in that state the later decisions seem to have virtually destroyed the authority of the vigorous protest quoted below.⁴ See § 274, note 1, *supra*. Two other extracts of a similar tenor from dissenting judgments are set out in the note to § 65, *ante*.

v. Boston & A. R. Co. (1885) 139 Mass. 580, 53 Am. Rep. 733, 2 N. E. 115; *Badshaw v. Louisville & N. R. Co.* (1893) 14 Ky. L. Rep. 688, 21 S. W. 246; *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521. The reply to this assertion is simple. The Massachusetts case has never been disapproved in any later decision in that state, and the point that a fear of dismissal is not coercion has, as will be seen from the cases cited above, been twice reaffirmed. The Kentucky case remains unpugned, so far as we can discover, by any later ruling in that state. The authority of *Woodley's Case* has been doubtless shaken to some extent by the later English *dicta* and decisions cited in the chapter which deals with the maxim, *Volenti non fit iniuria*, (XX.); but on this particular point it has certainly not been overruled categorically in any case where the defense of a contractual assumption of risks, as distinguished from an assumption based on the maxim, has been relied on. Besides, these *dicta* and decisions are all of earlier date than the Wisconsin case and it is at least a reasonable hypothesis that the court deliberately preferred to follow the authorities which it cited, rather than any others. These remarks are made, not because we disagree with the learned authors in regard to the doctrine that the fear of dismissal should be regarded as coercion, but because we think it important that there should be no misapprehension as to the real effect of the cases on the subject.

In *Clarke v. Holmes* (1862) 7 Hurlst. & N. 947, 31 L. J. Exch. N. S. 356 8 Jur. N. S. 992, 10 Week. Rep. 405, S. E. 211.

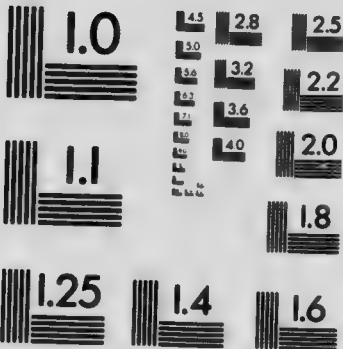
Byles, J., considered that a master who violated his contract with his servant to provide a fence for machinery exercised a species of compulsion over him, but whether he thought the essential element of this compulsion to be the fear of losing the employment is not apparent from the report.

"The third instruction of the defendant is to the effect that an employer is released from all liability for negligence, although aware of its continued existence, if the injured employee continued to work for him after he knew of the negligent and dangerous manner in which the employer allowed his business to be conducted. . . . It was palpably improper. It is sanctioned neither by reason, justice, nor law. The usual and legal duty of every employer is to provide all means and appliances reasonably necessary for the safety of those in his employment. It is a cruel, an inhuman, doctrine that the employer, though he is aware that his own neglect to furnish the proper safeguards for the lives and limbs of those in his employment puts them in constant hazard of injury, is not to be held accountable to those employees who, serving him under such circumstances, are injured by his negligent acts and omissions, if the injured parties, after themselves becoming cognizant of the peril occasioned by their employer's negligent way of conducting his business, continue in his employment and receive his pay, though they may be virtually compelled to remain by the stern necessity of earning the daily food essential to keep away starvation itself." *Richmond & D. R. Co. v. Norment* (1887) 84 Va. 172, 4 S. E. 211.



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where the writer has proffered some remarks as to what he conside. the absurdity of the legal theory of voluntary action.

Some of the English judges who have discussed the meaning and effect of the maxim, *Volenti non fit injuria*, have taken a more liberal view with respect to the dilemma in which the servant is placed when he is thus forced to elect between two disagreeable alternatives. See § 382, *post*.

289. Circumstances under which a servant is not deemed to have acted voluntarily in exposing himself to a risk.—The servant's non-assumption of the risk on the ground that the element of voluntary action was lacking has been asserted in four different classes of cases. The decisions cited should be compared with those reviewed in the corresponding sections (302, 382) of the chapters relating to contributory negligence in undertaking or continuing an employment, and to the maxim, *Volenti non fit injuria*. It will be found that, where either of these defenses is put forward, the position of the servant, so far as it depends upon the existence or absence of coercion, is more favorable than it is when this factor is considered in its bearing upon the availability of the defense of a contractual assumption of a risk.

a. Minors.—There is some authority for the doctrine that, where a minor is concerned, one class of extraordinary risks—*viz.*, those incident to work outside the scope of the original contract (see chapter xxv., *post*)—is *prima facie* not to be regarded as being undertaken voluntarily.¹ This conception, however, scarcely seems to have been necessary as a support for the conclusion of the court that the master is not, as matter of law, free from liability under such circumstances, and this was the only point actually involved in the case cited. There is, of course, no presumption that any extraordinary risk is assumed by the servant. See §§ 270-273, *supra*; § 461, *post*. This decision, therefore, does not seem to be of much significance in the present connection. The inference of a voluntary acceptance, which is ordinarily drawn from the bare fact that the servant went on working with a full appreciation of a given risk, may doubtless be rebutted, in the case of a minor as of an adult, by positive evidence. But, aside from this decision, there is, so far as the writer is aware, no intimation in the

¹ In *Chicago & N. E. R. Co. v. Harney* (1867) 28 Ind. 28, 92 Am. Dec. 282, the court held that a demurrer to a complaint which alleged that a minor was "compelled" by his superior to labor at a business much more perilous, and was injured while so engaged, had been properly overruled. The court said: "There was then no opportunity to adjust the compensation with a view to the risk. There was no consent to perform the service on any terms. It was a compulsory service, and under such circumstances neither justice nor policy requires that the master shall be acquitted of responsibility."

reports that, in the absence of such evidence, the action of a minor can be treated as involuntary any more than that of an adult. Such a conception, on the contrary, is impliedly negatived by the numerous cases in which minors have been denied recovery for injuries due to extraordinary risks. See subtitle D of this chapter, and chapter XXI, C, *post*.

b. Seamen.—There seems to be no reason why, under ordinary circumstances, seamen should not, like any other classes of employees, be deemed to have consented voluntarily to undertake any abnormal risks of which they have notice before they enter into their contract. This particular point, however, does not seem ever to have been discussed. On the other hand, it is well settled that no such voluntary quality can be ascribed to their conduct in continuing to expose themselves to abnormal risks which come to their knowledge while their contract is being carried out. The rationale of this exception to the general rule is that they are bound by their shipping articles to strict obedience, that they are subject to severe penalties if they refuse to perform their duties, and that they have not the option, which landsmen are theoretically supposed to possess, of abandoning their employment the moment they are exposed to an abnormal risk.²

"A seaman aboard ship is bound to perform such services as may be required of him in the line of his employment. He cannot hold back and refuse prompt obedience because he may deem the appliances faulty or unsafe. Masters of ships exercise large powers, and they may legally compel obedience to orders. A seaman necessarily surrenders much of his personal liberty and freedom of action, and he is never at liberty, like the landsman, to quit or make much objection to the circumstances surrounding the work commanded." *Lafourche Packet Co. v. Henderson* (1892) 36 C. C. A. 519, 94 Fed. 871.

"Obedience to officers is the necessary law of the ship; disobedience is criminal; and seamen have the corresponding right to protection against needless exposure. They are not required to vindicate their right to security by refusal to work at the risk of being put in irons or going to jail." *The Frank & Willie* (1891) 45 Fed. 494.

"The seaman on the voyage has no alternative but to obey or suffer punishment. He cannot dissent from or abandon the service on account of the dangers or unreasonableness of the particular service required, as he might do in

port, but must obey at any risk or hazard to himself; and yet he voluntarily incurs no risk, but acts upon the risk and responsibility of those whose lawful authority demands of him implicit obedience to every lawful command, however unreasonable or dangerous, to which he reluctantly submits to his own personal injury. The law which imposes upon the master this almost absolute authority also imposes upon him the fullest responsibility for its careful, considerate, and reasonable exercise in all emergencies, and in default of which it also imposes upon him a clear legal liability—or upon those he represents—for any personal damages occasioned by such default. The plaintiff, by protesting against the dangerous and unreasonable manner of accomplishing the object proposed, and by which he was injured, and suggesting a safer and more reasonable way of accomplishing the same object, and then submitting to the order and authority of the master, and attempting to do the work required in a careful and prudent manner, did his whole duty, and thereby removed from himself all of the responsibility. The master, by declining and rejecting the safer and reasonable manner proposed

c. *Convicts whose labor is hired by private employers.*—It is manifest that convicts whose services are let out under contract to private employers, and who, while they are at work, are under the control of a guard who has the power to secure their obedience by the exercise of force, are not voluntary agents in respect to such abnormal risks as they may be required to incur.³

d. *Statutory provisions restricting servant's right to abandon the employment.*—Under the provision of the Louisiana Code, which declares that laborers who hire themselves out to serve on plantations have not the right of leaving the person who has hired them, and that they cannot be sent away by the proprietor until the term of their engagement has expired, unless good and just causes can be assigned, it has been held that a man working for a monthly salary under a contract which covered a period of several months, which was required to take off the crop, did not, by remaining in the employment, undertake the risks created by a fellow servant's incompetency. The court considered that voluntary action was negatived, for the reason that, if he had left the employment, owing to his apprehension of danger, and afterwards brought suit for his wages, and been unable to establish satisfactorily the existence of a good cause for so leaving, he would not only have suffered the loss of the wages which would have accrued during the remainder of his term, but would also have rendered himself liable for the refunding of the wages already received.⁴

ness imperatively commanding the plaintiff to perform the work in the more dangerous way, assumed all of the responsibility and risk for the defendants. The plaintiff entered upon this dangerous service under duress and submission to compulsion, without the liberty of choice or freedom of the will, and is therefore not responsible for his acts, without negligence." *Thompson v. Hermann* (1875) 47 Wis. 602, 32 Am. Rep. 784, 3 N. W. 579.

A seaman who, after signing shipping articles, discovers that a certain appliance which he deems unsafe is to be used, and, upon informing the officer that he will not go if used, is assured that it will not be used, does not assume the risk of its use during the voyage. *Keating v. Pacific Steam Whaling Co.* (1899) 21 Wash. 415, 58 Pac. 224.

³*Chattahoochee Brick Co. v. Braswell* (1893) 92 Ga. 631, 18 S. E. 1015; *Dalheim v. Lemon* (1891) 45 Fed. 225.

⁴*Poirier v. Carroll* (1883) 35 La. Ann. 699. The scope of this decision,

it will be observed, is extremely narrow, as the considerations relied upon are applicable only in cases where the injury is received between the time when the servant obtains knowledge of the abnormal danger and the time when he may, without a breach of his contract, leave the employment without incurring the consequences of a wrongful abandonment. In most industrial occupations, the period thus limited is usually very brief, and even if a statutory provision similar to that of the Louisiana Code were generally in force, the position of servants would not be improved to any great extent. Nor is it by any means certain that courts generally would be willing to concede the correctness of the inferences drawn in this decision, with regard to the effect of that provision. It does not seem to alter in any degree the rights which the parties to a contract of service possess apart from statute,—at all events in states where the common law prevails. Ordinarily, whenever there has been incompetency of that pronounced

In one case it seems to be taken for granted that coercion which will preclude the inference of an assumption of the risk is established if it appears that the master's representative refused to permit the plaintiff to stop work immediately upon his expressing a wish to do so.⁵ In view of the principles laid down in the cases cited in § 288, *supra*, this theory seems to be of disputable soundness,—at least when applied to adults of full age and ordinary intelligence.

290. Complaint, objection, or protest omitted or made — (Compare §§ 383, 466, *post*.)—*a. No complaint, objection, or protest established by the evidence.*—The theory that the mere fact of the servant's having continued to work with knowledge of an abnormal risk charges him, as a matter of law, with an assumption of that risk, manifestly involves the corollary that, viewed as an evidential element, the servant's failure to express dissatisfaction with his environment is merely corroborative and confirmatory in its effect. Such, accordingly, is the significance of that fact in the numerous cases in which it is mentioned as indicative of the servant's intention to accept the responsibility for any future accidents which may be caused by the defective instrumentality.¹

character which would lead the average servant to throw up his position, it must have been of such a pronounced nature, and must have been manifested by acts or omissions of an import so unmistakable, that a court would very rarely feel any difficulty in adopting the servant's theory that the master had been guilty of a breach of contract in retaining the incompetent person in his employment. The reports of employers' liability cases show only too plainly that the almost universal inclination of servants is rather to take the most desperate chances than to abandon their work on slight provocation.

¹ *Malsky v. Schumacher* (1894) 7 Misc. 8, 27 N. Y. Supp. 331. There recovery was denied on the ground that the injury was really caused by the fact that the servant's attention was distracted by the conversation, and that, under such circumstances, the accident would have happened even if the words spoken had been expressive of consent, and not of refusal.

² The general principle may be laid down as follows: An employee who does not ask for further safeguards, or otherwise so conducts himself as to assure the employer that he is content with the machinery and appliances furnished, and will himself take the chance of injury, cannot recover against an em-

ployer for the injury sustained by him. *Jones v. Manufacturing & Invest. Co.* (1899) 92 Me. 565, 43 Atl. 512.

Under this theory where there is some evidence that the servant knew of the danger, it is error to refuse an instruction directing the jury to find for the employer if the servant, having such knowledge, continued to work without objection. *Wells v. Burlington, C. R. & N. R. Co.* (1881) 56 Iowa, 529, 9 N. W. 364.

The subjoined list of cases in which this principle has been recognized might be much lengthened, if any useful purpose were to be served by adding to it. In tabulating the cases it will be convenient to separate into different groups those in which the words "complaint," "objection," and "protest" are used, though they are practically synonymous in the present connection.

Seley (1894) 152 U. S. 145, 38 L. ed. *Seley* (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *The Maharah* (1891) 1 C. C. A. 181, 1 U. S. App. 20, 49 Fed. 111; *The Aulesund* (1877) 9 Ben. 203, Fed. Cas. No. 1 (a case where the plaintiff was the servant of a stevedore); *Linberg v. Glenwood Lumber Co.* (1900) 127 Cal. 598, 49 L. R. A. 33, 60 Pac. 176; *Cresswell v. Wilmington & N. R. Co.* (1899) 2 Penn. (Del.) 210, 43 Atl. 629; *McCauley v.*

b. Complaint, objection, or protest established by the evidence.
That the failure of the servant to complain, object, or protest is a circumstance purely corroborative in its nature, and not differentiating, is shown still more clearly by these cases which deal with

- Southern R. Co.* (1897) 10 App. D. C. 560; *Burns v. Chicago, M. & St. P. R. Co.* (1886) 69 Iowa, 450, 58 Am. Rep. 227, 30 N. W. 25; *Lumley v. Caswell* (1877) 47 Iowa, 159; *Conley v. Chicago, R. I. & P. R. Co.* (1897) 102 Iowa, 507, 71 N. W. 580; *Money v. Lower Vin Coal Co.* (1881) 55 Iowa, 671, 8 N. W. 652; *Forbes v. Boone Valley Coal & R. Co.* (1901) 113 Iowa, 94, 84 N. W. 970; *Schibbe v. Central R. & Bkg. Co.* (1890) 85 Ga. 592, 11 S. E. 876; *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582; *Bogenschutz v. Smith* (1886) 84 Ky. 330, 1 S. W. 578; *Hatt v. Nay* (1887) 144 Mass. 186, 10 N. E. 807; *Huffman v. Michigan C. R. Co.* (1896) 109 Mich. 251, 67 N. W. 118; *American Dredging Co. v. Walls* (1898) 28 C. C. A. 441, 55 U. S. App. 460, 84 Fed. 428; *Kielley v. Belcher Silver Min. Co.* (1875) 3 Sawy. 500, Fed. Cas. No. 7,761; *Hattaway v. Atlanta Steel & Tin-Plate Co.* (1900) 155 Ind. 507, 58 N. E. 718; *McCarthy v. Shoneman* (1901) 198 Pa. 568, 48 Atl. 493; *Philadelphia & R. R. Co. v. Hughes* (1888) 119 Pa. 310, 13 Atl. 286; *Chicago, B. & Q. R. Co. v. McGinnis* (1890) 49 Neb. 649, 68 N. W. 1057; *Kaure v. Troy Steel & I. Co.* (1893) 139 N. Y. 369, 34 N. E. 901; *Brossman v. Lehigh Valley R. Co.* (1886) 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226; *Green & C. Street R. Co. v. Bresmer* (1881) 97 Pa. 103; *Rummell v. Dilworth* (1885) 111 Pa. 343, 2 Atl. 355, 363; *Wilkinson v. H. W. Johns Mfg. Co.* (1901) 198 Pa. 634, 48 Atl. 810; *McCarthy v. Shoeman* (1901) 198 Pa. 568, 48 Atl. 493; *East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 63, 47 Am. Rep. 319; *Galveston, H. & S. A. R. Co. v. Eckols* (1894) 7 Tex. Civ. App. 429, 26 S. W. 1117; *Street v. Ohio Coal Co.* (1890) 78 Wis. 127, 9 L. R. A. 861, 47 N. W. 182; *Poll v. Hewitt* (1893) 23 Ont. Rep. 619.
- No objection.*—*Garnett v. Phannie Bridge Co.* (1899) 98 Fed. 192; *Hattaway v. Atlantic Steel & Tin-Plate Co.* (1900) 155 Ind. 507, 58 N. E. 718; *Swift & Co. v. Rutkowski* (1897) 167 Ill. 156, 47 N. E. 362; *Kroy v. Chicago, R. I. & P. R. Co.* (1871) 32 Iowa, 357; *South Florida R. Co. v. Weese* (1893) 32 Fla. 212, 13 So. 436; *St. Louis & S. E. R. Co. v. Britz* (1874) 72 Ill. 256; *Chicago & A. R. Co. v. Munroe* (1877) 85 Ill. 25; *Louisville & N. R. Co. v. Bryant* (1893) 15 Ky. L. Rep. 181, 2 S. W. 607; *Corbett v. Smith* (1898) 16 Tenn. 368, 47 S. W. 694; *Good v. Washington Mills Co.* (1893) 160 Mass. 234, 35 N. E. 484; *O'Connor v. Whitt* (1897) 169 Mass. 563, 48 N. E. 844; *Carrigan v. Washburn & M. Mfg. Co.* (1898) 170 Mass. 79, 48 N. E. 107; *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285; *Fletcher v. Louisville & N. R. Co.* (1899) 102 Tenn. 1, 4 S. W. 739; *Erdman v. Illinois Steel Co.* (1897) 95 Wis. 6, 69 N. W. 993.
- No protest.*—*Baltimore & O. R. Co. v. Baugh* (1892) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Martin v. Chicago, R. I. & P. R. Co.* (1901) Iowa 554, 36 N. E. 486; *Festy v. Paus* (1894) 161 Mass. 426, 37 N. E. 368; *Wescott v. New York & E. R. Co.* (1891) 153 Mass. 460, 27 N. E. 10; *Ft. Wayne, J. & S. R. Co. v. Gildersleeve* (1876) 33 Mich. 133; *Shackleton v. Manistee & N. E. R. Co.* (1895) 107 Mich. 16, 64 N. W. 728; *Huffman v. Michigan C. R. Co.* (1896) 109 Mich. 251, 67 N. W. 118; *La Paro v. Chicago & G. S. R. Co.* (1894) 99 Mich. 212, 58 N. W. 60; *Mansfield Coal & Coke Co. v. McEnery* (1879) 91 Pa. 185, 36 Am. Rep. 662; *Relgen v. Tomahawk Pulp & Paper Co.* (1901) 110 Wis. 307, 85 N. W. 960; *Thompson v. Missouri P. R. Co.* (1897) 51 Neb. 527, 71 N. W. 61.
- In some cases, two or more of these words are combined,—as, where the servant was denied recovery on the ground that he made no protest or complaint (*Johnson v. Devco Snuff Co.* [1898] 62 N. J. L. 417, 41 Atl. 936; *Warrington v. Atchison, T. & S. F. R. Co.* [1891] 46 Mo. App. 159); or no objection or protest (*Greenleaf v. Dubuque & S. C. R. Co.* [1871] 33 Iowa, 58).
- In one Virginia case it seems to be intimated that the absence of evidence of a complaint is not conclusive against the servant. *Richmond & D. R. Co. v. Norment* (1887) 84 Va. 167, 4 S. E. 211.

the converse situation, in which the servant has expressed his dissatisfaction. It is well established that his having done this will not throw the responsibility upon the master, if he afterwards goes on working.—at all events where he has no specific grounds for supposing that a remedy is to be applied at the earliest possible moment.² See § 285, *supra*. In other words, complaints, protests, or objections are unavailing where the risks are understood and the servant continues to encounter them.³ Especially must he be regarded as having assumed the risk where he is told that he may either continue to use the defective appliance or leave the employment.⁴

The rule is perhaps different where the maxim, *Volenti non fit injuria*, is specifically relied upon. See § 383, *b. post*.

But the authority of this case seems to be of an extremely dubious character in this as in other respects. See § 285, note 4, *supra*.

A brakeman who, without protesting against or reporting the infraction of a known rule requiring east-bound trains to enter a certain siding from the west end, alights for the purpose of opening the eastern switch, at a distance from it much greater than that at which he would, in the ordinary course of things have alighted if the train had been stopped before reaching the western switch, cannot recover for injuries received from falling into an open culvert at the place where he steps off the car. *West v. Southern P. Co.* (1898) 29 C. C. A. 219, 56 U. S. App. 323, 85 Fed. 393.

² *Assop v. Yates* (1858) 2 Hurlst. & N. 768, 27 L. J. Exch. N. S. 156 (boarding so placed as to be likely to fall).

That a servant protested against an order of the master to pursue his work with such help as he could command, on pain of being discharged, will not prevent him from being charged with an assumption of the risk of doing the work with an insufficient number of hands, where he had no reason to believe or hope that the order would be modified or revoked. *Atchison, T. & S. F. R. Co. v. Schroeder* (1891) 47 Kan. 315, 27 Pac. 965. The declaration of a laborer who seeks to recover on the ground that his master furnished unsuitable pieces of wood for checking cars on an incline has been held to show that he cannot maintain the action, where it states he was well acquainted with the nature of the timber furnished, and had on two occasions complained to his foreman

about the want of proper stuff. *McGee v. Eglinton Iron Co.* (1883) 10 Sc. Sess. Cas. 4th Series, 955.

"Protest against, or objection to, a service rendered dangerous by defective machinery, if the party making the protest or objection is under no legal obligation to remain in the service, cannot render the services subsequently performed involuntary. There is a disparity in the relation of master and servant, but not such as can make the act of the servant in remaining in a service which he knows to be peculiarly dangerous from defective machinery an involuntary act in legal contemplation." *Galveston, H. & S. T. R. Co. v. Drew* (1883) 59 Tex. 13, 46 Am. Rep. 261.

³ *Cummings v. Collins* (1876) 61 Mo. 520.

In one case it was observed, *arguendo*, that "the risk from the master's breach of duty never rests upon the protesting or unwilling servant. *Volens, not sciens*, is the test." *Dempsey v. Sawyer* (1901) 95 Me. 295, 49 Acl. 1035. This statement is evidently too broad, if it is intended to imply that a protest indicates in itself involuntary action.

⁴ *Lamson v. American Axe & Tool Co.* (1900) 177 Mass. 144, 58 N. E. 585. These decisions indicate that the supreme court of Iowa can scarcely be right in holding that an instruction is erroneous which, in stating the rule that the servant's continuance of work with knowledge of a risk charges him with its assumption, omits the conditional element of the absence of objection or protest against the maintenance of the defective conditions. *Greenleaf v. Dubuque & S. C. R. Co.* (1871) 33 Iowa, 52.

D. ASSUMPTION OF RISKS BY MINOR SERVANTS.

291. Ordinary risks.—The principle has frequently been laid down or recognized that a minor assumes the ordinary risks of any employment which he undertakes, in so far as these risks are, or ought to have been, known to and appreciated by him, whether the knowledge be his own observation and experience, or the instructions which he has received from his employer or his employer's representative.¹ In other words, the fact that the servant was a minor does not enlarge his rights, where it is once established that he understood the danger.² This principle has been applied in favor of the master in cases where the injury was caused by the negligence of the fellow servant;³ by permanent, visible conditions of the plant;⁴

¹ *Bohn Mfg. Co. v. Erickson* (1893) 5 C. C. A. 341, 12 U. S. App. 260, 55 Fed. 943; *Cudahy Packing Co. v. Maurer* (1901) 54 L. R. A. 258, 45 C. C. A. 515, 106 Fed. 645; *Dunn v. McVance* (1896) 59 N. J. L. 498, 37 Atl. 61; *Alabama Mineral Co. v. Marcus* (1896) 115 Ala. 389, 22 So. 135; *Crown v. Orr* (1893) 140 N. Y. 450, 35 N. E. 648, Reversing 71 Hun, 613, 24 N. Y. Supp. 620; *Beckham v. Hillier* (1884) 47 N. J. L. 12; *Smith v. Irwin* (1889) 51 N. J. L. 507, 18 Atl. 852; *Omaha Bottling Co. v. Theiler* (1899) 59 Neb. 257, 80 N. W. 821; *Anderson v. Morrison* (1875) 22 Minn. 274.

"If a minor engages to work, the risks of the business are incident to the work. He cannot claim on account of his minority to be relieved from the consequences of such risks. He might as well claim to be relieved from the consequences of enforcing the contract for his failure to perform any service." *New York C. & H. R. R. Co. v. Jones* (1890) 76 Tex. 350, 13 S. W. 374.

A parent has the right to engage his minor child in a dangerous employment. In such a case the parent impliedly assumes for himself and child the ordinary risks of the employment. *Gulf, C. & S. F. R. Co. v. Jones* (1890) 76 Tex. 350, 13 S. W. 374.

In *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103, the court, discussing § 357 of Beach on Contributory Negligence, in which that author criticises the doctrine which charges a minor with the assumption of ordinary risks, on the ground that, minors having no power to make a contract, they are not bound by their express contracts with their employers, and that for this reason no implied contract to assume ordinary risks

can arise, said: "Minors' contracts are not void. They are voidable only, and we think a plaintiff, whether a minor himself or another, by suing for an injury caused by some specific negligence committed in the course of a business, apart from the fact of employment itself, necessarily adopts, for the purposes of the action, the minor's voidable contract of employment, and subjects himself to the same rules that govern in actions by or in right of adult employees."

Vugout v. Kauffman Mill Co. (1895) 131 Mo. 241, 33 S. W. 428; *Hinckley v. Horadowsky* (1890) 111 Ill. 359, 8 L. R. A. 490, 24 N. E. 421; *Jones v. Roberts* (1894) 57 Ill. App. 56.

The fact that an employee is a minor does not vary the law as to his assumption of risk, if he has sufficient intelligence to comprehend the dangers incident to his service. *Goff v. Norwalk & W. R. Co.* (1888) 36 Fed. 290 (in charge to jury).

The mere fact that an employee is under the age of twenty-one years does not shield him from the usual responsibility incident to an employment voluntarily assumed by himself. *Houston & G. A. R. Co. v. Miller* (1879) 51 Tex. 270.

² See chapter XXVI, *post*.

³ As, where a minor is injured by the contact of some part of his person with moving machinery. *E. S. Higgins Carpet Co. v. O'Keefe* (1897) 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900; *Bohn Mfg. Co. v. Erickson* (1893) 5 C. C. A. 341, 12 U. S. App. 260, 55 Fed. 943; *Palmer v. Harrison* (1885) 37 Mich. 182, 23 N. W. 624; *Jones v. Roberts* (1894) 57 Ill. App. 56; *C. & N. Y. Guild* (1887) 144 Mass. 601, 12 N. E.

the common operations incident to the performance of his duties;⁵ by a defect in an appliance, where the existence of that defect does not imply negligence on the master's part.⁶

It will be observed that the rule, as thus stated, differs from the corresponding rule applicable to an adult in one important respect. In the case of an adult the servant's inability to recover for injuries resulting from ordinary risks is declared in terms which are indicative of the fact that his comprehension of those risks is presumed in the absence of evidence which justifies the opposite conclusion. In the case of a minor, on the other hand, the defense of an assumption of ordinary risks is viewed as one which is merely conditional upon the production of specific and positive evidence going to show that the risk in question was, as a matter of fact, comprehended. In short, where a minor is concerned, ordinary risks are, for evidential purposes, always treated at the outset of the inquiry as extraordinary, and the burden of establishing the servant's comprehension of the particular risk is cast upon the employer.⁷ Some courts, it is true, have laid it down that, where

338; *Ogley v. Miles* (1893) 139 N. Y. 1021; and to work on the construction of a building (*Erans v. Vogt & Bros. Sprickels' Sugar Ref. Co.* (1896) 177 Pa. 57, 35 Atl. 590; and other cases cited in § 399, note 1, subd. (h) *et seq.*, *post*).

Where a minor brakeman leaning out of the car was struck by a switch target with the position of which he was familiar, he cannot recover. *Erans v. Lake Shore & M. S. R. Co.* (1877) 12 Hun, 289.

See also *Probert v. Phipps* (1889) 149 Mass. 258, 21 N. E. 370 (comprehension of risk proved by testimony of minor himself); *O'Connor v. Whittall* (1897) 169 Mass. 563, 48 N. E. 844; *Pratt v. Proarty* (1891) 153 Mass. 333, 26 N. E. 1002; *De Souza v. Stafford Mills* (1892) 155 Mass. 476, 30 N. E. 81.

As that of coupling cars. *Viets v. Toledo, A. & G. T. R. Co.* (1884) 55 Mich. 120, 20 N. W. 818 (evidence here negative culpability on the part of those in charge of the train); *Oliver v. Ohio River R. Co.* (1896) 42 W. Va. 703, 26 S. E. 444; *Texas & P. R. Co. v. Carlton* (1883) 60 Tex. 401; *Umbach v. Lake Shore & M. S. R. Co.* (1882) 83 Ind. 191.

A minor of nineteen assumes the dangers incident to work on a construction train (*Eransville & R. R. Co. v. Henderson* [1893] 134 Ind. 636, 33 N. E.

In an action against an employer for injuries sustained by a minor employee, caused by the falling of lumber which he was piling, where there is no evidence that the work was dangerous, or that he did not know how to do it properly, or that he was wanting in capacity, and there being nothing alleged as to any defect in the appliances,—a nonsuit is properly granted. *Sims v. East & W. R. Co.* (1889) 84 Ga. 152, 10 S. E. 543. Former Appeal (1888) 80 Ga. 807, 6 S. E. 595.

⁵ *De Graff v. New York C. & H. R. R. Co.* (1879) 76 N. Y. 125.

⁷ Whether an infant is to be treated as having assumed the risks of personal injury to himself from performance of dangerous labor, and held to the exercise of ordinary care in order to recover damages from his employer for a personal injury, depends upon his capacity and fitness for the particular kind of labor upon which he is employed when injured. *De Lozier v. Kentucky Lumber Co.* (1892) 13 Ky. L. Rep. 818, 18 S. W. 451, where it was accordingly laid down that the jury should be instructed, in every case involving the liability of

a minor servant is of such an age that his physical and mental powers have virtually attained their full maturity, his rights and disabilities should be tested by the same standards as if he were actually over twenty-one.⁸ The proper logical meaning of this doctrine, however, seems to be, not that there is, as regards a minor of this age, a presumption that ordinary risks are appreciated and accepted, but rather that the age itself constitutes specific evidence which rebuts the presumption that there is no such appreciation and acceptance. The correct position undoubtedly is simply this,—that, on the one hand, a minor old enough to understand the risks of a dangerous employment must be deemed to have assumed those risks to the same extent as though he were an adult,⁹ and that, on the other hand, if a minor has

the master to a minor servant, to find for the plaintiff unless his age, intelligence, and experience were such as to induce a man of ordinary care and prudence to believe him qualified and fitted for the labor at which he employed him. In *Kehler v. Schwenk* (1892) 151 Pa. 505, 25 Atl. 130, the court, after citing *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412, proceeded thus: "It will be seen from this decision that, in actions by young persons against their employers, we recognize as sources of liability the inexperience of the servant, and the want of specific instruction as to the dangers of the service, and we suspend the rule that the servant assumes the risk of the service, when he has not knowledge by experience or by specific instruction." In *Map v. Smith* (1893) 92 Ga. 95, 18 S. E. 3, it was declared that the necessity of warning an inexperienced boy of seventeen of the dangers incident to machinery at which he is set at work is not dispensed with by the fact that the machinery is in perfect order, where the danger is not open and obvious. The rule as to the assumption of risk by a servant having equal knowledge with the master of the danger incident to the work "presupposes that the servant has sufficient discretion to appreciate the dangers, and has no application to the case of young and inexperienced children." *Fisk v. Central P. R. Co.* (1887) 72 Cal. 38, 13 Pac. 144. That there is no presumption that a minor understands ordinary risks was also recognized in *McIntosh v. Missouri P. R. Co.* (1894) 58 Mo. App. 281; *Wolski v. Knapp-Stout & Co. Co.* (1895) 90 Wis. 178, 63 N. W. 87; *Evansville & R. R. Co. v. Maddux* (1893) 134 Ind. 571, 33

N. E. 345, 34 N. E. 511. See also notes 9, 10, 11, *infra*.

In *Hague v. Colchester Mills* (1891) 60 Vt. 1, 37 Atl. 269, it was said that the length of time a boy had been employed in a factory, the nature of the work he had been engaged in, and the knowledge he had acquired of the machinery, are all matters to be considered by the jury, but afford no basis for a conclusion of law, where the question is whether he should have received instructions as to the danger of certain unfamiliar work which he was suddenly called upon to do.

Numerous other decisions in which this principle is taken for granted and be found cited in § 399, note 1, *supra*.

The point thus decided is, it should be observed, quite independent of the question whether an infant shall or shall not be presumed to have a capacity for understanding the dangers of his employment, according as he is above or below a certain age. See §§ 249, *ante*, and 348 *et seq.*

A contrary point is good against a demurrer based on the ground that the servant was sixteen years of age, and that the same presumptions, in regard to comprehension of risks, that are applicable to an adult, are also applicable to a minor over fourteen years of age. *White v. San Antonio Waterworks Co.* (1895) 9 Tex. Civ. App. 465, 29 S. W. 252.

⁸ *Alabama P. R. Co. v. Huggins* (1896) 115 Ala. 389, 22 So. 135, 136; *Cummins v. Citizens' Gaslight Co.* (1892) 132 Ind. 114, 16 L. R. 2 485, 30 N. E. 573 (see § 249, note, *ante*).

⁹ *Dunn v. McNamee* (1897) 59 N. J. L. 498, 37 Atl. 61; *Emma Cotton S. Co. v. Hale* (1892) 56 Ark. 237, 19

not the mental capacity and experience to appreciate the dangers of an employment, a master who employs him therein without instructing him as to those dangers is liable for an injury occasioned by his deficient intelligence.¹⁰

What is to be regarded as a sufficient age to justify a court in holding, as a matter of law, that the defense of assumption of ordinary risks is available to the master, must obviously be determined by considering the character of the risk from which the injury in suit resulted, in its relation to the actual age of the injured servant. It seems reasonable to say that, in the case of a very young child, the range of circumstances under which an appreciation of such risks is a necessary inference is so narrow that the doctrine of their assumption should be regarded as practically suspended, in so far as its application is a matter under the control of the court.¹¹ But it must be admitted that some courts have gone to such lengths in subjecting extremely young persons to the consequences of an imputed comprehension of the danger to which the injury was due, that it is difficult to assert that any such general principle as this has been definitely established.

Information as to ordinary as well as other risks is commonly conveyed to minors by means of instruction. See chapter xvi. If the master has adequately performed his duty in this respect, recovery by the servant becomes impossible for two reasons: First, because the master is guilty of no negligence in the premises, and the general

S. W. 600. This aspect of the principle is taken for granted in most of the cases cited in § 399, note 1, *post*.

To the same effect is *Gulf, C. & S. F. R. Co. v. Jones* (1890) 76 Tex. 350, 13 S. W. 374. There the actual point was that the master was liable because the minor had been employed without the consent of his parent. But this element is immaterial in the present connection. The existence or absence of consent may affect the parent's right of action for a loss of services, but has no significance where the essence of the wrong complained of is the exposure of the minor to a risk which he did not comprehend.

¹⁰ See chapter xvi., *ante*, and also the cases cited in § 399, note 1, *post*, where the servant was allowed to recover for injuries resulting from various causes.

¹¹ In a Texas case we find the following: "We do not believe that, upon sound principles of public policy or authority, the mere fact that an employee

is under the age of twenty-one years, should shield him from the usual responsibility incident to an honest employment voluntarily assumed by himself. This rule, however, is not enforced against a class of persons, who evidently would not exercise suitable discretion and experience as suitable employees in a dangerous business." *Houston & G. A. R. Co. v. Ller* (1879) 51 Tex. 270. In this case, where a youth of nineteen was injured by stumbling over a bar on a railway track, the same rule was applied. The great weight of authority supports this rule, "that, if a servant, under the age of twenty-one years, and not been instructed by the master as to the dangers of his employment, the question for the jury whether he acquired sufficient knowledge of the dangers to exempt the master from liability in case of injury." *Texas & P. R. Co. v. Brick* (1893) 83 Tex. 598, 20 S. W. 511, holding that the trial court had

principles stated in §§ 3, 60, *ante*, operate as a bar to the action;¹² and, secondly, because a properly instructed minor servant must be taken to have understood the risks to which that instruction related, and as the presumption of his ignorance of those risks is thus rebutted, his assumption of the risk becomes a necessary inference.¹³

A minor, although too young to be chargeable under the circumstances with contributory negligence, may be unable to recover for this reason that the evidence shows that he fully comprehended the risks involved in the act which caused his injury.¹⁴

From the foregoing remarks it is manifest that the inquiry whether a minor servant has assumed in a particular instance the ordinary risks of an employment always resolves itself into an examination of the weight of the evidence which tends to establish or negative the inference that he understood it. A further discussion of the subject will therefore be appropriately reserved for the chapter which deals generally with the circumstances under which a comprehension of risks is imputed to servants. See §§ 398 *et seq.*, *post*.

292. Extraordinary risks.—To a minor, as to an adult, the principle is applicable that he does not assume any risks which neither he nor his father—supposing the latter to have made the contract—had reason to believe that he would be required to encounter.¹ (As to

properly refused an instruction that "the plaintiff should be regarded as *sui juris* because he was of sufficient age and discretion to contract with defendant and assume the risks incident to his employment." These passages seem to contemplate theoretical, rather than a practical, suspension of the doctrine of the assumption of ordinary risks in the instance referred to. But if this is really its meaning, it is too sweeping under any view of the rights of minors.

¹²This seems to be a better way of putting the situation than that which is indicated in the statement that the same rules as to liability and obligation are applicable between a minor servant and his master as are applicable in a case in which an adult is injured, subject only to the limitations created by the requirement resting upon the master more fully to advise an inexperienced minor of any danger incident to the business than he is required to do in the case of an experienced person engaged in the same business. *Trans. & P. R. Co. v. Carlton* (1883) 60 Tex. 401.

¹³"Minor servants . . . are held to assume, by their contracts of employ-

ment, those ordinary risks of their service which are obvious to them, or have been pointed out in a manner suited to the comprehension of their youth and inexperience." *Beckham v. Hilber* (1885) 47 N. J. L. 12; *Carrington v. Mueller* (1900) 65 N. J. L. 244, 47 Atl. 564.

¹⁴On this ground the action failed where a boy under fourteen years of age was injured by getting astride of movable doors closing an elevator shaft and raised by the elevator as it came up for the purpose of seeing who was on the elevator below and preventing his raising it; the evidence being that he had been fully instructed as to the elevator, understood its operation, and had used it himself many times, and had been told not to go upon the doors. *Kant hold v. Arnold* (1894) 163 Pa. 269, 29 Atl. 883. In Pennsylvania the capacity of being negligent is conclusively presumed not to exist in children less than fourteen years of age. See § 318, *post*.

¹*Union P. R. Co. v. Fort* (1873) 47 Wall. 553, 21 L. ed. 739, cited to this effect in *Northern Pacific Coal Co. v. Richmond* (1893) 7 C. C. A. 485, 15 U. S. App. 262, 58 Fed. 756. A boy under

cases of this class, see, further, §§ 160-161, *post*.) On the other hand, it is equally well settled that the inference of a minor's assumption of such risks may be drawn by the court where the evidence is reasonably susceptible of no other construction than that the servant, notwithstanding his youth, had as full intelligence and information and as fully appreciated the danger to which he was exposed as a man of mature judgment under like circumstances.² In § 399, *post*, it will be shown under what circumstances a minor comes within the operation of this principle.

directed by his superior to perform a task *Spicer* (1893) 145 Ill. 329, 33 N. E. not within the range of his employment 944; *White v. Wittenmann Lithograph Co.* does not necessarily assume the increased risk from a defective machine, *Hicken v. Taaffe* (1887) 105 N. Y. 26, although he is aware thereof, and an adult with the same knowledge would 75 Md. 464, 23 Atl. 1094; *Thompson v. California Horseshoe Co.* (1896) 115 57 N. W. 298 (breach of statutory duty).

² *Herdman-Harrison Milling Co. v.*

CHAPTER XVIII.

CONTRIBUTORY NEGLIGENCE IN RESPECT TO THE ACCEPTANCE OR RETENTION OF A GIVEN EMPLOYMENT.

293. Introductory.

A. UNDER WHAT CIRCUMSTANCES THE SERVANT'S ACTION IS BARRED.

294. Servant's acceptance of duties for which he is not fitted.

295. Negligence not inferred from continuance of work, where servant had no knowledge of the abnormal risk which caused his injuries.

296. Negligence not necessarily inferable where knowledge of defects only is shown.

297. Knowledge of defects,—when sufficient to justify inference of negligence.

298. Negligence inferred, as matter of law, where knowledge both of defects and consequent risks is shown.

298a. Illinois doctrine.

299. Rationale of the servant's inability to recover, on the ground of negligence in continuing work.

300. When negligence is not imputed, as a matter of law, to a servant who knows of a risk.

301. Missouri doctrine as to the effect of the servant's knowledge.

302. Voluntary or involuntary quality of the servant's action in continuing work.

a. Will power of servant overcome.

b. Servant's fear that he may lose his position if he disobeys.

c. Voluntary action not predicable in the case of seamen.

302a. Duty of the servant to quit the employment when he ascertains that he is exposed to an abnormal risk.

303. Failure of servant to report a defect.

a. Generally.

b. To whom the report should be made.

c. Sufficiency of the notice.

304. Duty of servant to remedy defects.

B. RELATION BETWEEN THE DEFENSES OF ASSUMPTION OF RISKS AND CONTRIBUTORY NEGLIGENCE.

305. Generally.

306. Logical independence of the two defenses.

307. Contributory negligence at the time of the injury is material only in cases where there has been no assumption of the risk.

308. Cases not giving due effect to this principle.

309. Defenses confused owing to inaccuracies of terminology.

310. Doctrinal confusion between the defenses.

311. Concluding remarks.

The defense discussed in this chapter is treated in chapters XXI. XXIV., *post*, with relation to the four special elements indicated by the titles.

293. Introductory.—In the preceding chapter it has been shown that the servant's assumption of a risk caused by the master's negligence is based upon the hypothesis of an implied agreement. But it is obvious that, under the general principles of the law of negligence, evidence of the servant's continued exposure of himself to a known peril also raises a question which is independent of the conventional relations of the parties, *viz.*, whether he was acting with reasonable prudence in encountering that peril. Side by side, therefore, with the series of cases in which the defense raised is an assumption of the risk, we find another series in which the theory upon which the master seeks to escape liability is that the servant contributed to his own injury by his negligence in entering or remaining in an employment which involved abnormal dangers. The rulings upon this latter aspect of the servant's conduct are much less consistent and harmonious than those in which his knowledge of the risk is dealt with as evidence of its conventional acceptance by him, and the difficulties of formulating a body of clear and well-defined principles are greatly aggravated by the fact that the two defenses have been confounded, both verbally and doctrinally, to an extraordinary degree. See subtitle B, *infra*.

A. UNDER WHAT CIRCUMSTANCES THE SERVANT'S ACTION IS BARRED

294. Servant's acceptance of duties for which he is not fitted.—

A servant's acceptance of any given employment is deemed to be equivalent to an assertion that he is properly qualified for his duties. *Spondet peritiam artis*. Hence, if he suffers injury as a result of his want of skill or experience, the accident is considered to be caused by his own negligence in accepting a position for which he was unfitted.¹ It has even been held that the master is not liable under these circumstances, although he was aware that the servant had not such experience and skill as were required for the safe performance of the

¹ *Sunney v. Holt* (1883) 15 Fed. 880; him, uses improper appliances, and puts a heavy ladder against the stack so that it breaks off and he falls with it, shows himself so ignorant of methods on board of a boat that he cannot recover damages for injuries sustained by the fall. *The City of St. Louis* (1893) 56 Fed. 720.
Missouri, K. & T. R. Co. v. Young (1896) 4 Kan. App. 219, 45 Pac. 963. This principle seems also to be dimly recognized in *Morris v. Gleason* (1879) 4 Ill. App. 395.
 A deck hand on a steamboat, who, when directed to paint the smokestack, misunderstands the directions given

duties which he undertook.² But the correctness of this doctrine seems decidedly questionable, since the situation thus supposed is, according to the authorities cited in § 237, *ante*, one which raises a duty to instruct the servant; and the breach of that duty should, it is submitted, be regarded as the legal cause of the servant's injuries.

A servant who voluntarily and without necessity undertakes work which is outside the scope of his proper employment and which he is not competent to perform is manifestly negligent.³ Compare §§ 457, 465, *post*.

295. Negligence not inferred from continuance of work, where servant had no knowledge of the abnormal risk which caused his injuries.—There is no dispute with regard to the evidential significance of the servant's knowledge, when considered under its negative aspects. As, in cases where the defense raised is an assumption of the risk, it is well settled that the master cannot escape liability on the ground of the servant's contributory negligence unless the elements of danger are shown to have been known, either actually or constructively, to the servant.¹

One of these elements is the existence of the abnormal conditions of which the danger is an incident.² If the accident was due to two

¹ *Alexander v. Louisville & N. R. Co.* (1886) 83 Ky. 589 (instruction to this effect approved); *McDermott v. Atchison, T. & S. F. R. Co.* (1896) 56 Kan. 319, 43 Pac. 248. In the latter case, where the servant had made known his inexperience, the court said: "It certainly cannot be held that the company is guilty of greater negligence in employing an inexperienced brakeman than he is in soliciting and accepting such employment."

² An employee engaged in running an elevator, who was not competent to determine the cause of the failure of the car to operate, or to apply the remedy, was guilty of contributory negligence where, in the belief that such failure was due to the loosening of the cable and that the car was suspended by the safety "dogs," when in fact it was caught on a projecting bolt, he undertook to adjust the cable, exposing himself to inevitable injury if the car descended, without calling upon skilled men whom he knew were provided by the employer for such emergencies, and who would have instantly discovered the difficulty. *Nelson v. Sanford Mills* (1896) 89 Me. 219, 36 Atl. 79.

³ No one can be charged with negli-

gence in failing to avoid danger of which he knows nothing. *Kearns v. Chicago, M. & St. P. R. Co.* (1885) 66 Iowa, 599, 24 N. W. 231. Negligence can only be affirmed in respect of situations and conditions known to the party to whom it is imputed. *Brown v. Louisville & N. R. Co.* (1895) 111 Ala. 275, 19 So. 1001. See also, to same effect, *Higgins v. Williams* (1896) 114 Cal. 176, 45 Pac. 1041. As to the general principle that knowledge is an essential element of negligence, see also chapter X., *ante*.

Compare § 271, *ante*, and §§ 319, 320, *post*.

² In the following cases the action was sustained: *Gulf, C. & S. F. R. Co. v. Donnelly* (1888) 70 Tex. 371, 8 S. W. 52 (railway track had suddenly, and without plaintiff's knowledge, become worse owing to the recent passage of a train; hand car derailed); *St. Louis & S. F. R. Co. v. McClain* (1891) 80 Tex. 85, 15 S. W. 789 (fireman was ignorant of defective wheel on his engine); *Norman v. Wabash R. Co.* (1894) 10 C. C. A. 617, 22 U. S. App. 505, 62 Fed. 727 (plaintiff injured through kneeling on a floor, not known to be defective); *Gibson v. Schwabacher* (1893) 99 Cal. 419,

or more distinct conditions the defense of contributory negligence fails, unless the servant was aware of all of them.³

The other element of which it must be proved that the servant was aware, in order to lay a foundation for this defense, is the fact that the abnormal conditions were dangerous to a person performing his functions.⁴

The servant's knowledge, actual or constructive, of the abnormal conditions and of the dangers created by them, is a question of fact to be determined with reference to the particular circumstances presented by the evidence. See chapter XXI., *post*.

The significance of these elements under their positive aspect,—namely, that which they present when there is evidence that the servant possessed a knowledge, actual or constructive, of one or both of them, is a less simple matter. It will be seen from the following sections that, while the authorities are in some important respects entirely harmonious as to the proper limits of the respective provinces of courts and juries in dealing with such evidence, there is a serious and irreconcilable conflict of opinion as to many vital points.

34 Pac. 104 (location of unprotected machinery not known to servant).

³ *Waldhier v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 37 (switchman knew that point of frog was loose, but did not know that the plate was broken, until his foot struck it); *New Jersey & N. Y. R. Co. v. Young* (1892) 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 723 (fireman knew that the air brake was defective, but not that the defect was so great as to render it impossible to stop the train within the distance at which a danger signal can be seen); *Cleveland, C. C. & St. L. R. Co. v. Brown* (1893) 6 C. C. A. 142, 18 U. S. App. 10, 56 Fed. 804 (workman did not know that his cutting of a supporting post would cause a structure to fall).

Where water escaped from a locomotive tank owing to the substitution of a wooden plug for the valve stem, and fell onto the iron apron connecting engine and tender, where it froze, creating an icy covering on which plaintiff slipped, receiving injuries, and plaintiff had observed the escape of water, but not the icy formation on the apron, it was for the jury to say whether, on observing the defect, it was plaintiff's duty to forthwith abandon the engine. *Mason & O. R. Co. v. Yockey* (1900) 43 C. C. A. 228, 103 Fed. 265. Knowledge by an employee set to work by the side of a pile of ore, that the light is insufficient,

and his continuance at the work, do not constitute an assumption of the risk of the unsafe condition of the pile. *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876. In *Ft. Worth & D. C. R. Co. v. Wilson* (1893) 3 Tex. Civ. App. 587, 24 S. W. 686, it was held that a charge that, if the deceased knew of the storm that washed away the defendant's track, the plaintiff could not recover, was properly refused, since the fact that the deceased might have had notice of the rain would not charge him with contributory negligence, unless he also had notice of the condition of the track which rain rendered dangerous. (This decision was reversed in 85 Tex. 516, 22 S. W. 578, but merely on points of practice.)

⁴ The necessity of establishing this fact is recognized in the following cases: *Wuolilla v. Duluth Lumber Co.* (1887) 37 Minn. 153, 33 N. W. 551; *Taylor v. Carver Mfg. Co.* (1885) 140 Mass. 150, 3 N. E. 21; *Sims v. Lindsay* (1898) 122 N. C. 678, 30 S. E. 19; *Bjornan v. Fort Bragg Redwood Co.* (1894) 104 Cal. 626, 38 Pac. 451; *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, per Byles, J. (uncovered machinery); *Davidson v. Cornell* (1890) 31 N. Y. S. R. 982, 10 N. Y. Supp. 521 (employee injured by the falling of a platform or structure on

296. Negligence not necessarily inferable where knowledge of defects only is shown.—(Compare § 272a, *ante*.)—An obvious corollary to the general rule laid down in the preceding section is that the servant is not prevented from recovering by evidence merely of his knowledge of the material conditions which caused the injury, inasmuch as such evidence still leaves the existence of the other essential element of his culpability to be established.¹ It is one thing to be aware that machinery is defective, or in a particular condition, and another thing to know or appreciate the risks resulting therefrom. A man of ordinary intelligence and experience may know the actual condition of an instrument with which he is working and yet not know the nature or extent of the risks to which he is exposed.² The accepted doctrine,

which he was required to work has a right to show his ignorance of the effects arising from the manner adopted in bracing the structure) Reversed in (1892) 132 N. Y. 228, 30 N. E. 573, but not on this point; *Walker v. Atlanta & W. P. R. Co.* (1898) 103 Ga. 820, 30 S. E. 503.

A finding that the servant was in the exercise of due care impliedly negatives his knowledge of the danger. *Chicago & E. I. R. Co. v. Hines* (1890) 132 Ill. 161, 23 N. E. 1021.

¹The mere fact that a servant has knowledge of defects in plans or methods of construction may not charge him with contributory negligence or assumption of risk. The question is, Did he know, or by the exercise of ordinary common sense and prudence could he have known, that, in addition to these defects, the risks existed? *Snedden v. Libera* (1896) 65 Minn. 337, 68 N. W. 36 (improper plan for construction of cistern wall). It is error to grant a nonsuit where, although it is admitted that the servant knew of the defect, he denied, and the evidence is consistent with the inference, that he had any actual knowledge that the appliance was dangerous. *Pitts v. Florida C. & P. R. Co.* (1896) 98 Ga. 655, 27 S. E. 189 (space allowed to exist between engine and tender, rendering apron liable to fly up—fireman injured); *Colbert v. Rankin* (1887) 72 Cal. 197, 13 Pac. 491 (plaintiff entitled to instruction that he was not guilty of contributory negligence unless he knew, or might have known, that by reason of the defect the employment involved danger).

A servant cannot be pronounced negligent, as a matter of law, on the theory that, if a certain method of doing work

betokened negligence on the master's part, the mere fact that the servant went on working, with a knowledge of the conditions, shows that he, also, was negligent. *Eddy v. Aurora Iron Works Co.* (1890) 81 Mich. 548, 46 N. W. 17.

²*Wuotilla v. Duluth Lumber Co.* (1887) 37 Minn. 153, 33 N. W. 551, where the court, emphasizing the inequality in the positions of the master and servant, refused to set aside a verdict for the plaintiff, who, being only a common laborer, and not a machinist, was caught in a gearing near which, as was testified by several witnesses, it was quite possible for anyone not acquainted with machinery to work without anticipating any danger.

A verdict which exempts the servant from the charge of negligence is not inconsistent with the fact that he knew of the abnormally dangerous conditions which caused his injury. "Knowledge is only an ingredient in negligence. It may be that the knowledge of the servant induced him to use extraordinary care, which care was yet insufficient to preserve him from accident. Besides, a servant knowing the facts may be utterly ignorant of the risks." *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, per Byles, J.

A finding by a judge, sitting as a jury, that a scaffold was manifestly defective, the ledge being too narrow, and the standard not tied, does not necessarily imply that the servant who used it was negligent. *Stuart v. Evans* (1883) 49 L. T. N. S. 138, 31 Week. Rep. 706 (see especially the opinion of Williams, J.).

An averment that a servant knew that a fellow servant was incompetent

therefore, is that, in order to charge a servant with contributory negligence, the dangers, and not the defects alone, must be so obvious that a reasonably prudent man would have avoided them.³ That is to say, the true test for the determination of the question whether the servant was in the exercise of due care is not to inquire whether he was aware of the defect which caused his injury, but whether that defect rendered the peril of remaining in the service so imminent that he ought to have abandoned it.⁴ Or, as the rule has also been stated, the continuance of an employee in the employer's service after he learns of defects in the machinery used in his employment will not defeat a recovery for injuries resulting from such de-

for a reasonable time before the injury caused by such fellow servant's negligence does not show that the former is debarred from recovery on the ground of contributory negligence. *Hocy v. Dublin & B. Junction R. Co.* (1870) Ir. Rep. 5 C. L. 206.

In *Young v. Syracuse, B. & N. Y. R. Co.* (1899) 45 App. Div. 206, 61 N. Y. Supp. 202, Smith, J., in discussing certain cases which he was distinguishing from the one before him, remarked that the court could not say, as a matter of law, that the dangerous conditions were so obvious as to make them an apparent risk, and drew the inference that the cases did not come within the doctrine of assumed risks, but presented a question of contributory negligence. Clearly the proper way of putting the matter was that one of the elements of an assumption of the risk, viz., the servant's knowledge of it, was not so indisputable that the court could say that it existed.

³ *Ashland Coal & I. R. Co. v. Wallace* (1897) 101 Ky. 626, 42 S. W. 744. Rehearing Denied in (1897) 101 Ky. 644, 43 S. W. 207 (defective roof in mine).

In a case where the injury was caused by an explosion of gas in a mine, and it was proved that the plaintiff knew that some of the cross-cuts were closed, but denied that he knew the dangerous effect this would have upon the ventilation, the court reasoned thus: "The danger must be such as may reasonably be expected to entail accident or injury, not a remote probability or chance of accident. It must be such as a fairly prudent, cautious man ought to think likely to result in accident, and which he ought not to risk. Does the rule require the employee in all cases to stop work simply because he knows of defective machinery or condition? In this

case could the plaintiff fairly expect that these openings would leave an insufficient supply of air? And did he know that there was gas present, in which case the openings would be a real danger, otherwise not? Was it rash, or even imprudent, to work? Was he so in thinking he might go on safely? Under the circumstances of this case, you cannot say that the situation was such as to impress him with a feeling of insecurity. To do so you must fix the rule unalterably that knowledge of any defect whatever, finally resulting in disaster, should have caused the employee to stop, and will forbid recovery. Would the interests of either employer or employee be subserved by such a rule? To know simply of a defect of machinery, or that the condition or surroundings of a working place are not just what they should be to guarantee safety, is not to be certainly or necessarily forewarned of danger. Does the employee from that knowledge in all instances assume all risks? I think not. The question is, Did he know, or ought he to have known by the use of ordinary common sense and prudence, as applied in the particular instance, that dangers were before him likely to flow from the defect or condition? Not simply that he knew the defect or condition existed. He need not in all cases quit work. He may run some risks provided they be such as a prudent, careful man would, under the circumstances, run." *Graham v. Newburg Orrel Coal & Coke Co.* (1893) 38 W. Va. 273, 18 S. E. 584.

⁴ *Southern P. Co. v. Yeargin* (1901) 48 C. C. A. 497, 109 Fed. 436 (engineer of passenger train injured by collision with helper engine running backwards without a headlight on the tender).

fects, unless they are so dangerous as to threaten immediate injury, or the danger is such as to be reasonably apprehended by him.⁵

Considered with reference to the respective functions of courts and juries, the principles above laid down will usually involve the consequence that, when the specific evidence submitted only goes to the extent of establishing the servant's knowledge of the defect, the question of his contributory negligence cannot be withdrawn from the jury.⁶ Especially is the servant entitled to the benefit of this principle

⁵ *Mangum v. Bullion, B. & C. Min. Co.* (1897) 15 Utah, 534, 50 Pac. 831.

"The right of a servant to recover on account of the master's negligence is not affected by notice of any defects other than such as the servant ought, in the exercise of ordinary prudence, to have foreseen might endanger his safety." *Wagge v. North Pacific Coast R. Co.* (1889) 78 Cal. 430, 21 Pac. 114 (brakeman allowed to recover, where he was injured owing to the fact that the cow-catcher of the engine was defective and failed to throw aside a cow which had strayed through a gap in the fence, the result being the derailment of the train).

⁶ See cases already cited in this section, and also the following: *Undermaur v. Dames* (1866) L. R. 1 C. P. 274, 35 L. J. C. P. N. S. 184, 12 Jur. N. S. 432, 14 L. T. N. S. 484, 14 Week. Rep. 586, 1 Harr. & R. 243; *Goggin v. D. M. Osborne & Co.* (1896) 115 Cal. 437, 47 Pac. 248; *Eureka Co. v. Bass* (1883) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216; *Le Clair v. First Div. of St. Paul & P. R. Co.* (1873) 20 Minn. 9, Gil. 1; *Norfolk & W. R. Co. v. Ward* (1894) 90 Va. 687, 24 L. R. A. 717, 19 S. E. 849; *Louisville & N. R. Co. v. Kelly* (1894) 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407 (negligence is question for jury where knowledge of conditions only is indisputable—deadwoods out of repair, holes in track, or incompetency of fireman—brakeman injured while coupling); *Parker v. South Carolina & G. R. Co.* (1896) 48 S. C. 364, 26 S. E. 669 (derailment caused by defective engine and track); *Fordyce v. Edwards* (1895) 60 Ark. 438, 30 S. W. 758 (engine derailed by collision with a horse in consequence of its pilot being too high); *Laning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417 (plaintiff knew of incompetency of foreman. Here the master's agent had told the plaintiff that, if the foreman did not do better, he would have to discharge him—

a statement amounting to a conditional promise; but the ruling does not seem to turn upon this circumstance entirely); *Mchan v. Syracuse, B. & V. Y. R. Co.* (1878) 73 N. Y. 585 (nonsuit properly denied where engineer was injured by a derailment, he knowing merely that the track was somewhat out of repair); *Kain v. Smith* (1882) 89 N. Y. 375 (1881) 25 Hun. 146 (jigger used in loading cars seen to be defective); *Schwandner v. Birge* (1884) 33 Hun. 186 (plaintiff knew that the means of escape from fire prescribed by statute were not provided. Emphasis was laid here on the distinction between appliances used by the plaintiff himself and those in other parts of the establishment); *Hearey v. Hudson River Water Power & Paper Co.* (1890) 57 Hun. 3, 9, 10 N. Y. Supp. 585 (had fifteen years of age continued to use, for the purpose of pushing a heavy pipe, a pole which, to his knowledge, had become spongy and soft at the end, the consequence being that it slipped, and he was precipitated into a vat of hot fluid; error to rule that plaintiff must have known pole to be unfit for use); *Fox v. Le Conte* (1896) 2 App. Div. 61, 37 N. Y. Supp. 316 (negligence of plaintiff question for jury where he denied that he knew that the clicking of a power press indicated danger, and this testimony was corroborated by other witnesses, who stated that they did not consider danger to be a necessary inference); *Hungerford v. Chicago, M. & St. P. R. Co.* (1890) 41 Minn. 444, 43 N. W. 324 (brakeman injured by the "gooseneck" of an engine, generally used for passenger trains, but in this case ordered to be coupled to a freight car,—circumstances under which it would be extremely apt to cause injury to the person doing the coupling, if he were not familiar with the appliance); *Missouri P. R. Co. v. Lehnberg* (1889) 75 Tex. 61, 12 S. W. 838 (charge directing verdict for defendant, if there were patent defects, held properly re-

where the defective appliance had been safely used by himself or his fellow servants so frequently and so long that he might reasonably

fused where the servant saw that a switch engine had a square tank, but did not know the danger of its use); *St. Louis & S. F. R. Co. v. McClain* (1891) 80 Tex. 85, 15 S. W. 789 (verdict for plaintiff will not be set aside because the record shows that he knew of the defective condition of the appliance); *Gulf, C. & S. F. R. Co. v. Shearer* (1892) 1 Tex. Civ. App. 343, 21 S. W. 133 (instruction that knowledge of defect — unballasted track — rendered servant chargeable with negligence improperly refused); *Burman v. Texas Brewing Co.* (1897) 17 Tex. Civ. App. 446, 43 S. W. 808 (crack in singletree of wagon); *Pierson v. New York, N. H. & H. R. Co.* (1900) 53 App. Div. 363, 65 N. Y. Supp. 1039 (air brakes did not work properly owing to leak in steam pipe, which reduced the pressure below the requisite degree); *Brownfield v. Chicago, R. I. & P. R. Co.* (1899) 107 Iowa, 254, 77 N. W. 1038 (fireman remained on defective engine to complete run); *Davidson v. Cornell* (1892) 132 N. Y. 228, 30 N. E. 573 (servant knew of master's omission to provide the usual means of rendering secure the system of operations adopted, but did not know the natural consequences of that omission); *Foley v. California Horse-shoe Co.* (1896) 115 Cal. 184, 47 Pac. 42 (minor of fourteen had his sleeve caught in a cogwheel, while he was screwing on a misplaced nut); *Powers v. Standard Oil Co.* (1898) 53 S. C. 358, 31 S. E. 276 (rotten plankway); *Burns v. Merchants' & Planters' Oil Co.* (1901; Tex. Civ. App.) 63 S. W. 1061 (no watchman stationed to guard servant from moving cars).

The mere fact that a miner knew that one of two ore cars which he had to operate was higher than the others in use does not show conclusively that he knew it to be dangerously high with relation to the roof of an entry at a certain point. It is for the jury to say whether he was negligent in continuing to perform duties which required him to ride in that car through the entry. *Tennessee Coal, Iron & R. Co. v. Carrier* (1901) 47 C. C. A. 161, 108 Fed. 19. Where a boy of fourteen stumbled over a lump of coal near a railway track in a mine, it was held to be for the jury to say whether he appreciated the risk, although he knew the obstacle was there.

Northern Pacific Coal Co. v. Richmond (1893) 7 C. C. A. 485, 15 U. S. App. 262, 58 Fed. 756. It has been held that a fireman was not necessarily negligent in remaining on a locomotive the air brake of which was so defective that the train could not be stopped within the distance danger signals could be discerned, where it was not shown that this was manifest before the accident. *New Jersey & N. Y. R. Co. v. Young* (1892) 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 723. Whether or not a freight conductor was negligent in running a train over a road known to him to be defective, with an inadequate number of brakemen, is for the jury, upon evidence that a number of cars were added to the train under the orders of the train dispatcher, against the conductor's protest that there was not a sufficient number of brakemen. *Meir v. Charleston & S. R. Co.* (1898) 55 S. C. 90, 32 S. E. 828. A brakeman continuing work with knowledge of the discontinuance of night inspection of defendant's track does not assume the risk of an accident caused by the burning of a bridge over a stream, in the night. Such a change of system does not necessarily expose him to any certain danger. *Maydole v. Denver & R. G. R. Co.* (1900) 15 Colo. App. 449, 62 Pac. 964.

A switchman's knowledge that a switch engine is operated without a fireman does not of itself, as matter of law, preclude recovery for injuries resulting from the failure of the engineer to see signals, because his attention was diverted by the performance of a duty which ordinarily would be performed by a fireman. *Wright v. Southern P. Co.* (1896) 14 Utah, 383, 46 Pac. 374.

A special reason assigned for holding that an employee who was injured by the insufficiency of the supports used to sustain the sides and roof of a tunnel which he was excavating was not guilty of negligence in continuing the work was that he had a right to rely on the vigilance, knowledge, and judgment of the superintendent, and to act on the presumption that he would have spoken, if there was any probability of a cave in. *Kearney Electric Co. v. Laughlin* (1895) 45 Neb. 390, 63 N. W. 941.

In *Gallagher v. Piper* (1864) 16 C. B. N. S. 669, 33 L. J. C. P. N. S. 329, Willes, J., approved of the finding of

suppose that its use could be continued without danger.⁷ It is only in a very clear case that the question whether the servant appreciated the danger as well as the defect can be withdrawn from the jury.⁸

In instructing the jury it is proper to draw their attention to the rule that a servant is not necessarily chargeable with contributory negligence because of his knowledge of the conditions which gave rise to the danger, if he did not, in fact, know of the danger.⁹ On the other hand, an instruction ignoring or disregarding the element of danger, as distinguished from the knowledge of the defect, is erroneous.¹⁰ See, however, the following section, where cases which apply a less stringent doctrine are mentioned.

297. Knowledge of defects,—when sufficient to justify inference of negligence.—The doctrine laid down in the preceding section has manifestly arisen out of the necessity of providing a rule adapted for use in courts in which the practice of trial by jury prevails. Essentially it amounts to nothing more than this,—that when that part of the evidence, the significance of which is unquestionable, merely goes to the extent of showing that the abnormal conditions which caused the injury were known to the servant, and it is an open question whether he understood the risk created by those conditions, it is for

the jury that a laborer was not negligent in continuing to work after complaining to his foreman that the materials furnished for a scaffold which he was erecting were deficient in quantity, saying that "a man can hardly, under such circumstances, be considered a volunteer." (footboard, known to be defective, had been used by a switchman one hundred times a day for a week, without injury): *Hawley v. Northern C. R. Co.* (1880) 82 N. Y. 370 (engine run with cars attached over a defective road was overturned—other engine had frequently been run over the road in safety, in the same way that plaintiff was running his).

"It seems to be the true doctrine that perhaps there may be instances in which the knowledge of the defects, possessed by the injured party, is so definite that he must be deemed, as a matter of law, to have taken the risk on himself of injury arising therefrom, but that, as a general rule, such knowledge is only a circumstance to be submitted to the jury from which they may infer negligence." *McMahon v. Port Henry Iron Ore Co.* (1881) 24 Hun, 48 (non-suit held erroneous, where plaintiff knew that a blast had been negligently prepared).

See also cases cited in § 298a, note 4, and § 301, *infra*.

Many of the cases cited in chapter XXI., *post*, with regard to the effect of the servant's inexperience or minority are also pertinent in this connection.

⁷ *Lytle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571

⁸ *Louisville & N. R. Co. v. Kelly* (1894) 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407; *Kain v. Smith* (1882) 89 N. Y. 375 (1881) 23 Hun, 116.

⁹ *Knoxville Iron Co. v. Pace* (1898) 101 Tenn. 476, 48 S. W. 232. See also § 298a, note 2, *infra*.

¹⁰ *Lawless v. Connecticut River R. Co.* (1883) 136 Mass. 1; *Lasare v. Graniteville Mfg. Co.* (1882) 18 S. C. 275; *Weston, H. & S. A. R. Co. v. Purich* (1897; Tex. Civ. App.) 40 S. W. 191; *Bussey v. Charleston & W. C. R. Co.* (1898) 52 S. C. 438, 30 S. E. 477; *Southern P. Co. v. Yeargin* (1901) 48 C. C. A. 497, 109 Fed. 436; *Parker v. South Carolina & G. R. Co.* (1897) 48 S. C. 364, 26 S. E. 669.

See also note 6, *supra*, and § 298a, note 2, *infra*.

the jury to determine whether he was negligent in continuing in the employment. On general principles, it is plain that, where there can be no reasonable doubt that a person in the servant's position, who knew of the defect in question, must also have understood the resulting risk, it may be ruled, as a matter of law, that, for the purpose of the defense, his information was complete.¹ This is the rationale of those decisions in which a knowledge of the defect alone has been held sufficient to prevent recovery.² In determining whether the case is one in which the verdict of a jury on this point may be directed or overridden, the material question is, whether knowledge of the defects necessarily, and in legal contemplation, carries with it knowledge of the risk or danger, or whether knowledge of the defects can possibly warrant any other conclusion than that the risk was understood.³ If the conditions are such as to require an affirmative answer to that question, we arrive at the same point in the deductive process as that which is contemplated by the rule explained in the next section. Whether or not notice of danger in the continued use of a defective appliance can be imputed to the servant will depend upon the character of that appliance, and upon whether it was in so obviously a dangerous condition as to convey notice to a person of his intelligence of the danger which might result to him in consequence of his continuing to use it.⁴ As a matter of ultimate analysis, therefore, the decisions exemplifying that rule and those in which actions have been held not maintainable on the ground

¹ That an appliance may be so grossly or clearly defective that the servant must have known of the risk to which it exposed him was laid down in *Sims v. Lindsay* (1898) 122 N. C. 678, 30 S. E. 19. This is in accordance with the general principle laid down by Knowlton, J., in a dissenting opinion: "The danger may be so great and so obvious that, in any possible view of the evidence, the general judgment of common men would at once condemn his conduct in continuing to work, as careless." *Davis v. Forbes* (1898) 171 Mass. 548, 47 L. R. A. 170, 51 N. E. 20.

² That the rule by which the continuance of work with knowledge of defects implies negligence is founded on the presumption that a servant understands the dangers arising from these defects was expressly noted in *Galveston, H. & S. A. R. Co. v. Parrish* (1897; Tex. Civ. App.) 40 S. W. 191.

³ *Michael v. Stanley* (1892) 75 Md. 464, 23 Atl. 1094. In that case

the court stated the effect of the previous decisions in Maryland as follows: "If the machinery or appliances which the master has furnished contains obvious defects, of which the servant knew, or, as a reasonably prudent man, he might have known; or if he continues in the service after he has discovered, or by the exercise of reasonable care might have discovered, the existence of such defects,— he cannot recover against the master for injuries resulting from such defective machinery. In other words, if the servant has been wanting in such reasonable care and caution as would have prevented the happening of the accident, he is guilty of contributory negligence, and the master is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery through the negligence of the master or his general superintendent."

⁴ *Pitts v. Florida C. & P. R. Co.* (1896) 98 Ga. 655, 27 S. E. 189.

of the servant's knowledge of the defect merely are illustrations of the same theory. Knowledge of the danger is not denied to be a necessary element of the defense. It is merely taken for granted that knowledge of the defect must have carried with it a knowledge of the concomitant danger. Viewed from this standpoint, the supposed conflict between the authorities, which has troubled some judges, entirely vanishes so far as it is a matter of theory; for no court, not even those of Missouri and of the states which have followed the Missouri decisions (see § 301, *infra*), has gone to the length of declaring that it is for the jury, under every conceivable state of the evidence, to say whether a knowledge of the danger shall be inferred. But it must be confessed that, on the facts, it is sometimes extremely difficult, if not impossible, to reconcile the cases cited below, in which the servant's action failed on the ground of contributory negligence, with those cited under § 296, *supra*. In many instances the circumstances are, for practical purposes, identical, and in at least one, viz., where the defect under review was the unfitness of a fellow servant, absolutely identical.⁵

⁵ *Griffiths v. Gidlow* (1858) 3 Hurst. 1, Co. v. Worley (1893) 92 Ga. 84, 14 S. E. 361 (knowledge of fellow servant's unfitness appeared from plaintiff's own testimony); *Nelson v. Central R. & Bkg. Co.* (1891) 88 Ga. 225, 14 S. E. 210 (plaintiff nonsuited, where he himself testified that a brake rod was broken); *Melick v. Bell* (1897) 19 Ky. L. Rep. 267, 39 S. W. 823. Reversing on rehearing (1897) 38 S. W. 702 (level of hand car was worm-eaten); *Laurie v. Hagemeyer & Co.* (1892) 93 Ky. 591, 20 S. W. 704 (defective saw); *Michael v. Stanley* (1892) 75 Md. 464, 23 Atl. 1094 (minor of eighteen years injured by circular saw in which two teeth were wanting); *Erdman v. Illinois Steel Co.* (1897) 95 Wis. 6, 69 N. W. 993 (cracked saw); *Baker v. Western & A. R. Co.* (1882) 68 Ga. 699 (cleaver used for cutting iron bars threw off a splinter when struck by a hammer); *Western & A. R. Co. v. Bishop* (1873) 50 Ga. 465 (drawbar on locomotive tender was dangerously short); *McQueen v. Central Branch Union P. R. Co.* (1883) 30 Kan. 689, 691, 1 Pac. 139 (plainly visible defects in wheels of hand car which plaintiff had an opportunity to observe); *Jackson v. Kansas City, L. & S. R. Co.* (1884) 31 Kan. 761, 3 Pac. 501 (plaintiff knew that step of engine was not fit for use); *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582 (unblocked guard rail); *Goltz v. Mil-*

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There is good authority for the position that it is not a mis-direction to give a charge to the effect that, if the injured servant had continued work with a knowledge of the defective conditions, he was guilty of contributory negligence.⁶ But there is manifestly some danger that

unaker, L. S. & W. R. Co. (1899) 76 App. Div. 271, 42 N. Y. Supp. 116. The contributory negligence of the plaintiff, not the negligence of the master, is the proximate cause of the injury, where a miner, knowing of the need of proper repairs, continues working, and is injured by the fall of the roof. *Pittsburgh & W. Coal Co. v. Estimer* (1895) 53 Ohio St. 43, 40 N. E. 725; *Factor Coal Co. v. Hair* (1894) 20 Colo. 320, 26 L. R. A. 435, 38 Pac. 378; *O'Leary v. Maple Grove Coal & Min. Co.* (1901) 115 Iowa, 71, 87 N. W. 736.

McKee v. Chesapeake & O. R. Co. (1891) 35 W. Va. 500, 14 S. E. 261 was construed in *Woodell v. West Virginia Improv. Co.* (1893) 38 W. Va. 23, 17 S. E. 386, as a ruling that an engineer's knowledge that some stay bolts in a locomotive boiler were broken rendered him chargeable with negligence in going on working. But the actual decision was that his negligence was for the jury, as a promise to repair had been given.

Where a servant "knowingly" used defective machinery, he cannot recover damages for injuries resulting therefrom. *Johnson v. Western & I. R. Co.* (1875) 55 Ga. 133 (words of headnote written by the court).

An allegation that the delinquent co-servant had "a propensity to start machines after they were stopped," and that "this was known to the officers of the defendant corporation, and they retained him in its employ," will not authorize a recovery, where the plaintiff also alleges that he had a knowledge of this propensity. *Smith v. Sibley Mfg. Co.* (1890) 85 Ga. 333, 11 S. E. 616.

See also § 298a, note 5, *infra*.

"It has been held proper to instruct a jury that a railroad company cannot be held liable for an injury to a switchman caused by the fact that the engine used by the crew leaked steam so that it prevented the engineer from seeing a signal to stop, where the engine was in good condition when it was taken out by the crew, but became defective while they were using it, and they continued its use without objection. *Hunt v. Kane* (1900) 40 C. C. A. 372, 100 Fed. 256. In *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598, the court sustained the refusal of the trial

unaker, L. S. & W. R. Co. (1899) 76 Wis. 136, 44 N. W. 752 (iron hook plainly showed a flaw on the outside. Special finding that the defect could have been observed by the owner of the hook or parties that used it if they were exercising ordinary care in using or taking care of it, held conclusively to negative the right to recover); *Anderson v. C. A. Nelson Lumber Co.* (1896) 67 Minn. 79, 60 N. W. 630 (uncovered machinery); *Kinn v. Ford River Lumber Co.* (1892) 93 Mich. 172, 53 N. W. 10 (same facts); *Schroeder v. Michigan Car Co.* (1885) 56 Mich. 132, 22 N. W. 229 (same facts); *Peterson v. Sherry Lumber Co.* (1895) 90 Wis. 83, 93, 62 N. W. 944 (same point); *Nadon v. White River Lumber Co.* (1890) 76 Wis. 120, 43 N. W. 1135 (same facts); *Houston & T. C. R. Co. v. Myers* (1881) 55 Tex. 111 (arguendo); *Texas & P. R. Co. v. Bradford* (1886) 66 Tex. 732, 50 Am. Rep. 730, 2 S. W. 595 (no proper appliances furnished for curving rails); *Senior v. Ward* (1859) 1 El. & El. 385, 5 Jur. N. S. 172, 28 L. J. Q. B. N. S. 139, 7 Week. Rep. 261 (habitual violation of rule on which servant's safety depended); *Alabama G. S. R. Co. v. Davis* (1898) 119 Ala. 572, 24 So. 862 (derailment caused by a stub switch not matching with the main track); *Lindberg v. Glenwood Lumber Co.* (1900) 127 Cal. 598, 49 L. R. A. 33, 60 Pac. 176 (no seat on a wagon).

A brakeman who is notified by a rule of the company that he will sometimes have to couple cars which have lumber, etc., projecting over their ends, and is required to observe the manner in which such cars are loaded, cannot, even if such method of loading is negligent, recover for injuries received in coupling a car so loaded, for he is negligent in voluntarily engaging in the service with knowledge of the company's nonperformance of its duty. *Brennan v. Michigan C. R. Co.* (1892) 93 Mich. 157, 53 N. W. 358. An employee working in the vicinity of a clay bank assumes the risk from the caving-in of the bank where he knows that a large mass has already fallen and that a slide is imminent, but believes that he can finish the work at which he is engaged before the caving-in occurs. *Baker v. Sutton* (1896) 11

such an instruction may mislead the jury to the prejudice of the servant, and the better practice is, therefore, that which is indicated in the cases cited at the end of the last section.

The phrase "knowledge of the risk," which is customarily employed in statements of the principle applied in the cases cited under this section, is somewhat ambiguous in meaning. By one court it is interpreted as implying that the action is not barred by the servant's knowledge of a defect, unless the circumstances were such as "necessarily and inevitably to expose him to danger."⁷ But it is manifest that many of the decisions collected in note 4, *supra*, cannot be brought within the purview of any such stringent principle. They rather proceed upon the theory suggested in other cases, that negligence is properly inferred wherever injury is "reasonably be apprehended."⁸ The probability or improbability of

judge to charge the jury to the effect that the plaintiff could not recover if he knew, or had reasonable cause to believe, that the engine which exploded was defective, and approved the following instruction, as given: "If the plaintiff ran the engine when it was not in good working order, knowing it to be such; and the particulars in which it was not in good working order were signs of a defective condition in the boiler, causing an explosion by which the plaintiff was injured; and a competent engineer ought to have known that such particulars were signs of such defective condition; and the plaintiff held himself out as such a competent engineer when he entered into the employment of the defendants as an engineer,—he cannot recover." If we compare the language of the instructions thus rejected and adopted, it will be apparent that this Massachusetts case is not an authority for the unqualified proposition in support of which it is sometimes cited, *viz.*, that to defeat the action of the servant it must be proved, not only that he knew of the defects from which the injury resulted, but that he must also have known of the danger. Commenting upon the case, the supreme court of Texas has made the following remarks: This opinion we understand only to declare that knowledge of a defect which in the ordinary course of events, under the operation of well-known laws governing matter, may result in injury, will cast upon the person who, with knowledge of such, continues to use the defective implement or

machine, the risks incident to the business done with the defective implement or machine; but there is nothing in the opinion to indicate that the employer must have had knowledge of the danger of an explosion otherwise than a servant may have been affected with knowledge, or notice, by the defect itself, that such an event might occur. *Texas & P. R. Co. v. Bradford* (1884) 66 Tex. 732, 733, 59 Am. Rep. 739, 2 S. W. 593.

⁷ *Snow v. Housatonic R. Co.* (1861) 8 Allen, 441, 85 Am. Dec. 720 (plaintiff's foot caught in a hole in a plank crossing). Compare *Walsh v. E. & St. J. R. Co.* (1885) 97 Mo. 37, where the servant was allowed to maintain his action on the ground that the defect was not such as to render the place of work "necessarily dangerous."

⁸ *Eureka Co. v. Bass* (1886) 81 Am. 200, 60 Am. Rep. 152, 8 So. 216. "Whether continuing in the service after discovering the defect constitutes contributory negligence depends in a great measure upon its nature and extent. It is questionable, when the danger is so apparent that injury appears to be inevitable, the employee is not justified in continuing in the service. No man is bound to subject himself to certain and inevitable injury, endangering life in rendering service to another. Continuance in service under such circumstances would be reckless, and, if death ensued, suicidal. But that the injury should appear to be unavoidable is not requisite. When injury is imminent, when the appearance of injury is of a degree greater than that which produces the

encountering the particular risk of which the servant had knowledge at the time when the injury was received may also, as it would seem, be taken into account.⁹ In other words, whenever the servant sees, or ought to see, that the probable consequence of his remaining in an environment which the master's breach of duty has made more than usually dangerous will be some personal injury, the possibility of disaster is sufficiently serious to require him, as a prudent man, to discontinue work.

It should be observed that, under the evidence as sometimes presented, the failure of the servant to obtain the knowledge which, according to the decisions thus far cited, is sufficient to charge him with negligence in continuing to work, may be treated as in itself a culpable omission, operating as an efficient cause of the injury, as, where he failed to make an examination of the defective appliance;¹⁰ or did not notice a defect which was obvious.¹¹ See, generally, chapter XXI., *post*.

298. Negligence inferred, as matter of law, where knowledge both of defects and consequent risks is shown.—The ultimate proposition which, as already stated, is implied in the decisions mentioned under the preceding section is that, in the absence of some special element which suggests a sufficient excuse for his conduct, a servant is chargeable, as a matter of law, with contributory negligence if he goes on working after he has ascertained that an extraordinary risk, creating

impression that injury may result, when it leaves no room for reasonable doubt continuing in the service after knowledge of the defect causing the injury, and its nature and extent, must be regarded as contributory negligence." *Highland Ave. & B. R. Co. v. Walters* (1890) 91 Ala. 442, 8 So. 357.

On the ground that the danger in question was not so obvious and imminent that it necessarily informed the servant of the risk which he encountered, his contributory negligence was held to be for the jury, where a pole belonging to his employer, a telephone company, fell with him after he had disconnected the last of the wires attached to it, the evidence being that, although the pole had been condemned and marked for removal, there was nothing to show that it would not support his weight. *Southern Bell Teleph. & Teleg. Co. v. Clements* (1900) 98 Va. 1, 34 S. E. 951.

⁹See *Hoy v. Dublin & D. Junction R. Co.* (1870) Ir. Rep. 5 C. L. 206, where

Justice Lawson, in denying the soundness of the doctrine which would make continuance in employment with knowledge of the incompetency of a fellow servant contributory negligence, laid stress upon the fact that although a locomotive engineer (the plaintiff) might know that there was one incompetent engineer in the service of the common employer, he could not know that, when he was proceeding on the journey during which the injury was inflicted, he was to encounter that particular incompetent engineer.

¹⁰*Senior v. Ward* (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261 (plaintiff's intestate and his collaborators had been warned to examine the rope of a hoisting cage before descending into a mine, and had not done so).

¹¹*Bemisch v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998 (holes in which were the pins which confined the load on a buggy, so worn that the pins would not stay in, and the load fell off).

an ever present possibility of injury, has been superadded to the incidents of his employment.¹

The knowledge which this doctrine contemplates is the complete appreciation which, as is shown elsewhere (§ 271, *ante*), must also be established before the master can protect himself by the defense that the risk was assumed. The servant's continuance of work with a mere

¹The following cases apply or recognize this principle: *Stuart v. Evans* (1883) 49 L. T. N. S. 138, 31 Week. Rep. 706, per Cave, J.; *The Scapian* (1892) 2 C. C. A. 102, 8 U. S. App. 49, 51 Fed. 91 (stevedore used an unsafe steam winch, with knowledge of the danger and risk); *Reversing* (1891) 49 Fed. 393; *The Mac Morris* (1890) 137 U. S. 1, *sub nom.* *The Mac Morris v. Curry*, 34 L. ed. 586, 11 Sup. Ct. Rep. 29 (holding that contributory negligence does not wholly deprive the servant of his right to damages, a point not touched upon by the majority of the court of appeals, but made the foundation of a dissent by Goff, J.); *Burdoll v. Pennsylvania R. Co.* (1888) 21 W. N. C. 281, 13 Atl. 82 (brakeman killed in coupling broken car); *Tennant v. Boston Mfg. Co.* (1898) 170 Mass. 323, 49 N. E. 654 (defective saw); *Mchan v. Syracuse, B. & V. Y. R. Co.* (1878) 73 N. Y. 585 (defective track; conceded that engineer could not recover if he knew that it was so badly out of repair that it was dangerous to run over it); *Jones v. Roach* (1876) 9 Jones & S. 218; *Crutchfield v. Richmond & D. R. Co.* (1878) 78 N. C. 300 (held error to refuse to charge the jury that "if they believed that plaintiff [a brakeman] knew, or had reasonable grounds for believing, that the engine used by defendant prior to the time of the injury complained of was not controllable by the engineer, and that the roadbed was in a dangerous condition, and the plaintiff was injured thereby "then the plaintiff was guilty of contributory negligence"); *Nelling v. Industrial Mfg. Co.* (1886) 78 Ga. 260 (court refused to set aside a verdict for the defendant, being of the opinion that the jury were not misled by an instruction which announced in substance that if the servant is aware of the dangerous character of a particular tool or instrument, or may, by the exercise of ordinary care, be apprised of it, and continues nevertheless to use it, he cannot have redress for any damage he sustains by its use); *Pollick v. Sellers* (1890) 42

Ia. Ann. 623, 7 So. 786 (held negligence to trust one's weight, at a height of 70 feet above the ground, supported by guys extending under the trusses of a building in process of demolition, such trusses being known to be in such a condition that they were liable to fall at any moment); *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216 (defective fuse, known to be dangerous); *Pleasants v. Raleigh & A. Air-Line R. Co.* (1886) 95 N. C. 195 (section master used dump car which he knew to be out of order and in a dangerous condition); *Reese v. Wheeling & E. G. R. Co.* (1896) 42 W. Va. 333, 26 S. E. 204 (laborer, in spite of the repeated warnings of his foreman, traveled on a truck in a construction train pushed ahead of the engine, and was injured by a derailment); *Ballou v. Chicago, M. & St. P. R. Co.* (1882) 54 Wis. 280, 41 Am. Rep. 31, 11 N. W. 559; *Brossman v. Lehigh Valley R. Co.* (1886) 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226; *Bemisch v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998; *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612 (defective cow-catcher).

See also Illinois cases cited under the next section.

In *Darcey v. Farmers' Lumber Co.* (1894) 87 Wis. 245, 58 N. W. 382, the jury returned an affirmative answer to the following interrogatory: "Were the dangers and risks to the plaintiff, by reason of the uncovered condition of the saw, such as would be apparent to a person using ordinary care and observation, and having the knowledge and experience in sawmills which the plaintiff then had?" They also found that there was no want of ordinary care on the part of the plaintiff which contributed to cause the injury sustained by him. As the only ground on which contributory negligence was imputed to the plaintiff was that he remained in the service with knowledge of the risk, the second finding was held to be equivalent to an affirmation that he did not so remain with that knowledge, and to be therefore inconsistent with the first one.

apprehension of possible danger is not such negligence as will bar his action.²

The effect of this doctrine in relation to practical litigation is, it will be observed, practically to make it a matter of indifference, so far as the servant's rights are concerned, whether the master relies on the defense of assumption of risks or contributory negligence. In either case the functions of the jury cease when it is determined that both the defects and the resulting risks were known to the servant.³

298a. Illinois doctrine.— The general principle which is declared to be firmly established in Illinois is that, "if a person, knowing the hazards of his employment as the business is conducted, voluntarily continues therein, without any promise of the master to do any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein, unless, indeed, it may be caused by the wilful act of the master."¹ Owing to the perplexing manner in which the defenses of assumption of risks and contributory negligence have been confounded (see § 309, *infra*.), it is impossible to say precisely how far the true doctrine of assumption of risks, as a defense based on an implied contract, is really accepted by the courts of this state. But if the explicit language used in the section just mentioned² is to be taken as an indication of the doctrinal position actually adopted, the latter defense is the one which may normally be supposed to be raised in any case which turns upon the evidential significance of the servant's acceptance or continuation of work after he had ascertained that the employment involved an extraordinary risk. It has been deemed permissible, therefore, in spite of the ambiguity of the language used in some of the decisions cited below, to collect them under the present chapter, as being, properly speaking, illustrations of the same doctrine as that applied in the last section.³

¹ *Dumas v. Stone* (1893) 65 Vt. 442, in continuing to use it. Unless the evidence is clear that he understood the danger to be imminent or very great, it is for the jury to say whether he acted with reasonable prudence and discretion in venturing to run his engine over the road. *Harley v. Northern C. R. Co.* (1880) 82 N. Y. 370.

² *The Scrapis* (1891) 49 Fed. 393, 395.

³ See also *Stafford v. Chicago, B. & Q. R. Co.* (1885) 114 Ill. 244, 2 N. E. 185.

² See also § 299, notes 4, 6, *infra*.

³ *Stafford v. Chicago, B. & Q. R. Co.* (1885) 114 Ill. 244, 2 N. E. 185 (fel-
low servant known to be incompetent);
Pennsylvania Co. v. Lynch (1878) 90
Ill. 333 (plaintiff knew of the unsafety
of a platform which he was using to

As in other states, it is recognized that the servant's action is not barred unless he not only knows of the defective conditions, but also understands the danger created by them.⁴ But, as in other states, this limitation is of no practical importance in cases where servants cannot reasonably be supposed to possess the former kind of knowledge without possessing the latter also.⁵

299. Rationale of the servant's inability to recover, on the ground of negligence in continuing work.—In one case the servant's inability to recover where he continues work with knowledge of a defect is put

transfer freight from one car to another); *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92 (fellow servant known to be incompetent, so that plaintiff's position was extra hazardous); *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 459, 44 N. E. 876 (speaks of defect augmenting the danger of the service); *Coal Run Coal Co. v. Jones* (1889) 127 Ill. 379, 8 N. E. 865, 20 N. E. 89 (gas in mine exploded—known to have been accumulating in dangerous quantities); *Chicago & A. R. Co. v. Munroe* (1877) 85 Ill. 25 (switchman worked several years knowing that a drawbar was somewhat dangerous owing to the want of a thimble in a bumper to keep the coupling link from running back); *St. Louis & S. E. R. Co. v. Britz* (1874) 72 Ill. 256 (defective brakes); *Glass v. Chicago, R. I. & P. R. Co.* (1893) 41 Ill. App. 87 (plaintiff injured by slipping on bolt-head projecting from footboard of engine which he was attempting to board); *Helbig v. Slaughter* (1900) 95 Ill. App. 623 (finding that servant knew of unsafety held inconsistent with general verdict for plaintiff); *Fraser v. Schroeder* (1896) 163 Ill. 459, 45 N. E. 288; *East St. Louis Packing & Provision Co. v. McElroy* (1888) 29 Ill. App. 504.

It is error to charge that a servant, although he has full knowledge of a dangerous defect, may recover if he uses ordinary care to avoid injury from such defect; at all events where he has not reported the defect, or objected to the maintenance of the dangerous condition, or received a promise that it will be remedied. *Chicago, R. I. & P. R. Co. v. Clark* (1882) 11 Ill. App. 104.

Swift & Co. v. O'Neill (1900) 187 Ill. 337, 58 N. E. 416, affirming (1900) 88 Ill. App. 162 (insufficient light in a place where heavy trucks were being pushed to and fro); *Howe v. Medaris* (1898) 82 Ill. App. 515 (lever which controlled power by which paper cutter

was operated was worn, and the knife fell without warning); *Chicago & A. R. Co. v. Kinnare* (1898) 76 Ill. App. 394 (instruction approved which stated the necessity of proving a knowledge of the danger, as well as the defect); *Chicago & A. R. Co. v. Merriman* (1899) 86 Ill. App. 454 (similar ruling); *Union Show Case Co. v. Blindauer* (1898) 175 Ill. 325, 51 N. E. 709, affirming (1898) 75 Ill. App. 358 (instruction erroneous which declared the action not to be maintainable if the servant knew of the defect); *Batchelor v. Union Stock Yard & Transit Co.* (1900) 88 Ill. App. 395 (similar ruling).

The following cases fall under this category: *Morris v. Gleason* (1879) 4 Ill. App. 395; *Chicago, R. I. & P. R. Co. v. Clark* (1882) 11 Ill. App. 104 (platform near track); *Chicago & T. R. Co. v. Simmons* (1882) 11 Ill. App. 147, affirmed in (1884) 110 Ill. 340 (danger that the upper portion of a bank may fall when the lower part is excavated held to be obvious); *Illinois C. R. Co. v. Jones* (1882) 11 Ill. App. 324 (defective coupling); *Wabash, St. L. & P. R. Co. v. Thompson* (1884) 15 Ill. App. 117 (tumbling rod of pumping apparatus not boxed); *Chicago, B. & Q. R. Co. v. Montgomery* (1884) 15 Ill. App. 205 (peculiarly hazardous form of coupling); *Evans v. Chessmond* (1890) 38 Ill. App. 615 (rock in the roof of a drift of a mine in such a condition as to be liable to fall at any moment); *Peoria, D. & E. R. Co. v. Puckett* (1893) 52 Ill. App. 223 (brakeman injured by a hole in the track); *Illinois C. R. Co. v. Salsbery* (1893) 53 Ill. App. 411 (fireman injured by a collision due to the want of a lamp on a rotary switch); *Leonard v. Lage* (1894) 57 Ill. App. 223 (plaintiff injured by the fall of a bank of earth, the condition of which was visible); *Webster Mfg. Co. v. Schmidt* (1897) 77 Ill. App. 49 (incompetent co-servant).

upon the ground that his doing so is a fact which, of itself, shows that there was no negligence on the master's part. The consequences of this doctrine are, it will be noticed, similar to those which are entailed by the one already developed in an earlier part of this treatise (chapter VII., *post*), with reference more especially to the doctrine of an assumption of risks.¹ But the more common theory is that, whatever may be the period of service to which the servant's contract binds him, the master's failure to perform his obligations entitles the servant to abandon his employment if he see fit; and that, inasmuch as he has this right, his conduct in remaining at work after he acquires knowledge of an abnormal hazard must amount, in the absence of some special countervailing circumstance, to that species of negligence which consists in the deliberate exposure of oneself to unnecessary perils.² The servant's freedom of action is, of course, an especially decisive consideration, where his employment is for no definite period or time.³ The situation which thus supervenes upon the servant's failing to exercise his option to leave the employment is that the master, in permitting his machinery to be more than ordinarily dangerous, is guilty of negligence, while the servant, by remaining with

"If the servant, acting as a prudent man would ordinarily act, would undertake to do the work with knowledge of the defect, this very test relieves the master from liability, for the obligations and duties of master and servant are correlative; each is held to that degree of care in reference to all matters affecting the safety of the servant while in the master's employment which men of ordinary prudence would or ought to exercise under the same circumstances. If the servant, with a knowledge of the defect, as a prudent man may undertake the work, can it be said that the master has not exercised that degree of care required of him?" *Texas & P. R. Co. v. Bradford* (1886) 66 Tex. 732, 59 Am. P. p. 739, 2 S. W. 595.

¹ See the language used in *Luning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417; *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; *Wheeler v. Berry* (1893) 95 Mich. 250, 54 N. W. 876; *Reese v. Clark* (1892) 146 Pa. 465, 23 Atl. 246; *Marcen v. New York, S. & W. R. Co.* (1895) 167 Pa. 220, 31 Atl. 562; *Crutchfield v. Richmond & D. R. Co.* (1877) 76 N. C. 320.

This consideration seems to have been forgotten by Messrs. Shearman and Redfield when, in their treatise on Negli-

gence (ed. 1888) § 215, they undertook to sustain the doctrine discussed in § 298a, *supra*, by vouching in aid a supposed general principle that "a party to any other contract having mutual obligations is allowed to perform fully his part, notwithstanding the failure of the other party to fulfil a condition precedent, without necessarily waiving his right to insist upon performance of such condition at a later period." (This passage was cited with approval in *Thorpe v. Missouri P. R. Co.* (1886) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3, but has been excised in the last edition of the treatise.) The true rule, as it happens, is precisely the reverse of that here stated (see Bishop, Contracts, § 839, and a note by the present writer in *Davis v. Bronson* (N. D.) 33 Am. St. Rep. pp. 791 *et seq.*). But in any event, the negligence of the servant must necessarily be the proximate cause of any injury which he receives after the master's breach of the contract gives him the right to consult his personal safety, and thus, on general principles, constitutes a bar to his action.

² *Indianapolis, B. & W. R. Co. v. Flanagan* (1875) 77 Ill. 365 (brakeman employed by the trip). Compare §§ 288, 289, *ante*, and § 302, *infra*.

full knowledge of the resulting risks, contributes to his own injury.⁴ The causal connection between the employer's negligence and the injury is said to be broken at the time the danger becomes so plain that a person of ordinary care would not incur the risk of continuing to work at the place of danger.⁵ Under such circumstances, if the

⁴ *Szoboda v. Ward* (1879) 40 Mich. 420, quoting Cooley, Torts, pp. 551, 552.

"While there is an implied contract between employer and employee that the former shall procure and keep suitable tools, implements, means, etc., with which to perform the labors required of the latter, and also that the latter shall be advised by the former of all the dangers incident to the service, of which the latter is not cognizant, yet the failure of the employer in this regard furnishes no excuse for the conduct of an employee who voluntarily incurs a known danger. He must himself use due care and caution to avoid injury. If he has full knowledge of all the perils of a particular service, he may decline to engage in it, or require that it shall first be made safe; but if he does thus enter it, he assumes the risk, and must bear the consequences." *Pennsylvania Co. v. Lynch* (1878) 90 Ill. 333. (Note the confusion here between the conceptions of an assumption of risks and a want of due care; see § 309, *infra*.)

"It is for the plaintiff to show, not merely that the place was unsafe, and that he was injured thereby, but that he himself was in the exercise of due care. His evidence fails to show this, if it appears that, knowing and appreciating the danger arising therefrom, he voluntarily exposes himself thereto. Business is sometimes carried on in buildings or places obviously unsafe, and if, with a knowledge that a business is thus conducted, the workman engages in it, he takes the risks which he must know are incident thereto." *Taylor v. Carey Mfg. Co.* (1885) 140 Mass. 150, 3 N. E. 21. Is a man without fault who uses a dangerous and insufficient tool knowing it to be so? Can a man claim that he has been damaged by the fault of other employees who have furnished an insufficient tool, when he has for months used that tool and knows that it is unsafe, and still runs the risk? An employee is not without fault,—that is, he is a contributor to his own hurt,—if, however negligent others may be, knowing that negligence, seeing the danger, he still chooses to expose himself to the

danger. *Western & A. R. Co. v. Bishop* (1873) 50 Ga. 465.

"The fact that the danger is known, or might be known by the exercise of the natural faculties, will preclude a recovery where it is immediate and of such a character as to impose upon one who undertakes to pass the danger a hazard that a prudent man would not incur. A man has no right to cast himself upon a known danger where the act subjects him to great peril. If then is a risk, apparent or known, that will probably result in injury, he must not encounter it." *Lake Shore & M. S. R. Co. v. Pinchin* (1887) 112 Ind. 592, 13 N. E. 677 (an action by a stranger).

⁵ *Pollich v. Sellers* (1890) 42 La. Ann. 623, 7 So. 786.

"As to whether the employee was negligent, his actions should be judged by the facts as they existed, within his knowledge, or within what he ought to have known, at the time he acted or failed to act; and the previous negligence of the employer, which was known to the employee, or ought to have been known by him, will not excuse him. In the case at bar the failure to furnish props at the working place of the plaintiff below was negligence on the part of the defendant below; but if plaintiff knew of this negligence, or ought to have known thereof, and remained in the room, knowing the roof to be dangerous, his injury was directly caused by his own negligence in remaining in a room known to be dangerous, and not by defendant's negligence in failing to furnish props." *Pittsburgh & W. Coal Co. v. Estievenard* (1895) 53 Ohio St. 43, 40 N. E. 725.

"When the danger is not obvious or imminent, and both the employer and the employee, with full knowledge of the same, enter into the contract of employment, or continue the same, neither party is guilty of culpable negligence as toward the other; while if the danger is obvious and imminent, and it is encountered by the servant, then both parties are equally guilty of culpable negligence—that of the employee being culpable contributory negligence. In all cases the continuance on the part of the

servant were allowed to recover after voluntarily encountering the hazard, he would receive compensation for his own negligence.⁶

300. When negligence is not imputed, as a matter of law, to a servant who knows of a risk.—The doctrine stated in §§ 297, 298, *supra*, is applied in its unqualified form only in cases where the evidence does not present any of those special elements which are treated in chapters XXII.—XXV., *post*. It is also possible that, in all the courts whose decisions have thus far been cited, a servant who offered testimony going to show that he had reasonable grounds for supposing that the defective conditions of which he had obtained knowledge would have been remedied in the ordinary course of the master's business before the time when the injury was received would be allowed to go to the jury, even though he might not have received an explicit promise that the conditions would be remedied, or an explicit assurance that they had been remedied.¹ In this point of view, the continuance of work may be regarded as peculiarly justifiable, where the abnormal conditions were the result of a breach of a duty imposed upon the master by statute. It has been explicitly held that, under such circumstances, the servant is entitled to presume that the master will proceed to perform his duty without any unnecessary delay.² Compare chapter xxx.

servant in the master's employment with full knowledge of the danger, either negligence or it is not negligence. If it is negligence, and injury results, then no recovery can be had, because of the culpable contributory negligence of the servant; but if it is not negligence on the part of the servant, then neither can it be negligence on the part of the master. What the servant may lawfully do without negligence, the master may lawfully hire him to do without negligence. The master cannot be bound to take greater care of the servant than the servant is of himself. If the danger is such that an ordinarily prudent man could assume it without being guilty of negligence, then the same facts and the same reasoning which would show this would also show that there could not be any culpable negligence or any breach of duty on the part of another person for hiring him to assume it. There cannot be negligence on the part of the one, and not on the part of the other, where both are capable of understanding the danger, and both are fully informed as to all the facts." *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582.

⁶ *Illinois River Paper Co. v. Albert* (1893) 49 Ill. App. 363.

¹ This seems to be the effect of the

following cases: *Galveston, H. & H. R. Co. v. Bohan* (1898: Tex. Civ. App.) 47 S. W. 1050, Denying Rehearing in 47 S. W. 1052 (yard master not necessarily negligent in continuing to ride upon the footboards of switching engine because he knows that rocks frequently fall upon the tracks); *Terrill Compress Co. v. Arrington* (1898: Tex. Civ. App.) 48 S. W. 59 (recovery allowed where servant knew that a fellow servant had undertaken to remedy the defective conditions).

Where a miner has complained to his superior about the unsafe condition of the roof of a tunnel, and, after it has been partially secured, goes on working with the expectation that it will be more effectually secured in due time, he is not necessarily debarred from recovery, though he does not think it sufficiently propped. *McMonagle v. Baird* (1881) 9 Sc. Sess. Cas. 4th series, 364.

² *Quackenbush v. Wisconsin & M. R. Co.* (1885) 62 Wis. 411, 22 N. W. 519. The court there assimilates the position of a railway company which is derelict as regards its duty to build a fence to that of an employer who has promised to remedy defective conditions. See chapter XXII., *post*.

subd. b, *post*. But in any event it seems clear that the element of expectation will carry a differentiating significance for a certain limited period only. Compare § 302, note 6, *infra*. There is also a considerable body of authority for the view that even where none of these distinctly differentiating factors are introduced, a court is not necessarily warranted in inferring negligence, as a matter of law, from the mere fact that the servant remained in the employment with an appreciation of a risk resulting from the master's breach of duty.

"The mere fact that the servant knew the work was manifestly dangerous of itself does not constitute contributory negligence." *Webbin v. Ballard* (1886) L. R. 17 Q. B. Div. 122, 55 L. J. Q. B. N. S. 395, 54 L. T. N. S. 532, 34 Week. Rep. 455, 50 J. P. 597, per Smith, J. See also *Sledge v. Gayoso Hotel Co.* (1890) 43 Fed. 463 (complaint showing knowledge of danger, not demurrable); *Chicago G. W. R. Co. v. Price* (1899) 38 C. C. A. 239, 97 Fed. 423 (servant held entitled to recover unless the dangers were so obvious and threatening that a prudent man would have avoided them).

In an action by an employee on a scow to recover damages because of an injury due to the negligent act of the drunken captain, it is a question for the jury under the circumstances of the case whether the plaintiff was guilty of omissions which prevented his recovery, where he had seen the captain drunk on three occasions during his employment of eight days, and neither made complaint nor left the employment. *Tonnescen v. Ross* (1890) 58 Hun. 415, 12 N. Y. Supp. 150; *Thompson v. Ross* (1890) 35 N. Y. S. R. 273, 12 N. Y. Supp. 151 (same facts).

Where plaintiff went to work upon a defective street car, not knowing at the time that it was defective, but soon after discovered the defect, and that its use was surrounded by some danger, and thereupon continued work for an hour or more, until he was injured, the question of whether he was guilty of contributory negligence in continuing to use the same was for the jury. *Murdock v. Oakland, S. L. & B. Electric R. Co.* (1900) 128 Cal. 22, 60 Pac. 469.

In a leading English case Lord Esher used the following language: "I cannot see, therefore, that the knowledge of the plaintiff absolves the defendant from any duty. It is put in argument that the duty of the master is either to take reasonable care that there shall be no

defect or to tell the servant that he does not mean to do so. To me it seems an unnatural doctrine that merely telling the servant of the defect should absolve the master from liability, and unless there is some authority that binds me to accept it, I cannot do so. Is it true to say that the mere knowledge of the servant that the master is not going to take care that there is no defect or danger makes the continuance of the servant at the work evidence of negligence on his part? Are there not innumerable instances which negative this, - as, for instance, if the servant, in spite of the danger, does any act tending to save life or to the protection of his master's property? I protest against its being said that a jury are bound to find that there is negligence in such case on the part of the man who runs a risk. The knowledge of the plaintiff of the want of care of the defendant is not conclusive against the former, though it is a material fact for the consideration of the jury in determining whether under all the circumstances the plaintiff was guilty of contributory negligence. The case of *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, has been often observed upon, but it has never been overruled, and it seems to me to be this case. It is binding on us, and, moreover, it is, in my opinion, rightly decided, and in each of the judgments I find it laid down, that knowledge is only a fact in the case, to be taken into consideration by the jury with all the other facts and circumstances in determining the question whether the plaintiff has himself helped to bring about the accident in respect of which he seeks to charge the defendant." *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 689, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. Language of the same purport is also found in the opinions of Bowen and Fry, L. JJ.

This doctrine embodies the conception that, as it is expressed in some cases, the fact that an injured servant voluntarily took some risk is held not to be conclusive evidence, under all circumstances, that he was not using due care.⁴ The result of this theory obviously is that, whenever the danger is not of an obviously imminent and glaring character, the question whether the servant is debarred from recovering on the ground of contributory negligence depends on the use which he made of his knowledge of the danger.⁵ The implication manifestly is that, if the danger is one of the character thus indicated, the court may declare the action to be, as a matter of law, not maintainable.

In the opinion of the present writer this theory of the respective provinces of the court and the jury is not only fairer and more equitable, but also more correct in a purely juristic sense, than the alternative one which has been explained in the preceding sections. The hypothesis which underlies the latter theory,—*viz.*, that it must necessarily be imprudent to incur a danger the existence of which implies a dereliction of duty on the master's part,—appears to be quite arbitrary, as well as inconsistent with the fundamental conception upon which the defense of contributory negligence ultimately rests. The character and magnitude of a danger being the essential point to

In *Northern P. R. Co. v. Mares* (1887) 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321, the court approved the refusal of an instruction to the effect that the duty of the plaintiff is not to be determined by the single fact of his knowledge of the danger he incurred by continuing to serve with a coemployee known by him to be an unfit and incompetent person, and said that it was enough for the court to say, as it did, that a failure on the part of the servant to refuse to work, in view of that knowledge on his part, might be negligence,—that it was for the jury to say from all the attending circumstances whether his failure to do so was in fact contributory negligence.

See also the Missouri cases cited in § 301.

In North Carolina it has been held, on the ground that the weight of plaintiff's evidence is *always* for the jury, that the question of his contributory negligence cannot be considered on a motion for a nonsuit. *Bolden v. Southern R. Co.* (1898) 123 N. C. 614, 31 S. E. 851. But it is not apparent why the trial should proceed in this instance any more than in others, if the plain-

tiff's own testimony shows that the action cannot be maintained. It is inconceivable that the court can intend to stand sponsor for the doctrine that the negligence of the plaintiff is a question upon which the verdict of a jury is *always* finally decisive, and yet this ruling logically requires an acceptance of this position. In this regard it is inconsistent with the case of *Crutchfield v. Richmond & D. R. Co.* (1878) 78 N. C. 300, referred to in § 298, note 1, *supra*.

⁴ *Eggs v. Bath Gas & Electric Co.* (1900) 94 Me. 17, 46 Atl. 804. Compare also § 322, *post*.

⁵ *Wilson v. Louisville & N. R. Co.* (1887) 85 Ala. 269, 4 So. 701; *Mobile & B. R. Co. v. Holborn* (1888) 84 Ala. 133, 4 So. 146. A servant is not guilty of contributory negligence in working, merely because he knows the work to be dangerous, without regard to the degree of danger and risk involved; nor unless it be of a degree which would ordinarily deter one of ordinary prudence from the undertaking. *Southern R. Co. v. Guntton* (1898) 122 Ala. 231, 25 So. 54.

See also next section.

be considered in determining whether it was negligent to encounter it, it is manifestly illogical to adopt a doctrine which involves taking the position that, whatever the danger may have been, whether serious or trifling, g. imminent or remotely possible, the mere fact that it was attributable to the master's negligence carries the case into a category in which the controlling factor is a presumption *juris et de jure* that the servant was culpable in remaining in the employment. Such a criterion has never been applied in actions brought by strangers,⁶ and no valid reason has ever been suggested why it should be applied in actions brought by servants.

301. Missouri doctrine as to the effect of the servant's knowledge.—

The Missouri decisions upon the disabling effects of the servant's continuance of work with knowledge of abnormal conditions produced by the master's breach of duty are so extraordinarily conflicting that it will be convenient to review them separately. In a later section, the confusion, both of doctrine and terminology, which these cases exhibit, will be noted. At present we are concerned merely with the effect of the actual rules administered.

In the earlier cases the supreme court dealt with the defenses of contributory negligence and assumption of risks on precisely the same footing as the courts of other states; that is to say, the servant's knowledge of the risk was treated as an element which enabled the master to rely upon either one or other of the defenses at his option.¹ In cases where the defense put forward was contributory negligence the theory adopted was apparently the same as that explained in the preceding section, the quality of the servant's conduct in continuing in the employment being treated sometimes as a question for the jury, and sometimes as an inference of law.² But in 1885,—the very year,

⁶ See, for example, *Dewire v. Bailey* form his duties safely.—the evidence (1881) 131 Mass. 169, 41 Am. Rep. 219; *Anderson v. Scholey* (1888) 114 Ind. 553, 17 N. E. 125; *Martin v. North Star Iron Works* (1884) 31 Minn. 407, 18 N. W. 109; *Clayards v. Dethick* (1848) 12 Q. B. 439, Shearn. & Redf. Neg. § 92, note 8.

¹ Decisions recognizing the defense of assumption of risks are cited in § 274, note 1, *ante*.

² In *Stoddard v. St. Louis, K. C. & N. R. Co.* (1877) 65 Mo. 514, where a brakeman's foot was caught in a frog, while he was uncoupling cars, it was held to be for the jury to say whether, under the circumstances, he was justified in supposing that, by the use of great caution and skill, he could per-

form his duties safely.—the evidence being that four persons were necessary for switching the cars and making up the train: that the plaintiff and another man undertook this in the absence of the yard master, who had been notified of the sickness of one of the hands, but failed to provide a substitute; that the officers of the company knew that the engineer was addicted to drunkenness; that the engineer had been drinking that morning; and that the plaintiff knew the frog to be dangerous, owing to the lowness of the brake beam.

A case in which the servant was held unable, as a matter of law, to recover, on the ground that he was negligent in continuing to work with knowledge of a breach of duty by the master, and with-

it should be observed, in which the second of the cases just referred to was decided,—a novel doctrine was propounded, *viz.*, that, in cases in which a servant goes on working with knowledge of abnormal conditions, the only defense, if any, open to the employer is that plaintiff was negligent, under the circumstances, in continuing to perform his duties.³ Since that time the doctrine has been repeatedly applied in

out reporting it, is *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285, where it was held that the action was barred because the plaintiff knew of the incompetency of the vice principal whose act caused the injury. Two judges dissented, but the division of opinion seems to have been merely on the special ground that the delinquent servant was a vice principal, the contention on behalf of the plaintiff being that this circumstance took the case out of the operation of the rule which would otherwise have been applied, the effect of which, as a whole, was to deprive the master of the benefit of the latter defense, in cases where the risk was due to his breach of duty, and to make the servant's right to recover turn solely upon the question whether, in remaining in the employment, he had acted as a prudent man.

³ *Dorlin v. Wabash, St. L. & P. R. Co.* (1885) 87 Mo. 545. In this case it was remarked by Black, J., that the qualification of the principles previously administered was "in accord with common fairness and the daily conduct of master and servants."

In *Hamilton v. Rich Hill Coal Min. Co.* (1891) 108 Mo. 364, 18 S. W. 977, the same judge, referring to earlier decisions, said: "The question, whether continuing in the service after knowledge of danger arising from a defective appliance will defeat the servant's action, is properly a question of contributory negligence, as the authorities before cited well show, and is to be determined by rules applicable in such cases." The position of the court, as he pointed out, was that the doctrine by which a servant, who continues in the employment after knowledge of a defect in the appliance, thereby waives all objections to such defective instrumentality and takes upon himself all the risks, makes it the duty of the servant to abandon his contract of employment, because of a breach of duty on the part of the master, and is unjust and unreasonable.

See also, as to the reasons of abstract justice which underlie the rule, *Thorpe*

v. Missouri P. R. Co. (1886) 80 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3; *Hughes v. Fagin* (1891) 46 Mo. App. 43.

This doctrine received the unqualified approval of Messrs. Shearman and Redfield in the fourth edition of their well-known treatise on Negligence. See §§ 211, 212, *ante*. Most of this passage has been altered as respects the language, or altogether excised, in the last edition of this treatise. But the authors evidently remain of the same opinion, as they lay it down that the true rule is that a servant can recover for an injury suffered from defects due to the master's fault of which he had notice, if, under all the circumstances, a servant of ordinary prudence, acting with such prudence, would, under similar conditions, have continued the work under the same risk, and not otherwise. If the "true rule" is the one sustained by the great weight of authority the present writer takes leave to demur very strongly to the correctness of this statement. It may be asserted with confidence that, outside of jurisdictions in which the theory of the learned authors themselves has been deliberately adopted, no decision has ever been rendered which supports their view that contributory negligence is the *only* defense available to the master under the circumstances supposed, though it may be conceded that more authority may be found for the doctrine that the negligence of the plaintiff is for the jury, even when the conditions and the resulting risks are both known. For instance, in *McMahon v. Port Henry Iron Ore Co.* (1881) 24 Hun, 48, which is given a prominent place among their citations, we find language to this effect, but it would be putting a strained construction on the words of the court to suppose that they imply that the defense of assumption of risks is excluded altogether where the risks are caused by the master's breach of duty.

If this construction could be regarded as the correct one, the rule thus arrived at would now be of no authority whatever in view of later decisions of the New

this state. In working it out the courts necessarily follow lines which, up to a certain point, are very similar to those which are traceable to the decisions in jurisdictions in which contributory negligence is treated as being a concurrent and alternative defense, and not an exclusive one. Thus, mere knowledge of a defect is held not to be enough, as a matter of law, to bar the servant's action.⁴ Under this

York court of appeals. See, especially, *Knishen v. Pratt* (1896) 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 980, a strong case, as the duty violated was statutory, and the plaintiff was a minor, and yet the risk was held to have been assumed. Moreover, it is only necessary to examine the recent cases to see that the doctrine of the assumption of known risks is applied as regularly and consistently as it ever was in the great majority of the states, and that judges have, with the few exceptions adverted to, declined to countenance the logical and juridical paradox that the question whether a contract shall be implied may depend upon whether a prudent person would have bound himself by it. It is submitted, therefore, that the statement criticised is not the "true rule," either on principle or authority. For similar reasons, the clause which has been inserted in § 209 of the same treatise, limiting the cases in which a risk is assumed by the servant to those in which "ordinary prudence would require him to refuse to encounter it," cannot be conceded to be anything but a wholly unwarrantable attempt to qualify that doctrine by the addition of an irrelevant and incongruous element. Even in Missouri itself the doctrine of the learned authors has been so severely shaken by the latest decisions that it may fairly be doubted whether the earlier ones in which it was embodied are any longer to be regarded as good law. See following notes.

In two Missouri cases, decided after the publication of the passage we have been reviewing, its statement of principles was expressly approved: *Hamilton v. Rich Hill Coal Min. Co.* (1891) 108 Mo. 364, 18 S. W. 977, per Black, J.; *Thorpe v. Missouri P. R. Co.* (1886) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3.

⁴*Mahaney v. St. Louis & H. R. Co.* (1891) 108 Mo. 191, 18 S. W. 895 (defective track); *Sullivan v. Hannibal & St. J. R. Co.* (1891) 107 Mo. 66, 17 S. W. 748 (servant knew staging to be defective); *Hamilton v. Rich Hill Coal Min. Co.* (1891) 108 Mo. 364, 18 S. W.

977 (unblocked rail); *Douthett v. Kansas City* (1897) 136 Mo. 637, 38 S. W. 571 (insufficient bracing of trestle); *Warner v. Chicago, R. I. & P. R. Co.* (1895) 62 Mo. App. 184 (plaintiff's recovery not barred simply for the fact that a ladder which broke with him caused the injury was a simple contrivance); *Stoddard v. St. Louis, K. C. & A. R. Co.* (1877) 65 Mo. 520 (holding that although the evidence tended to show that plaintiff had knowledge of a spring frog, and the lowness of the brake beam of a tender, and that two hands instead of four were undertaking to make up the train, the question whether the action of the plaintiff in making up the train while having this knowledge was of such a reckless character as to make it contributory negligence on his part was for the jury); *Hughes v. Iowa* (1891) 46 Mo. App. 44 (incompetent fellow servant); *Tracer v. St. Louis Brewing Co.* (1896) 69 Mo. App. 17 (here the servant had only partial knowledge of the conditions); *Lee v. Chicago, R. I. & P. R. Co.* (1894) 57 Mo. App. 350 (same facts); *Thompson v. Missouri P. R. Co.* (1886) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3 (inadequate switching crew).

See also the case cited in note 6, *infra*.

But the language used to describe the circumstances under which the negligence of the servant still remains a question for the jury indicates that not only is his knowledge of the danger not enough to bar the action, but that the servant may, without necessarily losing his right to an indemnity, go on working in the face of all but the more serious kinds of peril. To justify the court in determining that he was, as a matter of law, guilty of negligence, the instrumentality which caused the injury must have been so "glaringly defective" (*Hahn v. Missouri P. R. Co.* [1887] 62 Mo. 440, 4 S. W. 937; *O'Mellia v. Kansas City, St. J. & C. B. R. Co.* [1893] 115 Mo. 205, 21 S. W. 503) or so obviously and immediately dangerous that a man of common prudence would refuse

doctrine, therefore, if the defects or insufficiency in the appliances—which term embraces the men employed to do the work, as well as other instrumentalities employed—is so great that, obviously, even with the use of great caution, the danger is imminent, then, as a matter of law, the servant who incurs the risk is guilty of contributory negligence, and cannot recover. But if, upon this question, there is substantial doubt, the question is one of fact for the jury, and a non-suit or demurrer to the evidence is not permissible.⁵ The doctrine is

to use it. *Settle v. St. Louis & S. F. R. Co.* (1895) 127 Mo. 336, 30 S. W. 125 (brakeman allowed to cover for injuries received through a defective hand-hold on a car); *Waldhier v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 37 (broken plate of frog, not such a "glaring and obvious" defect, as to operate as conclusive evidence that the place of work was necessarily dangerous). Or "so far out of repair that it would be necessarily dangerous to the mind of a prudent person" to use it. *Dorlin v. Wabash, St. L. & P. R. Co.* (1885) 87 Mo. 545 (defective track injured engineer). Or one of which the danger was "apparent and threatening." *Musick v. Jacob Dold Packing Co.* (1894) 58 Mo. App. 322 (open and unguarded tank in a dark room held to be of this character). Or so "patent and threatening that a prudent man would not have taken the chances." *Harrison v. Kansas City Star Co.* (1899) 81 Mo. App. 124. Or one which it was not reasonable to suppose might be "safely used by the exercise of care and caution." *Benham v. Taylor* (1896) 66 Mo. App. 308; *Warner v. Chicago, R. L. & P. R. Co.* (1895) 62 Mo. App. 192; *Bullmanster v. St. Joseph* (1897) 70 Mo. App. 60; *Hurst v. Kansas City, P. & G. R. Co.* (1901) 163 Mo. 309, 63 S. W. 695; *Smith v. Little Pittsburg Coal Co.* (1898) 75 Mo. App. 177.

It has also been laid down that to bar the servants' action, the "increased danger" must have been so "imminent and threatening as to require him to abandon the service." *Reichla v. Gruensfelder* (1892) 52 Mo. App. 43. Or "so glaring and obvious that there could be no fair debate about the question whether a prudent man would assume the risk under the circumstances." *James v. St. Louis, N. & P. Packet Co.* (1890) 43 Mo. App. 398. Or that the defect must have been one which "threatened immediate injury." *Stephens v.*

Hannibal & St. J. R. Co. (1888) 90 Mo. 207, 9 S. W. 589; *Scudby v. Missouri P. R. Co.* (1893) 118 Mo. 268, 24 S. W. 140; *Hahn v. Missouri P. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937 (want of blocking on railway); *Smith v. Little Pittsburg Coal Co.* (1898) 75 Mo. App. 177 (roof of entry in mine fell).

Thorpe v. Missouri P. R. Co. (1886) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3. In the following cases, also, in which the culpability of the plaintiff was held to be a question for the jury, this aspect of the situation was emphasized: *Saeder v. St. Louis, I. M. & S. R. Co.* (1830) 100 Mo. 673, 13 S. W. 714 (brakeman knew that track was rendered unsafe by a defective rail); *Hamilton v. Rich Hill Coal Min. Co.* (1891) 108 Mo. 364, 18 S. W. 977 (want of blocking between switch rails); *McMullen v. Missouri, K. & T. R. Co.* (1895) 60 Mo. App. 231 (inadequate number of servants); *Hannan v. Central Coal & Coke Co.* (1900) 156 Mo. 232, 56 S. W. 100 (miner continued to work in an entry after the owner of the mine had failed to comply with his request for props); *Adams v. Kansas & T. Coal Co.* (1900) 85 Mo. App. 486 (similar facts); *Booth v. Kansas City & I. Air Line* (1898) 76 Mo. App. 516 (section-man's eye put out by a sliver of iron which flew off of a battered clawbar); *Derore v. St. Louis & S. F. R. Co.* (1900) 86 Mo. App. 429 (improper arrangement of boxes on a push car).

An employee is not, as a matter of law, guilty of contributory negligence in continuing to excavate an embankment at its base after seeing the bulged condition of the bank overhead, with knowledge that earth had frequently fallen from the embankment at other points, where the bank had been in such condition for three or four hours and he relied upon the foreman to remove the overhanging portion as fast as safety required. *Bradley v. Chicago, M. & St.*

applied without regard to the question whether the servant had or had not received a promise that the defective conditions would be remedied.⁶ See chapter xxv., *post*.

The theory that the master is thus confined to the defense of contributory negligence has not obtained much foothold outside of Missouri.⁷ In some states it has been explicitly rejected.⁸ It is, of course, inconsistent with all those very numerous decisions (see chapter xxi., *ante*) which apply the doctrine that a servant's assumption of an extraordinary risk may be inferred, as a matter of law, if the evidence shows that the risk was, or ought to have been, known to him.⁹

P. R. Co. (1897) 139 Mo. 203, 39 S. W. 703. The fact that the plaintiff safely performed the work in which he was engaged when injured, for several days after the force of servants had been reduced, is one of the circumstances which may be considered as bearing on the question of the plaintiff's contributory negligence. *Thorpe v. Missouri P. R. Co.* (1896) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3.

⁶ *Pinck v. St. Louis Dressed Beef & Provision Co.* (1901) 159 Mo. 467, 61 S. W. 806 (defective switch in packing establishment).

⁷ The passage from Messrs. Shearman & Redfield's treatise which was referred to in note 2, *supra*, has been cited with approval in *Martin v. California C. R. Co.* (1892) 94 Cal. 326, 29 Pac. 645, and *Colorado C. R. Co. v. Ogden* (1877) 3 Colo. 499. But in California, at least, this doctrine is no longer accepted, even in cases where the defense of contributory negligence is raised. See *Limberg v. Glenwood Lumber Co.* (1900) 127 Cal. 598, 40 L. R. A. 33, 60 Pac. 176. And in both these states that defense is, at most, an alternative to assumption of risks. See § 274, note 1, *ante*.

The Missouri decisions are followed in *Dwyer v. St. Louis & S. F. R. Co.* (1892) 52 Fed. 87; *Sioux City & P. R. Co. v. Finlayson* (1884) 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860; *Lee v. Smart* (1895) 45 Neb. 318, 63 N. W. 940; *The Scraphis* (1891) 49 Fed. 393. The last-mentioned decision was reversed in (1892) 2 C. C. A. 102, 8 U. S. App. 49, 51 Fed. 91. The Federal courts certainly recognize the defense of assumption of

risks. See § 274, note 1, *ante*. Nor have they gone to the same extent as the Missouri courts in upholding the right of the servant to go on working without being chargeable, as a matter of law, with a want of care. In *Kearney v. Northern C. R. Co.* (1888) 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16, it was remarked that negligence was predicable of the exposure of oneself to dangers "so obvious and threatening that a prudent man would have avoided them." But these words can hardly be intended to carry that restrictive significance which they bear in the Missouri cases, as they should be construed with special reference to the facts at that point being (see § 302, note 9, *infra*) whether the plaintiff was bound to abandon his duties immediately upon the discovery of the defect. The doctrine of the Supreme Court of the United States is, as is shown by the decision in *Hanna v. Texas & P. R. Co.* (1879) 100 U. S. 224, 25 L. ed. 617, that, under ordinary circumstances, the action is barred by knowledge of any dangerous defect. See also cases cited in § 297, note 4, and § 298, note 1, *supra*.

⁸ In *East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 68, 47 Am. Rep. 319, the court remarked that this modification of the general rule was difficult to maintain on principle, as it virtually changed the rule as to the free agency of the servant, and required that the master should be more careful of the servant than the servant is of himself. It should be remarked that the decisions in other states, which the courts of Missouri have cited in support of this doctrine—for example, *Perigo v. Chicago, R. I. & P. R. Co.* (1880) 55 Iowa, 326, 7 N. W. 627; *Hawley v. Northern*

Even in Missouri itself the ordinary doctrine of assumption of risks has never been entirely discarded for any great length of time, and within recent years the courts have shown some tendency to fall into line with those of other jurisdictions.¹⁹

302. Voluntary or involuntary quality of the servant's action in continuing work.—(Compare §§ 288, 289, *supra*, and §§ 381-384, 410, *subd. c*, 466, *post*.)

C. R. Co. (1880) 82 N. Y. 370; *Patterson v. Pittsburgh & C. R. Co.* (1874) 76 Pa. 349, 18 Am. Rep. 412; *Same v. Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720,—are not fairly available as precedents at least to the extent asserted. The mere fact that they emanate from jurisdictions in which the defenses both of assumption of risks and of contributory negligence are recognized as being appropriate to cases where the effect of the servant's continuance of work with knowledge of an unusual risk is in controversy, proves that they are not authorities for the principle that evidence of such knowledge raises a question of contributory negligence exclusively.

Passing over, as immaterial in the present discussion, the decisions of a date earlier than that at which the "glaring danger" doctrine first made its appearance, we find an explicit recognition of the doctrine of assumption of risks in *Alcorn v. Chicago & A. R. Co.* (1891) 108 Mo. 81, 18 S. W. 188; *Reichla v. Gruenfelder* (1892) 52 Mo. App. 43, seems to be another affirmation of the same principle. In the following year it was held that an instruction that the plaintiff's action is not barred, unless the danger is apparent and threatening, is misleading. *Fugler v. Bothe* (1890) 43 Mo. App. 44, per Rombauer, P. J., in a dissenting opinion which was adopted by the supreme court (1893) 117 Mo. 487, 22 S. W. 1113. *Coontz v. Missouri P. R. Co.* (1893) 115 Mo. 669, 22 S. W. 572 (defective car wheel), also seems to be argued on the assumption that, if the servant's knowledge should have been found by the jury, the servant's action would not have been maintainable. *Fugler v. Bothe*, 117 Mo. 487, 22 S. W. 1113, was thought by the St. Louis court of appeals to have sounded the knell of the "immediate and threatening danger" doctrine. *Moore v. St. Louis Wire Mill Co.* (1893) 55 Mo. App. 491, 495.

It was remarked in *Marshall v. Kan-*

sas City Hay Press Co. (1897) 69 Mo. App. 256, that the doctrine of *Fugler v. Bothe* was "restored and vitalized" in *Steinhäuser v. Spraul* (1895) 127 Mo. 541, 27 L. R. A. 441, 28 S. W. 626, 30 S. W. 102. It is, perhaps, open to discussion whether the risk in the case thus referred to was not held to be assumed on the ground that it was an ordinary one. But in *Nugent v. Kauffman Mill Co.* (1895) 131 Mo. 241, 33 S. W. 428, we find a categorical enunciation of the doctrine of assumption of extraordinary risks, in the court's discussion of one of the theories of the evidence upon which the plaintiff relied, though the case really turned on the view that the danger was one incident to the work for which the servant was hired. The curious conflict which is disclosed by comparing these decisions with those collected in notes 2 to 7, *supra*, is rendered still more perplexing by some of very recent date which show that, in spite of what was said in the *Fugler* and *Nugent* cases, *supra*, the "glaring danger" doctrine is still applied by the supreme court. *Settle v. St. Louis & S. F. R. Co.* (1895) 127 Mo. 336, 30 S. W. 125; *Hurst v. Kansas City, P. & G. R. Co.* (1901) 163 Mo. 309, 63 S. W. 695; *Hamman v. Central Coal & Coke Co.* (1900) 156 Mo. 232, 56 S. W. 1091.

In two late cases the decision in *Fugler v. Bothe* (1893) 117 Mo. 487, 22 S. W. 1113, was followed by the court of appeals: *Benham v. Taylor* (1896) 60 Mo. App. 308 (structure close to track in mine); *Wray v. Southwestern Electric Light & Water Power Co.* (1897) 68 Mo. App. 380 (switch in headboard in electric-light establishment was out of repair). But, singularly enough, in *Irmer v. St. Louis Brewing Co.* (1897) 69 Mo. App. 17, decided in the same year, the court cited, in support of its ruling, the decision of the court of appeals in *Fugler v. Bothe*, which, as already mentioned, was reversed by the supreme court.

a. *Will power of servant overcome.*—See § 440, subd. c, *post*.

b. *Servant's fear that he may lose his position if he disobeys.*

In some cases it is laid down that the servant's fear that he may lose his situation is a material factor, where the question is whether he was guilty of negligence in undertaking to do a piece of work in response to a direct order.¹ But on general principles it is clear that the doctrine must necessarily be subject to the qualification recognized in one case, *viz.*, that the servant cannot recover if the danger to be encountered was so serious that a prudent man would not have risked it for the sake of a short job.²

On the other hand, according to the stricter view, which is a logical corollary of the theory that a servant is free to remain or to leave his employment, the fact that he undertook an abnormally dangerous piece of work because he feared that he would be discharged if he declined to undertake it is a wholly immaterial element. The sole point to be considered is whether the danger was or was not so great

¹ *Fogus v. Chicago & A. R. Co.* (1892) 50 Mo. App. 250; *Chicago, R. I. & P. R. Co. v. McCarty* (1896) 49 Neb. 475, 68 N. W. 633; *Brennan v. Front Street Cable R. Co.* (1894) 8 Wash. 363, 36 Pac. 272. In *Harrison v. Denver & R. G. W. R. Co.* (1891) 7 Utah, 523, 27 Pac. 728, the court, in upholding the correctness of a charge to the effect that a servant is not bound to set up his own judgment against that of his master as to the safety of the work, under peril of dismissal, where the work ordered to be done is not obviously dangerous, or of such a nature that he can see that it cannot be performed with safety, or where there may be a difference of opinion about it in the minds of reasonable and prudent persons, said: "An employee is not usually in a condition to abandon his employment for slight reason; for out of employment means often out of bread and meat for his family, and he will take unusual and hazardous risks to keep his place, and no employer ought to put him to the choice of peril, or loss of employment." In *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698, the court said, in reviewing a case where a brakeman had been injured in obeying an order of his conductor which violated a rule of the defendant: "The question involved in all such cases is whether the subordinate feels constrained to obey the orders of his superior, though apparently obedience will be attended with peril, rather

than run the risk of defying his authority. The fact that the conductor has the power to employ and discharge brakemen on his train is but evidence to show that the brakemen fear to disobey his commands. The existence of such authority, in the very nature of things, cannot be made the invariable test of the servant's culpability. If the servant never knows or communicates with a higher official than the conductor, and receives every order upon which he acts in the line of his duty from him as a superior, as it is a matter of universal knowledge is the true state of facts on all railroads, is it not reasonable for the laborer to conclude that the conductor has power to waive the requirement of the rule that he has signed, and that, if he refuses to comply in accordance with his direction, and thereby delays the departure of a train, he may at least be reported for inefficiency, and discharged from the service of the company? If the servant acts upon a well-grounded fear of losing his place, the reason of the rule would be met, and he should be declared free from culpability, unless the plaintiff recklessly exposed himself to manifest peril, or chose to subject himself to danger when another safe mode of discharging his duty was open to him, as in *Chambers v. Western North Carolina R. Co.* (1884) 91 N. C. 475."

² *East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 63, 47 Am. Rep. 319.

that a prudent man would not have faced it.³ His position is apparently not improved by entering a protest against being obliged to go on with the work,—at all events where that protest merely takes the form of a declaration that he will not take the responsibility.⁴

Under either theory, of course, where it is proved that the servant was ordered to do a certain act on pain of being discharged if he refused, the action is clearly not barred if it is shown that he did not fully appreciate the risk to which obedience would expose him.⁵

c. Voluntary action not predicable in the case of seamen.—Thus it is held that negligence cannot be predicated of the act of a sailor in obeying, without remonstrance, the order of his superior to operate a dangerous uncovered winch, where disobedience of the orders would, under the ship's rules, subject him to punishment, and would also, under the law of the forum, subject him to imprisonment and forfeiture of wages. *Eldridge v. Atlas S. S. Co.* (1892) 134 N. Y. 187, 32 N. E. 66. In the opinion of the majority it was said: "The defendant insists that the command to operate this dangerous winch was not lawful, and therefore plaintiff might rightfully have refused obedience. If it be conceded that the command was unlawful, it does not necessarily follow that plaintiff's obedience was negligence. For, whether the command was lawful or unlawful, the evidence is to the effect that his disobedience would have resulted in his punishment. The boatswain, under whose orders plaintiff was operating the winch, testified that the plaintiff 'was bound to obey the order that I gave him; if he did not obey the order he would have been put in irons and fined.' Grant that the plaintiff had been so learned in the law as to know that the courts would ultimately decide the command was unlawful, and disobedience to it lawful, he could know no way of escape from the ship's punishment of his disobedience, for there was none. The jury found in effect that he was coerced, through fear of punishment, into obedience. If the command was unlawful, the defendant's case is not improved by the fact that the punishment it would visit upon disobedience was also unlawful. In any event the plaintiff was in a dilemma. He had to choose between present punishment with a possible hope of remote justification, and customary obedience to orders with the hope that by care he would escape injury. Grant that he

³ *Halcy v. Case* (1886) 142 Mass. 316, 7 N. E. 877; *Linch v. Sagamore Mfg. Co.* (1887) 143 Mass. 206, 9 N. E. 128.

⁴ *Wescott v. New York & N. E. R. Co.* (1891) 153 Mass. 460, 27 N. E. 10.

where it was held that a conductor could not recover for injuries caused by a collision which resulted from starting

his train in violation of rules, by command of his superior officer, when he knew that the other train had the right of way, and that such officer had no special information regarding it.

⁵ *Colorado Midland R. Co. v. O'Brien* (1891) 16 Colo. 219, 27 Pac. 701.

made a mistake in judgment under these difficult conditions, the law does not adjudge it to be negligence, and the jury, upon consideration, have refused to do so. We cannot hold that their refusal was error." The dissent was on the ground that it was not necessary to consider whether the servant was or was not negligent in obeying the specific order which led to his being injured, as an assumption of the risks incident to the use of his master's appliances in the condition in which they were might be implied from his acceptance of the service.⁶ For reasons similar to those which prevent the defense of assumption of risks from being a bar to an action by a seaman (see § 289, *subd. 1, ante*), it is held that negligence cannot be imputed to such an employee merely for the reason that he does not refuse to perform a duty which will expose him to an abnormal risk.⁷ But it would seem that, if he is doubtful whether a particular appliance is safe, he is at least bound to make some objection, or ask that another one shall be furnished.⁸

That the contributory negligence of a seaman in respect to the manner in which he conducted himself in performing his duties is a ground for mitigation of damages, see § 315, *post*.

302a. Duty of the servant to quit the employment when he ascertains that he is exposed to an abnormal risk.—The doctrine that it is, as a matter of law, contributory negligence to continue working after the existence of an abnormal risk is ascertained, obviously involves the corollary that there is a positive duty on the servant's part to withdraw from the dangerous environment (together, within a reasonable time after he has, or ought to have discovered its unsafety,¹ or

⁶ *Eldridge v. Atlas S. S. Co.* (1890) 55 Hun. 309, 8 N. Y. Supp. 433; same case, after retrial (1890) 58 Hun. 96, 11 N. Y. Supp. 468.

⁷ *Rothwell v. Hutchinson* (1886) 13 Sc. Sess. Cas. 4th series 463. There the court said: "Where a workman, seeing a danger before him, knowingly rushes into it, he has himself to blame if he sustains injury from it, the alternative being that he must decline to go on with his work." The case of a seaman is very different from that of the ordinary workman on land. It is quite impossible to suggest that, because a seaman sees something wrong with the gearing of the vessel, or with some of the appliances, he is therefore to strike work. The discipline of the ship is quite inconsistent with such a position, and I should suppose that, if any man in the condition of a seaman on board a ship of the mercantile marine were to

take this course, he would, in the first place, be put in irons by the master, and would probably be sent to prison when he came on shore.

To the same effect, see *Anderson v. New York & C. Mail S. S. Co.* (1897) 13 App. Div. 218, 43 N. Y. Supp. 213 (1896) 17 Misc. 93, 39 N. Y. Supp. 425 (not negligence *per se* to obey an order to go below and close the ports without taking a light; servant fell down partly opened hatch while returning to deck); *Keating v. Pacific Stream Whaling Co.* (1899) 21 Wash. 415, 58 Pac. 224 (not negligence to obey orders of officers, though danger to be encountered is known).

⁸ *The Julia Fowler* (1892) 49 F.1. 277 (rope supporting triangle gave way).

¹ "If he [the servant] has notice of any defect . . . from which injury may be reasonably apprehended, he

discontinue the use of the dangerous instrumentality,² especially where he has it within his power to remedy the defect.³ If the peril is created by the unfitness of one of his co-servants, his proper course is to refuse to work any longer in a position where that unfitness will be a possible source of danger.⁴

It is manifest, on the other hand, that the consequence of adopting the doctrine that it is not culpable, as a matter of law, to continue working with a knowledge of an abnormal risk, is that an election between these alternative courses cannot be treated as being absolutely obligatory.⁵

should, generally speaking, quit the service for his own protection." *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216. In *Davis v. Baltimore & O. R. Co.* (1893) 152 Pa. 314, 25 Atl. 498, it was remarked that the plaintiff knew that box cars were in common use on the rear of freight trains, and, if he did not think them reasonably safe with the exercise of reasonable care, it was his own folly to ride on one.

See also *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92; *Baltimore & O. R. Co. v. Baugh* (1892) 149 U. S. 405, 37 L. ed. 787, 13 Sup. Ct. Rep. 914; *Bjornman v. Fort Bragg Redwood Co.* (1894) 104 Cal. 626, 38 Pac. 451; *Camp Point Mfg. Co. v. Ballou* (1874) 71 Ill. 417; *Chicago & A. R. Co. v. Munroe* (1877) 85 Ill. 25; *Illinois C. R. Co. v. Jones* (1882) 11 Ill. App. 324; *Missouri Furnace Co. v. Abend* (1883) 107 Ill. 44, 47 Am. Rep. 425; *Swift & Co. v. Rutkowski* (1897) 167 Ill. 156, 47 N. E. 362; *Smith v. Drake* (1889) 125 Pa. 501, 17 Atl. 449; *Philadelphia & R. R. Co. v. Huber* (1889) 128 Pa. 63, 5 L. R. A. 439, 18 Atl. 334; *Linowski v. Susquehanna Coal Co.* (1893) 157 Pa. 153, 27 Atl. 577; *Hawk v. Pennsylvania R. Co.* (1887; Pa.) 9 Cent. Rep. 786, 11 Atl. 459; *Jackson v. Kansas City, L. & S. K. R. Co.* (1884) 31 Kan. 764, 3 Pac. 501; *Pittsburgh & W. Coal Co. v. Estieronard* (1895) 53 Ohio St. 43, 40 N. E. 725; *Coal & Min. Co. v. Clay* (1894) 51 Ohio St. 542, sub nom. *Consolidated Coal & Min. Co. v. Floyd*, 25 L. R. A. 848, 38 N. E. 610. In *Bannon v. Lutz* (1893) 158 Pa. 166, 27 Atl. 890, the trial judge was asked by defendant to give the following instruction: "If the employee thinks that his employer is conducting his business in an unsafe way, it is his duty to leave it, and he cannot recover

for injuries received by reason of the kind of machinery, or mode of doing business which has been used and practised for several years, and with which the employee was familiar." The following remarks made by him in reply were approved, as a whole, by the supreme court: "In some particulars, it is, in my judgment, correct, and in others it is incorrect. In my judgment, if the employee thinks that his employer is conducting his business in an unsafe way, then it is his duty to quit it; he cannot, in other words, dictate to his employer how to conduct the business; but it is the duty of the employer to furnish proper machinery to conduct it. In other words, I make a distinction between a man conducting his business, and furnishing appliances with which to conduct it. He can conduct it as he thinks proper, and if the employee don't like that way he must leave it."

² *Hellig v. Slaughter* (1901) 95 Ill. App. 623.

³ *Bemis v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998.

⁴ *Frazier v. Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467.

⁵ "It is undoubtedly the duty of a master, where his servant is engaged in hazardous employments, to see that every reasonable precaution on his part, to insure safety, is observed. The primary duty of the servant is obedience, and it is not to be expected that he will, upon mere imaginary danger, of which he may be conscious, assert his right to relinquish his employment. He naturally looks to his employer for the observance of all reasonable and proper precautions, and his continuance in the service when such precautions have not been observed is rather to be attributed to confidence reposed in those to whose superior judgment he yields." *Keargan v. Kucanough* (1876) 62 Mo. 232. See

Under the more rigorous, as well as the more lenient, doctrine, a servant is not bound to abandon his work the moment he has discovered the abnormal danger. The rule is that, after reporting the danger to his superior officer, he may, if it is not imminent and obvious, continue to encounter it for what is described as a "short" or "reasonable" time, with the expectation that the master will perform his duty by removing it.⁶ In other words, if he has justifiable grounds for believing that the master will remove the source of danger, whether his impression is the result of an explicit promise or not, he may continue working without culpability as long as the jury may consider it to be reasonable to retain that belief.⁷ As a matter of fact it will be found that, in the majority of cases, the time which had elapsed between the discovery of the abnormal conditions and the accident was at least sufficiently long to give the servant an ample opportunity for considering whether it would be advisable for him to continue to incur the risk. In no case, probably, would a court allow recovery where the defect which caused the injury had come to the servant's knowledge several months before the accident.⁸

The case of a railway servant stands upon a special footing, as he is deemed to owe a duty to the public as well as to his employers, and the effect of the decision, as a whole, is that he is justified in taking much greater risks than employees in other occupations, without necessarily forfeiting his right of action. Under ordinary circumstances, such a servant seems to be, at all events, entitled to remain at work until he obtains an opportunity of notifying the proper agent of the master as to the existence of the danger.⁹ It is only in very ex-

also cases cited under chapter XXIII., master that the dangerous conditions will be remedied. See § 429, *post*.

⁶ *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582; *Chicago, W. & V. Coal Co. v. Peterson* (1890) 39 Ill. App. 114 (miner apprehended that the roof of a drift was dangerous, but had demanded that the owner should, as he was bound to do by statute, supply material for propping it); *Ross v. Chicago, M. & St. P. R. Co.* (1881) 2 McCrary, 235, 8 Fed. 544 (jury charges that two or three weeks was not an unreasonable time to remain at work with an incompetent co-servant whose unfitness the plaintiff had reported).

⁷ *Hoffman v. Dickinson* (1888) 31 W. Va. 142, 6 S. E. 53. See also § 300, notes 1, 2, *supra*. Compare the language used in describing the length of the period during which a servant is justified in remaining in an employment after receiving an explicit promise from the

⁸ See, for example, *Limberg v. Glenwood Lumber Co.* (1899) 127 Cal. 598, 49 L. R. A. 33, 60 Pac. 176 (teamster had complained, about nine months before the accident, that the lines were too short); *Western & A. R. Co. v. Bishop* (1873) 50 Ga. 465 (unsafe coupling used for ten months).

⁹ *Henion v. New York, N. H. & H. R. Co.* (1897) 25 C. C. A. 223, 51 U. S. App. 157, 79 Fed. 903 (injury to station master owing partly to the condition of a platform, and partly to the want of a proper system for regulating the approach of trains to the station).

In *Louisville & N. R. Co. v. Kella* (1894) 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407, it was held that the trial judge had properly refused a request for an instruction to the effect that, if the plaintiff knew that the dead-

extreme circumstances that he will not be warranted in remaining on a train until it reaches the next station.¹⁰ But the exigencies of rail-

roads of the cars he was attempting to couple were out of repair, that there were holes and pitfalls in the roadbed, and that the fireman in charge of the engine was incompetent, and remained in the service of the company without making objection, and without receiving any promise that the causes of danger mentioned should be removed, he was not entitled to relief. "If the defendant in error," said the court of appeals, "knew that the deadwoods were out of repair, he must, in all probability, have acquired the knowledge on the spot; and, consistently with the terms of the instruction, his supposed knowledge of the condition of the track, and of the incompetency of the fireman as an engineer, may have come to him so recently as to have afforded him no opportunity to make objection or complaint. Besides, even if he had the supposed knowledge, it was a question for the jury whether or not, under the circumstances, he ought to have attempted to make the coupling, and in so doing was himself negligent, or to be considered as having voluntarily assumed the risk of his act. The question was essentially one of contributory negligence, and the instruction should have been so framed as to leave it to the jury."

"The danger arising from the want of a step on one of the cars in a freight train over which a brakeman may have to pass is not so imminent as to subject him to the charge of recklessness in having remained at his post, where he is assured by the conductor that the car will be removed from the train when it reaches a station a few miles distant, if, upon examining his manifests, he finds that it does not contain perishable freight. *Kane v. Northern C. R. Co.* (1888) 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16. So, it has been said, *quando*, that an engineer is not necessarily negligent because he does not abandon his engine between two stations, when he first discovers it to be defective. *Irvine v. Flint & P. M. R. Co.* (1891) 89 Mich. 416, 59 N. W. 1008. This principle is impliedly recognized in *Pierson v. New York, N. H. & H. R. Co.* (1900) 53 App. Div. 363, 65 N. Y. Supp. 1039, where an engineer was held not to be negligent in taking his engine over to a station a considerable distance beyond the place where the air brakes

had refused to work. But the actual point of the decision is different. See § 296, note 6, *supra*.

Usually an engineer may continue to operate the engine until he reaches a station where the defect can be cured or a new engine obtained, if the defect is such that he might reasonably believe that it could be safely operated by great care, and if the risk is not greater than persons of ordinary prudence would take. *Fordyce v. Edwards* (1895) 60 Ark. 438, 30 S. W. 758. Where an engineer for a special trip was assigned an engine which, on examination seemed efficient, but the airbrake proved worthless, and repairs could not be made until his return to the starting point, he did not, by continuing at his post on the return trip, take all the risk of accident. *Flynn v. Kansas City, St. J. & C. B. R. Co.* (1887) Mo. 10 West. Rep. 418. See also the remarks of Brewer, J., in *O'Rourke v. Union P. R. Co.* (1884) 22 Fed. 191.

A brakeman is not chargeable with negligence in attempting to use the brakes on cars so loaded as to make their use unsafe, when he first discovers the fact at a time when the cars are in rapid motion toward a standing car upon which others are at work, and in imminent danger. *Irvine v. Flint & P. M. R. Co.* (1891) 89 Mich. 416, 59 N. W. 1008. To the same effect, see *Groff v. Cincinnati & L. R. Co.* (1871) 1 Cin. Sup. Ct. Rep. 264 (d. & t. bridge).

Where the unfitness of a servant was ascertained for the first time on the trip, it was held correct to refuse to give the peremptory instructions asked for by the defendant, that if the plaintiff knew, or even had the opportunity of knowing, before his fall from the car in question, that the engineer was an unfit or unsafe man to run the engine, it was the plaintiff's duty absolutely to refuse to work with him any longer. The Supreme Court said: "The duty of the plaintiff, under such circumstances, is not to be determined by the single fact of his knowledge of the danger he incurred by continuing to serve with a coemployee known by him to be an unfit and incompetent person. It was enough for the court to say, as it did, that a failure on the part of the plaintiff to refuse to work, in view of that knowledge on his part, might be negligence on his part."

way traffic will not excuse the servant for running the risk of almost certain injury.¹¹

303. Failure of servant to report a defect.—(Compare § 282, *ante*.)

a. Generally.—From the language used in some of the cases it would seem that the failure to report the existence of a defect was regarded merely as a supplementary and cumulative ground for barring

The qualification was correct, that it was for the jury to say, from all the attending circumstances, whether the failure to do so was in fact contributory negligence. A suitable judgment on that question can only be reached by carefully weighing the probable consequences of both courses of conduct, and it might well happen that even at the risk of injury to himself, occasioned by the unskillfulness of his coemployee, the plaintiff might still reasonably be regarded as under a duty not suddenly and instantly to refuse to continue in the conduct of the business of his principal. Many cases might be conceived in which the latter course might even increase the danger to the plaintiff himself, and entail great injury and loss to others." *Northern P. R. Co. v. Mares* (1887) 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321. To the same effect, see *Francie v. Kansas City, St. J. & C. R. R. Co.* (1895) 127 Mo. 658, 28 S. W. 842. Affirmed in (1895) 127 Mo. 676, 30 S. W. 129 (switchman not bound to abandon work immediately upon his ascertaining incompetence of engineer).

"No recovery can be had by a fireman who remained, without protest, on a detached engine when he knew that it was about to be run without orders over a section of the road on which, as he was aware, the engineer had no right to take it without orders. *Baltimore & O. R. Co. v. Bough* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, Field, J., dissenting, but only on the ground of the fireman's knowledge of the conditions. The following remarks of the learned judge, made after the review of the evidence which led him to his conclusion as to the facts, are of sufficient general interest to be worth quoting: "His information as to what was known, and consequently directed or omitted, by the engineer on that subject, was too imperfect for him to act upon it. His continuance as fireman on the locomotive after its movement to return to Bellaire was not with sufficient knowledge of any failure of the engineer to give the proper orders as to a scheduled train to justify

an abandonment of the locomotive. It was under the direction of the engineer, not of the fireman, and he may have felt confident that it could be run on a side track if necessary to avoid any possible collision with a train coming in the opposite direction, as was sometimes done. It would be a dangerous notion to put into the heads of firemen and other employees of a railroad company that if they had reason to believe, without positive information on the subject, that dangers attended the course pursued by the movements of the train under the direction of its conductor they would be deemed to assume the risk of such movements if they did not expostulate with him, and, if he did not heed the expostulation, leave the train, even after it had commenced one of its regular trips. A strange set of legal questions would arise, more embarrassing to the courts than the fellow-servant question, if such action should be deemed essential to the retention by the employee of the right to claim indemnity for injuries which might follow from the course pursued. If the employees could abandon a train after it had commenced one of its regular trips when they had reason to believe, without absolute information, that danger might attend their continuance on it, new strikes of employees would spring up to embarrass the commerce of the country and annoy the community, founded upon such alleged apprehensions. The circumstances attending the cases in which an employee has been held to have voluntarily assumed the risks of an irregular, improper, or ill-advised movement of a train, under directions of its conductor, are essentially different from those of the case before us."

An engineer is guilty of contributory negligence, where, of his own volition and without orders, he attempts to take his train across a bridge which he has reason, from his personal examination, to believe to have become unsafe through a flood, the waters of which are still rising. *Columbus & W. R. Co. v. Bridges* (1888) 86 Ala. 448, 5 So. 864.

the servant's action, rather than as an indispensable ingredient of the defense.¹ It has also been specifically laid down that the servant's continuance of work with knowledge of the risk is contributory negligence, as matter of law, only where the servant has failed to object or protest.² But the simplest and most rational view would seem to be that the duty to report is really a distinct and specific obligation, the breach of which renders a servant chargeable with contributory negligence, though, in the nature of the case, the effect of that breach can seldom, if ever, become a practical question in any instance on which the legal significance of the servant's conduct in continuing to work does not also present itself for consideration. And such seems to be virtually the view of the courts which have adverted to the failure to perform the duty as one of the distinct factors bearing upon the right of recovery.³ The servant's inability to recover is, of course, espe-

¹ See *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *McQueen v. Central Branch Union P. R. Co.* (1883) 30 Kan. 691, 1 Pac. 139; *Lawrence v. Hagonmeyer & Co.* (1892) 93 Ky. 591, 20 S. W. 704; *Jones v. Roach* (1876) 9 Jones & S. 248; *Pollich v. Sellers* (1890) 42 La. Ann. 623, 7 So. 786; *Silvia v. Wampnam Mills* (1900) 177 Mass. 194, 58 N. E. 590; *Atlanta & C. Air Line R. Co. v. Ray* (1883) 70 Ga. 674.

"If the engineer," said the court in *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 224, 25 L. ed. 612, 617, "after discovering or recognizing the defective condition of the cowcatcher or pilot, had continued to use the engine without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held, in that case, to have himself risked the dangers which might result from the use of the engine in such defective condition."

² *Greenleaf v. Dubuque & S. C. R. Co.* (1871) 33 Iowa, 52. Under the characteristic Missouri doctrine reviewed in § 301, *supra*, neither the failure to complain, nor the making of a complaint, is decisive. *Thorpe v. Missouri P. R. Co.* (1886) 89 Mo. 652, 58 Am. Rep. 120, 2 S. W. 3.

³ *Cunningham v. Merrimac Paper Co.* (1895) 163 Mass. 89, 39 N. E. 774; *Dequan v. Jordan* (1895) 164 Mass. 84, 41 N. E. 117; *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285; *At-*

lanta & C. Air Line R. Co. v. Ray (1883) 70 Ga. 674; *McCharles v. Horn* (1894) 10 Ark. 111; *Fin. & Smelting Co.* (1894) 10 U. S. 50, 37 Pac. 733; *Coal & Min. Co. v. C.* (1894) 51 Ohio St. 542, *sub nom.* *Consolidated Coal & Min. Co. v. Floyd*, 25 L. R. A. 818, 38 N. E. 610; *Frazier v. Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467; *Brausch v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998; *Lincoski v. Susquehanna Coal Co.* (1893) 157 Pa. 153, 27 Atl. 577; *Patterson v. Pittsburgh & C. R. Co.* (1874) 76 Pa. 389, 394, 18 Am. Rep. 412; *Baker v. Allegheny Valley R. Co.* (1880) 95 Pa. 211, 40 Am. Rep. 634 (*arguendo*); *Philadelphia & R. R. Co. v. Huber* (1889) 128 Pa. 63, 5 L. R. A. 439, 18 Atl. 334; *Cratchfield v. Richmond & D. R. Co.* (1878) 78 N. C. 300; *Columbus & W. R. Co. v. Bradford* (1888) 86 Ala. 574, 6 So. 90; *Le Clair v. First Dir. of St. Paul & P. R. Co.* (1873) 20 Minn. 9, Gil. 1; *New Orleans, J. & G. V. R. Co. v. Hughes* (1873) 49 Miss. 258; *Lytle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571; *Illinois C. R. Co. v. Jewell* (1867) 46 Ill. 99, 92 Am. Dec. 240; *Allerton Packing Co. v. Egan* (1877) 86 Ill. 253; *Stafford v. Chicago, B. & Q. R. Co.* (1885) 114 Ill. 244, 2 N. E. 185; *Chicago & A. R. Co. v. Cullen* (1900) 187 Ill. 523, 58 N. E. 455, *Affirming* (1900) 87 Ill. App. 374; *Chicago & A. R. Co. v. Bragonier* (1886) 119 Ill. 51, 7 N. E. 688; *Camp Point Mfg. Co. v. Ballou* (1874) 71 Ill. 417; *Toledo, W. & W. R. Co. v. Eddy* (1874) 72 Ill. 138; *St. Louis & S. E. R. Co. v. Brit* (1874) 72 Ill. 256; *Pennsylvania Co. v. Lynch*

cially clear where he has failed to fulfil a duty in this regard which has been imposed upon him by the express orders of his employer.¹

That the servant cannot be debarred from maintaining an action on the ground that he did not report a defect, except where he was actually chargeable with a knowledge of that defect, follows immediately from the general principle explained in § 295, *supra*, and it has been so held in the cases cited below.² Nor can any duty to report be predicated with regard to conditions which are, or which may be presumed to be, known to the employer.⁶

b. *To whom the report should be made.*—As a general rule the servant's duty to report a defect is not considered to have been properly performed unless he notifies some employee whose official rank or functions are such that his knowledge, as thus acquired, will be imputed to the master, and cast upon the latter an immediate duty to remedy the dangerous conditions.⁷ Commonly, if not ordinarily, any employee to whom this description is applicable will be also the agent

(1878) 90 Ill. 333; *Missouri Furnace Co. v. Abend* (1883) 107 Ill. 44, 47 Am. Rep. 425; *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92; *Wabash, St. L. & P. R. Co. v. Thompson* (1884) 15 Ill. App. 117; *Evans v. Chessmond* (1890) 38 Ill. App. 615; *St. Louis Press Brick Co. v. Kenyon* (1893) 57 Ill. App. 640; *Pavia, D. & E. R. Co. v. Puckett* (1893) 52 Ill. App. 223; *Illinois Steel Co. v. Paschke* (1893) 51 Ill. App. 456; *Howe v. Medaris* (1899) 183 Ill. 288, 55 N. E. 724; *Revering* (1899) 82 Ill. App. 515; *Chicago & A. R. Co. v. Merriman* (1899) 86 Ill. App. 454; *Helbig v. Slaughter* (1901) 95 Ill. App. 623; *Ross v. Chicago, M. & St. P. R. Co.* (1881) 2 McCrary, 235, 8 Fed. 544; *McFarlan Carriage Co. v. Potter* (1899) 153 Ind. 107, 53 N. E. 465.

"Owing the master a duty in protecting his property, and being charged with the safety of fellow servants, of travelers, and of the property of shippers, the railway operative, knowing of defects in machinery, or want of skill in fellow servants, is derelict in not advising his master, that investigation and repairs of machinery, or the discharge of the unfaithful may follow, for the safety of all concerned." *Evansville & T. H. R. Co. v. Duell* (1893) 134 Ind. 156, 33 N. E. 355.

⁴ *Knoxville Iron Co. v. Smith* (1887) 86 Tenn. 45, 5 S. W. 438 (held error for

the court to refuse an instruction to the effect that a convict in a coal mine, who failed to report that a roof was dangerous, as was required by an order promulgated by the penitentiary lessors, could not recover).

⁵ *Dale v. St. Louis, K. C. & N. R. Co.* (1876) 63 Mo. 459; *Perry v. Ricketts* (1870) 55 Ill. 234.

⁶ *Baker v. Allegheny Valley R. Co.* (1880) 95 Pa. 211, 40 Am. Rep. 634; *Schep v. Southern P. Co.* (1890) 6 Utah, 319, 23 Pac. 751 (danger of unblocked frogs); *Fairbank v. Haentzschke* (1874) 73 Ill. 236 (shaft removed by master himself and temporarily placed so as to project several feet into the room where the servant was at work). This principle has been embodied in the English employers' liability act of 1880, and in some of the American statutes modeled upon it. See chapter XXXVII, *post*.

⁷ *Richardson v. Cooper* (1878) 88 Ill. 273. Notice of a defect in machinery to a fellow servant is not sufficient to charge the master. *Chicago & A. R. Co. v. Merriman* (1901) 95 Ill. App. 628; *Galveston, H. & S. A. R. Co. v. Eckels* (1894) 7 Tex. Civ. App. 429, 26 S. W. 1117 (switchman directing the work of other switchmen, but himself under orders of yard master, who was the only person having the right to discharge the subordinates, held not a proper person to whom to make complaint). Compare §§ 148-150, *ante*.

who is invested with the authority to apply the remedy.⁸ But this concurrence of functions is not invariable.⁹

If the employee to whom the report is made fails to repair the defects, the servant is bound to notify the owner; and if he does not do this, he continues to work at his own risk.¹⁰

c. Sufficiency of the notice.—Whether a servant gave to the employer due notice as to the dangerous conditions is primarily a question for the jury.¹¹

304. Duty of servant to remedy defects.—(See also cases cited in § 132, note 11, *post*.)—The obligations of a subordinate servant in respect to the condition of the instrumentalities which he uses are generally limited to reporting to a superior any defects which come to his notice. But it is quite clear, both on principle and authority, that, if he is directed and empowered to remedy the defects, he is bound to undertake this function, if its execution is reasonably within his capacity.¹ The cases illustrating this situation may be referred to the same general category as those discussed in § 313, *post*.

B. RELATION BETWEEN THE DEFENSES OF ASSUMPTION OF RISKS AND CONTRIBUTORY NEGLIGENCE.

305. Generally.—Since the conception underlying the servant's assumption of a known risk is essentially that of an implied agreement to accept the responsibility for any bodily hurt which may result from

Notice of the incompetency of a servant, if given to a foreman having power to hire and discharge men, without any accountability to a superior, is notice to the employer. *Wust v. Erie City Iron Works* (1892) 149 Pa. 263, 24 Atl. 291; *Ross v. Chicago, M. & St. P. R. Co.* (1881) 2 McCrary, 235, 8 Fed. 544 (master mechanic of railway held to be a proper person to whom to report incompetency of fellow servant). See *Weber Wagon Co. v. Kehl* (1891) 40 Ill. App. 585 (complaint to the foreman under whom a servant works, of a dangerous appliance, is proper). *Parody v. Chicago, M. & St. P. R. Co.* (1882) 5 McCrary, 38, 15 Fed. 205 (yard master a proper person to whom to report defect in drawbar).

A yard master whose duty it is to report defective engines to the train master, although having no personal authority to direct repairs to be made or to remedy such defects, is the proper person to whom a switchman employed in the yard should complain of a de-

fective engine. *Picart v. Chicago, R. I. & P. R. Co.* (1891) 82 Iowa, 148, 47 N. W. 1017.

⁸ *Lincoski v. Susquehanna Coal Co.* (1893) 157 Pa. 153, 27 Atl. 577.

⁹ *Ross v. Chicago, M. & St. P. R. Co.* (1881) 2 McCrary, 235, 8 Fed. 544. It is not enough to notify the employer or his representative that an appliance, like a hand car, consisting of numerous parts, is "in bad shape." It must be shown that knowledge of the particular defect was brought home to the employer. *Burlington & C. R. Co. v. Liehe* (1892) 17 Colo. 280, 29 Pac. 175.

¹ Recovery has been denied, where plaintiff, a railway fireman, had his attention called to the loose condition of a step on the engine, and noticed several different times thereafter that it was loose, and each time he refixed it without reporting it to the foreman, and was told by the engineer to remove the step, but failed to do so, and on the same day, in attempting to use the step, was injured. *Kerrigan v. Chicago, M.*

his exposure to that risk,¹ and the theory upon which contributory negligence is held to preclude him from recovery is that he was guilty of imprudence in the premises, and that this imprudence was partially or entirely the cause of his injury,² the differentiation of the two defenses in practice would seem to present no great difficulty. But, as a matter of fact, the obvious distinction between them, and the logical results of that distinction, have, in a singularly large number of cases, been lost sight of, or treated as immaterial, or even denied to exist.³

St. P. R. Co. (1899) 104 Wis. 166, 80 N. W. 586.

See also *Kenney v. Second Ave. R. Co.* (1895) 89 Hun. 340, 35 N. Y. Supp. 395 (driver of street car did not make any attempt to remedy brake); *Butte v. Pleasant Valley Coal Co.* (1896) 14 Utah. 282, 47 Pac. 77 (miner did not repair defective track in room where he was working); *Truman v. Rudolph* (1895) 22 Ont. App. Rep. 250 (orders of employee to apply remedy were not carried out); *Couray v. Chicago G. W. R. Co.* (1897) 103 Iowa, 373, 72 N. W. 543 (foreman in charge of railway coal house and appliances did not keep them in suitable condition).

¹ See § 276, *ante*.

² Wharton, Neg. § 300; Shearm. & Redf. Neg. 5th ed. § 63; Beven, Neg. pp. 168 *et seq.*; Pollock, Torts, p. 374.

³ This remark is not intended to apply to cases in which the inability of the servant to recover for an injury caused by a known risk is affirmed in perfectly general terms, without any specific mention of either of these defenses. Such are the following: When an employee, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if he is subsequently injured by such exposure. *St. Louis & S. E. R. Co. v. Britz* (1874) 72 Ill. 257. If the servant, after having knowledge of the defective machinery, apparatus, or material, remains in the service, and attempts to use the same, and is thereby injured, he cannot recover of the company for such injury. *Houston & T. C. R. Co. v. Myers* (1881) 55 Tex. 111, quoting *Pierce, Railroads*, p. 379, note 4. If a servant wilfully encounters dangers which are known to him, or are notorious, the master is not responsible for an injury occasioned thereby. *Berna v. Gaston Gas Coal Co.* (1885) 27 W. Va. 285, 55 Am. Rep. 304; *Messie v. Peel Splint Coal Co.* (1896) 41 W. Va.

620, 24 S. E. 614. Compare also the passage quoted from *Pittsburgh & O. R. Co. v. Stenberger* (1879) 92 Pa. 276, 7 Am. Rep. 684, § 307, note 3, *infra*. See also *Asxop v. Yates* (1858) 2 Hunt. N. 708, 27 L. J. Exch. N. S. 156 (recovery denied simply on the ground that the servant's voluntary continuance of work, without any specific allusion to his assumption of the risk, or contributory negligence); *W. Charles v. H. Silver Min. & Smelting Co.* (1891) 1 Utah. 470, 37 Pac. 733 (holding that verdict for the defendant should be reversed where the plaintiff himself testified that he continued, with knowledge of a fellow servant's untimely exposure himself to the dangers arising therefrom; but the actual theory of the defense was not mentioned); and the cases cited in § 257, *ante*.

That the defense of contributory negligence is one impliedly meant in many of the cases in which language of the tenor is used may sometimes be inferred from expressions found in the other parts of the opinion, or from the customary practice of the court to test the right of recovery, with reference to the defense. But if the court is one which treats the servant's continuance of work sometimes as being indicative of a knowledge of care and sometimes as showing that he assumed the given risk, it is a matter merely of surmise which defense is intended to take effect. This uncertainty, however, is probably never of any practical importance, since in all the misadventures where this ambiguous language has been employed the servant's knowledge of the risk prevents his maintaining the action, as a matter of fact, whether the one defense or the other is relied on. Sometimes each of the two defenses seems to have been present in the mind of the judge at different stages in the progress of the case. This is one of the earlier English cases that deal on the effect of the servant's knowledge.

It is most desirable, therefore, to obtain an adequate idea of the true relation between these defenses. Few lawyers, we imagine, realize the extent to which this department of the law has been unnecessarily obscured and complicated through the downright intellectual obliquity or the slovenliness of language by which the boundary line between them has been blurred or obliterated.

306. Logical independence of the two defenses.—The logical situation resulting from a distinction, of which the existence of two separate lines of decisions, in which the servant's voluntary exposure of himself to a known risk is considered from the standpoint of an assumption of the risk and of contributory negligence in incurring that risk, constitutes a practical recognition, has frequently been explained by the courts.¹

Chief Baron Pollock remarked during the argument of counsel that a servant "took the risk" if he went on working after the master himself had observed a defect and expressed his opinion about it, while, in the judgment of the court, delivered by Watson, B., the servant's right to recover was denied on the ground that he knew that the defective appliance was used, and, being "contributory of the injury," came under the principle stated by Lord Cranworth in *Paterson v. Wallace* (1854) 1 Macq. H. L. Cas. 148, 28 Eng. L. & Eq. 48, that a plaintiff must, as a condition precedent to recovery, establish that the injury arose from no "rashness of his own." *Griffiths v. Gidlow* (1858) 3 Hurlst. & N. 648, 27 L. J. Exch. N. S. 404. Similarly in *Dyson v. Leach* (1857) 26 L. J. Exch. N. S. 221, while the other judges rested their decision on the plaintiff's assumption of the risks, Channell, B., took the ground that, by continuing in the defendant's employ, he directly contributed to the accident.

"Carelessness is not the same thing as intelligent choice." Bowen, L. J., in *Thomas v. Quartermaine* (1887) 1 L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. (The remainder of the passage of which this remark forms a part is quoted in chapter xx., *post.*) In the same case Fry, L. J., said: "There are two matters which often arise for discussion in these cases of negligence, which are, I think, liable to be confused, and yet are inseparable in reason. The one is the willingness of the plaintiff to assume the danger; and this willingness, if assumed with full

knowledge, may lessen or remove any duty of the employer to the employer, and may thus prevent the arising of a new cause of action, though, in the discharge of the work undertaken, the workman may have been guilty of no negligence. The other is the negligence of the plaintiff, which may have placed him in circumstances of difficulty or danger, or which, when he is placed in such circumstances, may have contributed to the injury. Here there may have been no willingness to enter on the danger, but negligence when in it. In both these questions the knowledge of the plaintiff may be a material ingredient. But the questions are nevertheless distinct."

"Assuming the risks of an employment is one thing and quite an essentially different thing from incurring an injury through contributory negligence." *Mundle v. Hill Mfg. Co.* (1894) 86 Me. 400, 30 Atl. 16.

"Aequiescence with knowledge is not synonymous with contributory negligence. One having full knowledge of defects . . . may use the utmost care to avert the dangers which they threaten." *Hesse v. Columbus, S. & H. R. Co.* (1898) 58 Ohio St. 167, 169, 50 N. E. 355.

"There is a clear and logical distinction between a defense resting upon the assumption of risks, and that predicated upon contributory negligence." *McDon v. Chicago & A. R. Co.* (1891) 108 Mo. 81, 18 S. W. 188.

"The doctrine of assumption of risk by the employee is distinct from the doctrine of contributory negligence, although there may arise a certain condition of facts capable of supporting either inference. This has given rise to a

The two defenses being distinct, it follows that evidence of the servant's having begun or continued work with a knowledge of the danger

great deal of confusion of statement when dealing with these defenses. 'Assumption of risk' rests in the law of contract, and involves an implied agreement by the employee to assume the risks ordinarily incident to his employment, or a waiver, after full knowledge of an extraordinary risk, of his right to hold the employer for a breach of duty in this regard. *Hooper v. Columbia & G. R. Co.* (1884) 21 S. C. 547, 53 Am. Rep. 694. The law as to waiver applies because the relation between the employer and employee is contractual, and waiver is the voluntary relinquishment of a known right. By the contract the employer and employee each assume certain risks, but, as in all contracts, either party may waive his right to insist upon strict performance of the other's contractual duty. When, therefore, a case arises in which it is shown (upon proper pleading) that the employee has assumed the risk from which the injury arose, or, what is the same thing in effect, has waived his right to hold the employer responsible for the risk, the employee's action is defeated because of his agreement, and not because of negligence. 'Contributory negligence,' on the other hand, rests in the law of torts, as applied to negligence, and when such defense is established the plaintiff's action is defeated, not because of any agreement, express or implied, but because his own misconduct was a proximate cause of the injury." *Bodie v. Charleston & W. C. R. Co.* (1900) 61 S. C. 468, 39 S. E. 715. "This distinction, while not emphasized in the charge, was plainly manifest therein, for the jury were instructed as to both defenses in language from which the distinction was inferable." (That this court has not always borne in mind the distinction recognized in this passage will be apparent from the case cited in § 309, note 3, *infra*.)

"There is an essential difference between the defense of contributory negligence and the defense of assumption of risk,—a difference often obscured, but which should be kept clear in the mind for a correct understanding of the relative rights and duties of master and servant, as to the dangers arising from the use of defective machinery or appliances. Contributory negligence is a breach of the legal duty of due care im-

posed by law upon the servant, but, if unwilling or protesting he may be excused. Assumption of risk is not a duty, but purely voluntary upon the part of the servant. The risk from the master's breach of duty never tests upon the servant, testing or unwilling servant. It is not *volens*, in the test." *Dempsey v. Sawyer* (1901) 93 Mo. 295, 49 Atl. 16.

"The defenses of 'contributory negligence' and of 'assumed risk' are separate and distinct. The doctrines are applicable under different conditions. 'Contributory negligence,' in a case of this kind, implies the existence of negligence on the part of an injured person co-operating with that of a master, thus aiding in producing the injury." *Texas & P. R. Co. v. Bryant* (1896) 13 Tex. Civ. App. 134, 27 S. W. 825. The doctrine of 'assumed risk' obtains without necessary reference to the existence of negligence. If the servant, with knowledge of a defect in the master's premises, and of the danger and risk incident thereto, continues in the service of the master without proper notice to the latter, he assumes the risk incident to the service and growing out of the existence of the defect, and this with regard to the degree of care which he may exercise in the performance of his labors." *Texas & N. O. R. Co. v. Gray* (1892) 83 Tex. 214, 18 S. W. 600. See also *Probert v. Phipps* (1884) 140 Mass. 258, 21 N. E. 370; *Tuttle v. Detroit, G. H. & M. R. Co.* (1887) 122 Mich. 189, 30 L. ed. 1114, 7 Sup. Ct. 1160; *Southern P. Co. v. Schuy* (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *Sneda v. Libera* (1890) 101 Minn. 337, 68 N. W. 36; *Ind. C. N. Nelson Lumber Co.* (1890) 101 Minn. 79, 60 N. W. 630; *Wheat v. Duluth Lumber Co.* (1887) 37 Mich. 153, 33 N. W. 551; *St. Louis, Ft. & M. R. Co. v. Irwin* (1887) 37 Kan. 70, 16 Pac. 146; *Pennsylvania Co. v. Wolf* (1896) 15 Ind. App. 583, 43 N. E. 520, 44 N. E. 377; and cases cited in the next section.

The defense of assumed risks and that of contributory negligence being distinct, they should not be confused in a charge. It is error to give an instruction to the effect that, if the jury found that there was danger, however careful the parties might be, and that such danger was known to the plaintiff, then he

arising from the master's breach of duty raises both the question—whether he assumed that danger, and whether he was negligent.²

If for any reason it appears that the master is precluded from availing himself of one of these defenses, the servant's action may still be resisted on the ground that the other is applicable.³

assumed the risks ordinarily incident to the employment. *Mayton v. Sonmfield* (1898; Tex. Civ. App.) 48 S. W. 608, on the ground that the instruction asked for confused two distinct propositions, that relating to the risks assumed by an employee, and that relating to the amount of vigilance that should be exercised, it has been held not to be error to refuse to charge a jury that the servant assumed a certain risk as one ordinarily incident to his employment, and was bound to be vigilant in avoiding it. *Union P. R. Co. v. O'Brien* (1896) 161 U. S. 451, 40 L. ed. 760, 16 Sup. Ct. Rep. 618. An instruction to the effect that continuance of work with actual or constructive knowledge of a defect increasing the dangers of one's employment tends to show contributory negligence has been considered to confound a waiver with contributory negligence. *Cochill v. Wapello Coal Co.* (1886) 68 Iowa, 751, 28 N. W. 56.

The twofold conclusion to which the servant's knowledge may conceivably lead is recognized in relation to two kinds of negligence:

(1) That which is predicated of a continuance of work. See *De Losh v. Ward* (1897) 168 Mass. 579, 47 N. E. 436; *McQueen v. Central Branch Union P. R. Co.* (1883) 30 Kan. 691, 1 Pac. 139; *Cole v. St. Paul, M. & M. R. Co.* (1895) 34 Minn. 45, 24 N. W. 311; *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447, 67 N. W. 358.

"If, with knowledge, or with means of knowledge, equal to his employer's of defects in the machinery, the servant, without remonstrance, voluntarily continues in the service, a waiver of his claim for damages is said to have taken place, or his conduct is regarded as negligence contributory to the resulting injury." *Wells v. Coe* (1886) 9 Colo. 159, 11 Pac. 50.

Where the evidence showed that a defect in appliances for work occurred after plaintiff had commenced work, an instruction, given under the head of assumption of risk, that if plaintiff knew of the existence of the hole he fell into, or would have known of it in the exercise of proper care with reference to

what was going on there, so far as he knew of it, he could not recover, and that if he did not know of it and would not have known of it in the exercise of proper care, the jury must decide whether the injury was due solely to some neglect of duty by defendant, as appropriate to the defense of contributory negligence also, and is therefore not prejudicial to plaintiff, even if the matter should be referred to the bench on contributory negligence. *Richter v. Lawrence Mfg. Co.* (1900) 176 Mo. 203, 57 N. E. 366.

(2) That which consists in the failure to use proper care in regard to the act which was the immediate cause of the injury. See *Gibson v. Erie R. Co.* (1875) 63 N. Y. 449, 20 Am. Rep. 552 (chakeman climbing the side ladder of a car, when his duties did not require it, was struck by a projecting roof the position of which he knew); *Southern P. Co. v. Selby* (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *Ballou v. Chicago, M. & St. P. R. Co.* (1882) 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. 559; *Bemis v. Roberts* (1891) 113 Pac. 1, 21 Atl. 998; *Hammilton v. Brooklyn P. R. Co.* (1897) 17 App. Div. 588, 43 N. Y. Supp. 474; *Charr v. Christian* (1887) 36 Minn. 413, 31 N. W. 457; *McDonald v. Chicago, St. P. M. & O. R. Co.* (1889) 41 Minn. 439, 43 N. W. 380; *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447, 67 N. W. 358; *Stone v. Oregon City Mfg. Co.* (1870) 4 Or. 52.

In view of the fact that the defenses are alternative and concurrent, a statement like the following is too broad: The law does not impute negligence to a servant for using the machinery of his master which he knows to be defective. He merely assumes the risk incident to such defect, and cannot recover damages for any injury which results from it. *Green v. Cross* (1890) 79 Tex. 130, 15 S. W. 220. It is clear that negligence may be imputed if the master chooses to rely on that defense. See *Missouri P. R. Co. v. Somers* (1890) 78 Tex. 439, 14 S. W. 779.

It has been pointed out that, while in many circumstances a servant may,

307. Contributory negligence at the time of the injury is material only in cases where there has been no assumption of the risk.—It would seem that, in view of the contractual relations of the parties, the first question which, in a natural, logical sequence, first demands settlement, is whether the risk which caused the injury was one of those accepted under an implied agreement, and that the question whether the servant's conduct was imprudent only becomes material after the conventional assumption of the risk has been negatived.¹ In a good many cases we find the essentially secondary and ulterior character of the second question fully recognized. Thus, courts have refused to consider the defense of contributory negligence where the evidence showed that the risk was assumed either as being ordinary,² or for the reason that, although it was extraordinary, the servant went on working with a full comprehension of its nature and extent.³

by giving notice of defects in machinery or in the course of business, relieve himself from the risks which he ordinarily assumes, the rule relates more particularly to the employer's negligence, and that the question of contributory negligence in the servant always remains to some extent, and he is always bound to use reasonable care under all the circumstances known to him. *McPeck v. Central Vt. R. Co.* (1897) 25 C. C. A. 110, 50 U. S. App. 27, 79 Fed. 590.

In *Cleveland, C. C. & St. L. R. Co. v. Baker* (1899) 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224, it was held that a statute which expressly excluded the defense of assumption of risk in cases where a servant was injured by a breach of its provisions did not prevent the employer from successfully maintaining the defense of contributory negligence.

For the reason that, in order to authorize recovery, the absence of contributory negligence must be established, it has been held error to instruct a jury that, if the servant did not understand the dangers incident to his duties, he did not assume the risks, and defendant was liable for injuries resulting therefrom. *Storer Mfg. Co. v. Millane* (1900) 89 Ill. App. 532.

¹ That this is the true logical sequence is implied in the remark of the supreme court of Massachusetts that, if the servant has not exercised such care as ordinary persons are accustomed to exercise under like circumstances, he cannot recover, even if he did not assume the risk voluntarily. *Mahoney v. Dore* (1892) 155 Mass. 520, 30 N. E. 366.

² *Northern C. R. Co. v. Husson* (1882) 101 Pa. 1, 47 Am. Rep. 690; *McIntosh v. Missouri P. R. Co.* (1894) 58 Mo. App. 281; *Jones v. Roberts* (1894) 57 Ill. App. 56.

³ In *Carbine v. Bennington & R. R. Co.* (1889) 61 Vt. 348, 17 Atl. 491, the court said, the employee having assumed the perils of his employment in respect to the bridge (low overhead) the question of contributory negligence was not in this case. An assumption of the risks of the employment by a servant will bar recovery, independently of the principle of contributory negligence. *Conley v. American Exp. Co.* (1895) 87 Me. 352, 32 Atl. 965.

"The master's liability arises from the fact that he subjects his servants to dangers which in good faith he ought to provide against; but he is not responsible for those dangers to which the servant voluntarily subjects himself, though he does so without carelessness or breach of duty." *Pittsburgh & C. R. Co. v. Sentmeyer* (1879) 92 Pa. 276, 37 Am. Rep. 684. The assumption of the risk will exonerate the master from liability, though the servant was himself free from negligence. *Louisville & N. R. Co. v. Orr* (1882) 84 Ind. 50. An employee may not shield himself from the consequences of a conscious encountering of risk on the ground that he exercised prudence in the undertaking to which the risk attaches, and from which the injury results. *Texas & P. R. Co. v. Bryant* (1894) 8 Tex. Civ. App. 144, 27 S. W. 825; *Missouri, K. & T. R. Co. v. Wood* (1896) Tex. Civ. App. 35 S. W. 879. It matters not what care and

Whenever the evidence suggests that the servant knew of the extraordinary risk which caused the accident the jury should be instructed

caution a servant uses in the discharge of his duties; if his injuries are received on account of the hazards he has assumed,—those that he was acquainted with,—he cannot recover. *Chicago, R. I. & P. R. Co. v. Clark* (1882) 11 Ill. App. 104.

In *Saxton v. Hawksworth* (1872) 26 L. T. N. S. 851, Mellor, J., corrected counsel, who was proceeding to argue that there was no contributory negligence, by the remark: "You mean no acquiescence in the insufficient supply of hands." In *Perigo v. Chicago, R. I. & P. R. Co.* (1879) 52 Iowa, 276, 3 N. W. 43, the court, after referring to decisions relating to the doctrine of assumption of risks, said: "The doctrine of these cases is that the negligence of the defendant, in furnishing defective or improperly constructed machinery and implements, is waived by remaining in the employment without protest or promise of amendment. The waiver of the negligence of the defendant places the case in the same position as though the defendant had not been negligent, and without the negligence of the defendant there can be no recovery. This waiver cannot be affected by the particular situation in which the employee may be placed, or the rapidity and promptness with which he may be required to act at the time of the accident. These questions may, very properly, bear upon the question of the contributory negligence of the employee, but they can have no bearing upon the question whether the defendant has been guilty of negligence, about which the employee has a legal right to complain."

In *St. Louis, I. M. & S. R. Co. v. Davis* (1891) 54 Ark. 389, 15 S. W. 895, a case of an unblocked frog, the court said: "We think confusion has sometimes crept into cases like this, from the effort to determine them by the rules of contributory negligence. We do not think they necessarily furnish the correct criterion for determination, but that the contract of employment is a necessary element of consideration. It is an elemental principle that an employee, when he enters into service, agrees to assume all risks ordinarily incident to his employment, and if he is of mature years, experienced in the business undertaken, and knows what instrumentalities are to be used by him,

he contracts that he will assume the risks incident to using that class of instrumentality, as well as any other risk incident to the business, and, if the master uses proper care in providing the kind contemplated, the employee cannot complain, although some other kind would have been less dangerous; his contract hushes his complaint, regardless of the employer's negligence."

In *Terax & P. R. Co. v. Bradford* (1886) 66 Tex. 732, 59 Am. Rep. 739, 2 S. W. 595, the court remarked: "It has sometimes been held that, although the servant may have been aware of the defect, yet if a man of ordinary prudence on this account would not have refused to do the work, but would have continued in the service and have attempted to perform it, that then he may recover for an injury resulting from such defect. It seems to us that such a rule is unsound; for if the servant, acting as a prudent man would ordinarily act, would undertake to do the work with knowledge of the defect, this very test relieves the master from liability, for the obligations and duties of master and servant are correlative; each is held to that degree of care, in reference to all matters affecting the safety of the servant while in the master's employment, which men of ordinary prudence would or ought to exercise under the same circumstances. If the servant, with a knowledge of the defect, as a prudent man, may undertake the work, can it be said that the master has not exercised that degree of care required of him?"

The following passage is taken from a dissenting opinion in *Young v. Syracuse, B. & N. Y. R. Co.* (1899) 45 App. Div. 305, 61 N. Y. Supp. 209; but it is so clear and incisive as to be well worth quoting: "In the prevailing opinion it is said that the servant is not bound, at all times and under all circumstances, to be mindful of the dangers that surround him while engaged in the performance of his duty, even though he may be well aware of their existence. If the doctrine of the assumption of obvious risks has any vital force, how can it matter whether or not the servant has in mind the danger? This fact clearly has significance if the question be one of contributory negligence. If it be one of the assumption of obvious risks, it is clearly immaterial. Under that doc-

regarding the legal consequences of such knowledge, as justifying the inference both of an assumption of the risk and of contributory negligence.⁴ It is erroneous, under such circumstances, to refuse

trine the master is absolutely relieved from liability resulting from that risk. There is no question of the care or the negligence of the employee. It is a contract exemption absolute." (Per Smith, J.)

See also *Feely v. Pearson Cordage Co.* (1894) 161 Mass. 426, 37 N. E. 368; *Morris v. Gleason* (1877) 1 Ill. App. 517; *Ames v. Lake Shore M. S. R. Co.* (1893) 135 Ind. 363, 35 N. E. 117; *Louisville & N. R. Co. v. Kemper* (1897) 147 Ind. 561, 47 N. E. 214; *Louisville, N. A. & C. R. Co. v. Sandford* (1889) 117 Ind. 269, 19 N. E. 770; *Wilson v. Winona & St. P. R. Co.* (1887) 37 Minn. 327, 33 N. W. 908; *Gulf, C. & S. F. R. Co. v. Schwabbe* (1892) 1 Tex. Civ. App. 573, 21 S. W. 706.

Under the strict rules of common-law pleading, an allegation that plaintiff was free from fault does not supply the lack of averments negating the voluntary assumption of the risk. *Louisville, N. A. & C. R. Co. v. Corps* (1890) 124 Ind. 429, 8 L. R. A. 636, 24 N. E. 1046.

The Illinois doctrine of comparative negligence has no application where an unwise or injudicious rule of the master, well known and understood by the servant, produces a hazard which he is presumed to incur voluntarily as an incident of his employment. *Illinois C. R. Co. v. Neer* (1887) 26 Ill. App. 356.

⁴*Texas & P. R. Co. v. French* (1893) 86 Tex. 99, 23 S. W. 642. This requirement was held not to have been satisfied by the following instruction: "If it should appear that plaintiff knew that in performing said duty in the manner that he undertook to do so, or by the exercise of ordinary care might have known, that it was dangerous, and he still continued performing said work, then plaintiff cannot recover. It was the duty of the plaintiff, for his own safety, to exercise that degree of care that a reasonably prudent person would have exercised under the same circumstances; and if his injury resulted to him from a failure on his part to use such care, then you will find for the defendant, and that without regard to whether Collins had or had not failed to perform the duty required of him." The court said: "That the servant must

use ordinary diligence to protect himself from danger, and that he is chargeable with notice of such defects as might discover by the exercise of such diligence, is a different proposition from that embraced in the charge asked and refused. While the charge given is correct, yet the appellant was entitled to have both propositions submitted to the jury, since both issues arose upon the evidence and under the pleadings."

In *Texas & N. O. R. Co. v. Connor* (1892) 83 Tex. 216, 18 S. W. 609, the following charge was held incorrect: "If the gooseneck coupling apparatus was not more dangerous than an ordinary coupler, and if plaintiff knew of its being there, and did not use ordinary care as a man of ordinary care and skill should have used, considering the circumstances and danger attending the making of such a coupling, then the verdict should be for the defendant;" also: "The existence of either one of the facts referred to in the charge, connected by and, would be sufficient to exempt defendant of liability, and each of them should have been given as separate defenses."

Error is not predicable of an instruction which leaves to the jury only the question whether the plaintiff was guilty of negligence, if the evidence is such that it would not be permissible to draw the inference that the servant was aware of the risk before the accident. *Gulf, C. & S. F. R. Co. v. Gray* (1901) Tex. Civ. App.) 63 S. W. 927.

The following passage, though not relating to an accident to a servant, may be usefully quoted in the present connection: "Ordinarily, in actions to recover damages for injuries to person or property, an instruction as to the effect of contributory negligence on the part of the plaintiff will cover all that need be said to the jury upon this branch of the case. But the principle that one may be debarred from a recovery when he voluntarily assumes the risk is not identical with the principle on which the doctrine of contributory negligence rests, and in proper cases this ought to be explained to the jury. One may, with his eyes open, undertake to do a thing which he knows is attended with more or less peril, and he may, both in entering upon the undertaking and in

structions explaining the doctrine of assumption of risks,⁵ especially if it is also laid down explicitly that the servant's knowledge merely casts upon him the duty of using greater care in the use of, and in avoiding danger from, such appliance.⁶

carrying it out, use all the care he is capable of. But whether or not he thereby assumes the risk may depend on other circumstances. One may, without fault of his own, be in a situation where he must choose a perilous alternative. The degree of danger, the stress of circumstances, the expectation or hope that others will fully perform the duties resting on them may all have to be considered." *Miner v. Connecticut River R. Co.* (1891) 153 Mass. 398, 26 N. E. 994.

⁵ *Woodell v. West Virginia Impror. Co.* (1893) 38 W. Va. 23, 17 S. E. 386. In *Texas & P. R. Co. v. Bryant* (1894) 8 Tex. Civ. App. 134, 27 S. W. 825, where the servant was injured by a hole in a railway platform, the court refused to give an instruction, demanded by the defendant, which affirmatively invoked the defense of an assumption of the risk, and gave the following charge: "A railroad employee is bound to use, in caring for his own safety while in such employment, such care as a man of ordinary prudence would exercise, under like circumstances. In entering the service of a railway company he assumes all the ordinary risks incident to his employment, among which is the risk of any injury that may result to him from working in a place which he knows to be in such an unsafe condition as would render it probable to a man of ordinary prudence that to work there would be attended with danger, and, should he go upon or into such a place, knowing it to be unsafe, he is bound to use all the care which a man of ordinary prudence would exercise under like circumstances, and prevent injury to himself." The court sustained the objection of the defendant to this instruction, that it "confounds the distinction between an assumed risk and contributory negligence, to the prejudice of defendant, inasmuch as defendant's contention is, and was, that the hole in the platform was an obvious defect, and apparently dangerous, and that its defective condition was known to plaintiff so as to preclude recovery by him when he exposed himself to the danger, irrespective of any negligence on his part."

⁶ *Peirce v. Clarin* (1897) 27 C. C. A. Vol. I. M. & S.—48.

227, 53 U. S. App. 492, 82 Fed. 530. That any instructions are erroneous which give the jury to understand that, although the servant possessed that knowledge, he is entitled to recover provided he was in the exercise of due care, see *Chiastoo, R. I. & P. R. Co. v. Clark* (1882) 11 Ill. App. 104; *Wink v. Weiler* (1891) 41 Ill. App. 342 (instead of instruction that, if the plaintiff used the defective appliance knowing it to be defective, then the jury should consider such fact in determining whether the plaintiff exercised due care); *Mexican C. R. Co. v. Shean* (1891; Tex.) 18 S. W. 151; *Mundie v. Hill Mfg. Co.* (1894) 86 Me. 400, 30 Atl. 16 (held error to give an instruction permitting the jury to find for the plaintiff if she was not negligent, where both the defense raised by the defendant, and the hypothetical state of facts on which the jury asked for instructions, raised the question whether the plaintiff had assumed the risks of the defect); *Chicago, I. & L. R. Co. v. Glover* (1900) 154 Ind. 584, 57 N. E. 244; *Terre Haute & I. R. Co. v. Pruitt* (1900) 27 Ind. App. 227, 57 N. E. 949.

An instruction in an action for death of a switchman from stepping into a hole in a side track should not direct a verdict for plaintiff in case the jury made certain findings which did not include one that deceased did not know of the defect, or have equal means with defendant for such knowledge, though they were required to find that he had been in the exercise of ordinary care. *Lake Erie & W. R. Co. v. Wilson* (1901) 189 Ill. 89, 59 N. E. 573, Reversing (1900) 87 Ill. App. 360. In an action by a brakeman for injuries caused by a low covered bridge, it was error to charge that, though plaintiff might have known of the existence of the bridge, and assumed the risk of being struck by it, yet he had the right to recover, if, owing to the escape of steam from the engine, or darkness, or fog at the time of the accident, he could not, by ordinary care, discover his approach towards the bridge. *Norfolk & W. R. Co. v. Marpole* (1899) 97 Va. 594, 34 S. E. 462.

In *Foley v. Jersey City Electric Light*

308. Cases not giving due effect to this principle.— The principle explained in the preceding section being, in a logical point of view, perfectly plain and unassailable, it is not a little remarkable that there should be so many cases in which it has been either wholly ignored, or has not been given its proper effect. Such are the cases in which the theory on which the plaintiff is denied recovery is contributory negligence, although the evidence shows that there was no breach of duty

Co. (1892) 54 N. J. L. 411, 24 Atl. 487, hiring, and not upon the absence or the jury was directed to inquire whether the danger arising from the absence of a step on a lamp pole was of such imminent character that a person of ordinary prudence, having regard for his own safety, would have declined to use it. If so, they were told that the plaintiff could not recover; but if it were otherwise, if the peril was not so imminent and threatening but that he might with safety go up to the light and trim it and get back again by the exercise of extra care, he could recover. Under these instructions the jury rendered a verdict for the plaintiff. A new trial was ordered, the court saying: "If the servant knows of the defect, and it is of such a nature that a prudent person will not abandon the service on account of it, then no negligence can be charged to the master for permitting the defect to continue. If the plaintiff was justified in concluding that he could ascend the pole and return with safety by using extra care, the defendant had the right to draw the same conclusion, and, in that event, the defendant was in no fault. If the peril was of such imminent character that it was imprudent on the part of the plaintiff to attempt to ascend the pole, then, under the rule laid down by this court, the verdict is wrong. If the plaintiff acted as a prudent man in undertaking to ascend the pole, the injury must be ascribed to mere accident, the casual slipping of his foot. In that case neither he nor his employer is to be held guilty of a want of care. The servant and the master had equal means of forming a correct judgment. Therefore, whatever want of prudence in taking the risk is chargeable to the one must be imputed to the other. The attempt to engraft this exception upon the general rule introduces the element of the absence or presence of due prudence on the part of the servant into this discussion, which is a circumstance, in my judgment, wholly foreign to it. The immunity of the master rests upon the contract of hiring, and not upon the absence or presence of negligence in either party. The master says to the servant: 'You understand fully the nature of the employment and the danger attending it; will you enter upon it?' The servant says: 'I accept it; and the law implies that he accepts it, with all the risk incident to it, without regard to the magnitude of the danger. The question is not whether it was prudent on his part to encounter the peril. In contemplation of law, his undertaking to assume the apparent risk of the work was general and unqualified. He might have restricted his assumption of danger by stipulating that he would take upon himself such liability to injury only as could be avoided by due care on his part. In the absence of such a term in the engagement, it cannot be introduced, by implication, without changing its purport, and importing into it a condition unfavorable to the master, and which has not his consent.'"

In *Garety v. King* (1896) 9 App. Div. 443, 448, 41 N. Y. Supp. 633, the question of the plaintiff's knowledge being raised by the defendant's counsel, the trial judge in his main charge instructed the jury "that, if the deceased did know of the existence of that window [in the roof], and nevertheless undertook to work there, he assumed the risk of the apparent danger;" and "it is for you, therefore, to say whether the deceased did know of the existence of that peril." But at a subsequent stage of the trial he retracted this instruction, and specifically charged the jury that it was an erroneous statement of the law; and that, even if the deceased did know of the existence of the skylight, but exercised due care to avoid accident, the plaintiff might recover. The appellate court said: "That instruction was tantamount to saying that, if the deceased were free from negligence, he did not assume the risk of working at a dangerous place, known to him to be dangerous; and it put the subject definitely before the jury in such a way as

on the master's part;¹ or in which it is laid down that if a servant is injured, when obeying the orders of a superior in a branch of business for which he was "specially" employed, his knowledge of the danger will be considered in estimating the degree of care he should use to avoid it.² Nor is this principle properly taken into account,

to authorize them to ignore altogether (if they found on the other issues in favor of the plaintiff), the question of the assumption by the decedent of the risks attendant upon his working in a known place of danger. The learned judge virtually eliminated from the case the entire question of the assumption of the risk, and made that issue identical with the one relating to contributory negligence, and thus inadvertently the jury were misled on that subject."

An instruction is also erroneous which gives the jury to understand that the only defense predicable from the servant's knowledge is contributory negligence. *Kochler v. New York Elev. R. Co.* (1896) 9 App. Div. 449, 51 N. Y. Supp. 209. But an instruction treating the employee's knowledge as affecting only the question of contributory negligence, while erroneous, is not ground for reversal, where other instructions treat his knowledge as affecting the assumption of the risk, and the jury find specially that the employee did not have knowledge of the increased peril. The instructions objected to here read thus: "The fact, if it is a fact, that Leyden had knowledge that the roof was in a dangerous condition does not necessarily preclude a recovery by the plaintiff. Knowledge is always an important matter for consideration, but it does not always establish contributory negligence. If one undertakes to pass a known danger so great that no person of ordinary prudence would voluntarily encounter it, then he is guilty of contributory negligence, for no person possessing knowledge of danger has a right to go into a place which ordinarily prudent men would avoid. If, however, the danger is known, but it is not of such a character as that prudent men would decline to encounter it, then the attempt to pass it is not, in and of itself, such negligence as will defeat the action. But if he does attempt to pass it, he must exercise care proportioned to the known danger." *Rogers v. Leyden* (1890) 127 Ind. 50, 26 N. E. 210.

¹ *Jones v. Sutherland* (1895) 91 Wis. 587, 65 N. W. 496 (servant familiar with sawmills stepped, without looking,

on a slanting floor which was usual and necessary at the place, and, slipping, fell against a circular saw); *Loring v. Kansas City, Ft. S. & M. R. Co.* (1895) 128 Mo. 349, 31 S. W. 6 (section hand familiar with the usages of yards and the dangers from passing trains, held negligent in crossing a track in front of an engine in motion without looking. But it was also found that the men in charge of the train were not negligent, and therefore there was no fault committed by anyone for whose conduct the company was responsible); *Chesapeake & O. R. Co. v. Lee* (1888) 84 Va. 642, 5 S. E. 579 (no duty to warn servant of approach of train drawn by engine which had an unusually loud exhaust discharge, a better signal than a bell,—servant also held negligent in uncoupling standing cars on an incline when loaded train was drawing near); *Sheeler v. Chesapeake & O. R. Co.* (1885) 81 Va. 188, 59 Am. Rep. 654 (fireman held unable to recover, because, without any necessity, he leaned so far out of the engine that he was struck by the timbers of a bridge truss of the usual width); *Northern C. R. Co. v. Huxson* (1882) 101 Pa. 1, 47 Am. Rep. 690 (where the court, after denying that the risk in question was extraordinary, went on to say that the elements of danger were open and obvious to the servant, and that, if he failed to adapt himself to the circumstances, it was his own fault).

² *Mann v. Oriental Print Works* (1875) 11 R. I. 153. See also *Croce v. New York C. & H. R. R. Co.* (1893) 70 Hun. 37, 23 N. Y. Supp. 1100, where a track repairer was held unable to recover, on the ground that, being familiar with the danger from cars constantly passing in a yard without warning, he stepped on a track without looking. Yet, in another part of the opinion, that danger is spoken of as one of those assumed by such an employee.

In *The Chandos* (1880) 6 Sawy. 554, Deady, J., held that a sailor who went on a crane-line (a rope subjected to a continual chafing) in the dark, without any precaution against its breaking, or observation as to its then condition, was negligent, and added: "The libellant

where it was explicitly held, or the evidence warranted the inference, that the servant had assumed the risk; or, what amounts to the same thing, so far as the right of recovery is concerned, was culpable, as a matter of law, in continuing to work; and yet the actual rationale of the decision is that he failed to take proper precautions to safeguard himself against that risk.³

assumed the ordinary risks of his employment, and the liability of the crane-line to part appears to be one of them. The negligence of the libellant was the proximate, if not the sole, cause of the injury."

³ *New York, L. E. & W. R. Co. v. Lyons* (1888) 119 Pa. 324, 13 Atl. 205 (flagman who attempted to board a moving engine with a defective step, the condition of which he knew, while his hands were encumbered with two lanterns, and he might have stopped the train, held negligent as a matter of law); *Mansfield Coal & Coke Co. v. McEnergy* (1879) 91 Pa. 185, 36 Am. Rep. 662 (plaintiff, who knew that a bridge was defective, held negligent in driving his team onto it); *Taylor v. Carew Mfg. Co.* (1885) 140 Mass. 150, 3 N. E. 21 (held that appropriate precautions were not taken by a servant who walked quickly into a dark basement room, when the eyes afford practically no assistance, without attempting, either by hands or feet, to find a hole which he knew to be somewhere in the room, although he could not tell exactly where); *Pingree v. Leyland* (1883) 135 Mass. 398 (servant injured through his inadvertence in handling unboxed machinery, of the condition of which he was fully cognizant); *Odell v. New York C. & H. R. R. Co.* (1890) 120 N. Y. 323, 24 N. E. 478 (servant injured by the unexpected starting of a sawing-machine while he was engaged in changing saws, was guilty of such contributory negligence as will prevent a recovery, if he knew that the machine was out of order when he placed his hand upon the saw); *Alcorn v. Chicago & A. R. Co.* (1891) 108 Mo. 81, 18 S. W. 188 (servant aware of the constant dangers caused by the wearing away of the blocking of frogs, but held unable to recover because he failed to use proper care in the manner of making the coupling); *Clark v. St. Paul & N. C. R. Co.* (1881) 28 Minn. 131, 9 N. W. 581 (trackman knew of roof projecting over track and through his inattention was struck); *Illick v. Flint & P. M. R. Co.* (1888) 67 Mich.

632, 35 N. W. 709 (brakeman, knowing of position of bridge near track, swung himself out so far from a car that he came into contact with it—no call of duty to go upon the car till after the bridge was passed); *Pittsburgh & C. R. Co. v. Seutmeyer* (1879) 92 Pa. 276, 37 Am. Rep. 684 (railroad servant rode on top of freight train without any call of duty, and was struck by a low bridge the position of which he knew); *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710, 6 So. 277 (brakeman, notified of low bridge, failed to take necessary steps to avoid being struck by it); *Quibell v. Union P. R. Co.* (1891) 7 Utah, 122, 25 Pac. 734 (servant failed to look out for coal chute which he knew to be near the track); *Helfrich v. Ogden City R. Co.* (1891) 7 Utah, 186, 26 Pac. 295 (engineer who knew that there were telegraph poles close to the track, and had been warned to keep his head inside the cab, was killed by striking his head against one of the poles while he was leaning out); *Paland v. Chicago, St. L. & N. O. R. Co.* (1892) 44 La. Ann. 1003, 11 So. 707 (one employed as keeper of a building to prevent trespassers from dilapidating and stripping it is guilty of such contributory negligence as will prevent a recovery, where the building fell and killed him, owing partly to his failure to perform such duty, the possibility of an accident from this cause having been apparent for sometime before its occurrence, so as to make the risk one of those incident to the service); *Albert v. New York C. & H. R. R. Co.* (1894) 80 Hun. 152, 29 N. Y. Supp. 1126 (brakeman negligent if, seeing that a car is crippled, he does not take proper precautions to avoid the consequences of handling it in that condition); *Ray v. Jeffries* (1887) 86 Ky. 367, 5 S. W. 867 (servant injured by his careless handling of a compound of nitro-glycerine the nature of which he understood); *Evans v. Chessmond* (1890) 38 Ill. App. 615 (servant worked under loose rock in mine, the condition of which was as well known to the servant

In view of the division of functions between court and jury under the common-law sys. in of procedure, a failure to raise the preliminary defenses of assumption of risks or of culpability in continuing to work may often be seriously prejudicial to the master, for although the circumstances may show that one or both of these defenses was available, it may be impossible to say, as a matter of law, that the servant did not act prudently in dealing with the known perils. It is manifest that, where the facts disclosed warrant both the inference that the servant had assumed the risk or was guilty of contributory negligence in continuing to work, and the inference that he was lacking in proper care with respect to the act which was the immediate cause of the injury, the proper course for the trial judge to follow is

as to the master, without making any examination, or asking the master to remove it); *Way v. Chicago & N. W. R. Co.* (1888) 76 Iowa, 393, 41 N. W. 51 (car repairer, who knew that the ground was slippery with ice, and who had complained of the absence of his assistant, attempted to raise a heavy draft-iron, and slipped); *Wormell v. Maine C. R. Co.* (1887) 79 Me. 397, 10 Atl. 49 (servant held to have carelessly put himself in the way of obvious peril); *Nolan v. Shickle* (1879) 69 Mo. 336 (unnecessarily going on obviously dangerous scaffold); *Carroll v. Pennsylvania Coal Co.* (1888) 1 Monaghan, 234, 15 Atl. 688 (men engaged in dumping coal from a track upon trestles, and knowing that the track was dangerous because the end of the track had become depressed, failed to take the obvious and simple precautions necessary to obviate accidents by using blocks to arrest the cars, or by raising the track at the end); *Krafft v. Meyer* (1896) 92 Wis. 252, 65 N. W. 1032 (stevedore fell down a scuttle which he should have known was left open while the vessel was loading); *Chicago & N. W. R. Co. v. Donahue* (1874) 75 Ill. 106 (yard switchman understanding that trains were constantly passing, unnecessarily stepped on a track and was run down by one of them); *Peoria, D. & E. R. Co. v. Puckett* (1893) 52 Ill. App. 222 (brakeman who knows that there is a cattle guard at a designated place bound to guard against it in performing his duties, although it is not properly constructed; instruction disapproved which made right of recovery dependent on the "proper construction"); *La Pierre v. Chicago & G. T. R. Co.* (1894) 99 Mich. 212, 58 N. W. 60 (conditions known,

but ground of decision was that the accident might have been obviated by common prudence); *Louisville & N. R. Co. v. Lair* (1893) 14 Ky. L. Rep. 850, 21 S. W. 618 (negligence in coupling held a bar to the action of a brakeman, the danger of coupling being also said to be one of the ordinary risks of the employment); *St. Louis, A. & T. R. Co. v. Mara* (1891 Ark.) 16 S. W. 196 (fish-plate fell from and derailed a hand car which the plaintiff knew to be defective in such a way as to render it likely that objects would fall, he himself being the person who had supervised the loading).

In *Wannamaker v. Burke* (1886) 111 Pa. 423, 2 Atl. 500, where recovery was denied on the ground that the risk was appreciated by the servant, the court superfluously introduces the consideration that the fact that alterations were being made in the building in the presence of the employees was notice to them of the possibility of danger of some sort, and of the necessity of exercising greater caution.

A similar failure to realize the supererogatory nature of the defense of contributory negligence in cases where an assumption of the risk is established is apparent in the following extract: "Minor servants are held to assume, by their contract of employment, those ordinary risks of their service which are obvious to them, or have been pointed out in a manner suited to the comprehension of their youth and inexperience. They cannot ignore the dictates of common prudence or the instructions of their superiors to guard themselves from these apparent dangers, and charge the consequences upon their employers." *Beckham v. Hillier* (1885) 47 N. J. L. 12.

to differentiate the defenses clearly, and to explain by suitable language that they are cumulative in their operation.⁴

The following instruction, which was held in *De Berry v. Carolina C. R. Co.* (1888) 100 N. C. 310, 6 S. E. 723, to have been rightly given, seems to be also open to the same criticism: "Even if the step or platform was split, yet, if a prudent man, knowing its condition, would not have stepped upon it, the plaintiff was guilty of negligence, provided he knew, or could by the exercise of reasonable care and caution have known, the condition of the platform before he stepped upon it." But the views prevailing in this state with regard to the two defenses are decidedly peculiar (see § 310, *infra*), and the effect of this ruling cannot be estimated with reference to the standpoint of other courts.

⁴In the following cases the inferences deducible respectively from the conduct of the servant previously to, and at the time of, the accident, are separately mentioned: This has often been done. *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521 (servant held to have assumed the risks of the situation, and to have been guilty of a "want of particular care" in regard to the act which immediately preceded the accident); *Marean v. New York, S. & W. R. Co.* (1895) 167 Pa. 220, 31 Atl. 562 (car inspector, who had assumed risk of want of signal flag, held negligent in going under a car without inquiring about the movements of cars); *Nuss v. Rapsnyder* (1896) 178 Pa. 397, 35 Atl. 958 (risk of defective scaffold first declared to be assumed and then plaintiff held negligent in using it); *Rumsey v. Delaware, L. & W. R. Co.* (1892) 151 Pa. 74, 25 Atl. 37 (brakeman, who was declared to have assumed the risk of the want of a watchman at a crossing, was held negligent in being in a place of danger on the pilot of the engine); *Kelly v. Baltimore & O. R. Co.* (1887; Pa.) 10 Cent. Rep. 56, 11 Atl. 659 (servant injured by being caught between a building near the track and a car, while descending from the car, the location of the building being familiar to him, was nonsuited on the grounds (1) that he assumed the risks arising from the situation of the building; (2) that he was negligent in not paying proper attention to the risk he was incurring in the performance of the act); *Brossman v. Lehigh Valley R. Co.* (1886) 113 Pa.

490, 57 Am. Rep. 479, 6 Atl. 226 (servant knew of low bridge, but, his mind being on his work, he was paying no attention to the impending danger); *Dritt v. Pacific R. Co.* (1872) 50 Mo. 302 (servant knew of low bridge, and was caught while sitting on the brake in broad daylight with his face towards the bridge); *Williams v. Delaware, L. & W. R. Co.* (1889) 116 N. Y. 628, 22 N. E. 1117 (brakeman had constructive notice of the height of a low overhead bridge, and failed to stoop sufficiently); *Owen v. New York R. Co.* (1869) 1 Lans. 108 (same decision on like facts); *Clark v. Richmond & D. R. Co.* (1884) 78 Va. 709, 49 Am. Rep. 394 (same decision on like facts); *Chesapeake & O. R. Co. v. Hafner* (1894) 90 Va. 621, 19 S. E. 166 (brakeman raised his head too soon while passing under a low bridge which he knew to be dangerous); *Norfolk & W. R. Co. v. McDonald* (1891) 88 Va. 352, 13 S. E. 706 (mismatched couplings handled in an unnecessarily dangerous manner); *McGrath v. New York & N. E. R. Co.* (1884) 14 R. I. 357 (1885) 15 R. I. 95, 22 Atl. 927 (recovery denied, where injured trackman rode on a hand car knowing that there were no general regulations as to warning train hands that cars were on the track, and was careless, like the other men on the car, in not seeing that special precautions were not taken to signal approaching trains).

Of course, under the Missouri doctrine, by which the rights of a servant who has continued work with knowledge of a risk are viewed entirely from the standpoint of contributory negligence, and such negligence is not inferable from the mere fact of such continuance, the servant's want of care in respect to taking appropriate precaution against the known danger may be the only theory on which the master can escape liability. See, for example, *Gleeson v. Excelsior Mfg. Co.* (1887) 94 Mo. 201, 7 S. W. 188 (watchman in building, knowing that hatchways were frequently left open, and charged with duty of closing them, fell into one, owing to his failure to look out).

For an instance in which the master might have escaped liability by raising one of the preliminary defenses, see *Plank v. New York C. & H. R. Co.* (1875) 60 N. Y. 607, holding that a

309. Defenses confused owing to inaccuracies of terminology.—The word "assume" and its various equivalents,¹ which are used to define the position of a servant with regard to a known risk to which he exposes himself by accepting or continuing in a given employment, are responsible for the injection of a vast amount of unnecessary obscurity and confusion into a subject which is already quite sufficiently encumbered with difficulties.

In the vast majority of the cases in which such knowledge has been held to bar the action, this term simply expresses a predicament resulting from an implied contract.² It is apparent that most of the courts in the United States have at some time or other employed the phrase "assumption of risk" to express the conception that the servant was guilty of contributory negligence. The italics are in every instance our own.³

brakeman's knowledge of the existence of a trench across a railroad track was not sufficient to charge him with contributory negligence in failing to govern his conduct, while coupling cars, with due reference to the place of the dangerous condition of the place of work, inasmuch as the act of coupling cars necessarily required his whole attention and thought.

"Such as continues work at his own risk" (*Lincoski v. Susquehanna Coal Co.* [1893] 157 Pa. 153, 27 Atl. 577); "or takes the risk" (*Griffiths v. Gidlow* [1858] 3 Hurlst. & N. 648, 27 L. J. Exch. N. S. 404 [Pollock, C. B.]; *Taylor v. Carver Mfg. Co.* [1885] 140 Mass. 150, 3 N. E. 21; *Bunt v. Sierra Butte Gold Min. Co.* [1891] 138 U. S. 485, 34 L. ed. 1032, 11 Sup. Ct. Rep. 464).

There is also a want of precision about the statement that, "if the servant will engage in the hazardous undertaking, he must be considered as doing it at his peril." *Conroy v. Vulcan Iron Works* (1876) 62 Mo. 35.

This is the meaning attached to the phrase "assumption of risks" in the leading case of *Farewell v. Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339, and there can be no question but that this has always been its normal import ever since.

Mr. Beven (1 Negligence, 774) thinks the facts in this class of cases more often indicate election than agreement. The objection of the learned author is rather hypercritical, and opposed to the weight of authority. But, even if we suppose it to be well-founded, the legal relation created by an election must,

primarily at least, be quasi-contractual, and therefore quite distinct, in the aspect, from that which results from a tort like contributory negligence. It does not express a predicament arising from the commission of a tortious breach of duty. But it happens that the same word has also acquired, in popular parlance, a shade of meaning which implies that the person to whose conduct it is applied has been acting carelessly, and many courts, not being sufficiently alive to the importance of a scientifically exact terminology, have, unfortunately, allowed this loose and untechnical signification to insinuate itself into their judgments. The extraordinary prevalence of this phraseological error—for it can hardly be described otherwise, in view of the specialized meaning which the word has acquired,—will be apparent from the cases collected in the subjoined note.

Federal courts:—An employee is guilty of contributory negligence if he exposes himself to dangers "so obvious and threatening that a reasonably prudent man . . . would have avoided them. . . . He will be deemed in such case to have assumed the risks involved in such heedless exposure of himself to danger." *Kane v. Northern C. R. Co.* (1888) 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16.

"Beside, even if he [the servant] had the supposed knowledge, it was a question for the jury whether or not, under the circumstances, he ought to have attempted to make the coupling, and in so doing was himself negligent, or to be

It is abundantly evident from the illustrations here collected of this incorrect terminology, that unless the practice of the courts is

considered as having voluntarily assumed the risk of his act. The question was essentially one of contributory negligence, and the instruction should have been so framed as to leave it to the jury." *Louisville & N. R. Co. v. Kelly* (1894) 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 409. "The evidence would warrant no other conclusion than that he took the risks of the work, and that his negligence was the direct cause of his death." *Bunt v. Sierra Butte Gold Min. Co.* (1891) 138 U. S. 485, 34 L. ed. 1032, 11 Sup. Ct. Rep. 464.

For other cases in which the phrases "assumption of risks" and "contributory negligence" are used interchangeably, see *Atkyn v. Wabash R. Co.* (1889) 41 Fed. 193; *The Scraphis* (1891) 49 Fed. 393; *The Chandon* (1880) 3 Sawy. 554; *Richmond & D. R. Co. v. Finley* (1894) 12 C. C. A. 595, 25 U. S. App. 16, 63 Fed. 228; *Great Northern R. Co. v. Kaschke* (1900) 43 C. C. A. 626; 104 Fed. 440; *Southern P. Co. v. Yeargin* (1901) 48 C. C. A. 497, 109 Fed. 436; *Mason & O. R. Co. v. Yockey* (1900) 43 C. C. A. 228, 103 Fed. 265.

A court of appeal has laid it down that the dangers from a defective railroad track must have been so obvious and threatening to a servant engaged in the operation of trains thereon that a reasonably prudent man in his situation would have avoided them, in order to charge him with contributory negligence because he continued in the discharge of his duty, and thereby assumed the risks. *Chicago & W. R. Co. v. Price* (1899) 38 C. C. A. 239, 97 Fed. 423.

Alabama:—A servant who "voluntarily undertakes to perform a duty not within the scope of his employment assumes the risk." *Alabama G. S. R. Co. v. Hall* (1894) 105 Ala. 599, 17 So. 176 (discussing the defense of contributory negligence).

"Plaintiff was under no obligation to obey it [the order] without assuming the risk himself, if, by so doing, he incurred the risks of obvious peril, such as a reasonably prudent man would regard as extra hazardous." *Davis v. Western Railway of Alabama* (1894) 107 Ala. 626, 18 So. 173.

"The duty of a brakeman requires him, at any time, to put on the brakes, and if it is necessary to traverse a car

filled with coal in order to reach the brake, from a point where the brakeman properly is, we cannot say, as matter of law, he assumes the risk of a jerk or lurch of the train caused by the negligence of the engineer, if the jury so find, while walking across the car. If, however, the conductor or engineer directed the brakeman to remain at the first and second brakes, as some of the evidence tends to show, and if of his own accord he left and attempted to reach a third brake, we would say, under these circumstances, he assumed the risk of the venture, and, if the injury was in consequence of such disobedience of instructions, he would be guilty of contributory negligence." *Louisville & N. R. Co. v. Woods* (1894) 105 Ala. 501, 17 So. 41.

Where the servant fails to quit the service, after a reasonable time has elapsed for making promised repairs, is it illogical to presume he agrees to incur the risk? And would he not thereby be guilty of proximate contributory negligence? *Woodward Iron Co. v. Jones* (1885) 80 Ala. 123, 146 Ala. 600; *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216.

California:—If the servant "has knowledge of the circumstances, he is equally culpable, and he assumes the risk." *McGilpin v. Brodie* (1866) 31 Cal. 376.

In *Goggin v. D. M. Osborne & Co.* (1896) 115 Cal. 437, 47 Pac. 248, it was said to be a question for the jury whether the plaintiff knew of the danger of using an appliance, and so assumed the danger consequent upon such use, and, "what is much the same proposition, it cannot be said, as a matter of law, that a person of ordinary prudence would have refused to use" the appliance.

Illinois:—If the master refuses to remedy the dangerous conditions after the servant has complained of them, the latter "will have no alternative but to quit the master's employ. If he does not, he will be deemed to have assumed the extra hazard of his position thus occasioned. The case suggested, it will be perceived, is one of mutual negligence. On the part of the master, it is negligence to retain the derelict servant in his employ. It is, on the other hand, negligence in the complaining servant

now to be regarded as justifiable, upon the principle *Communis error facit jus*, there is an urgent necessity for a reform. The examples

to continue longer in the master's service, unless he intends to *assume the extra risk himself*." *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92.

The employer's breach of duty "furnishes no excuse for the conduct of an employee who voluntarily incurs a known danger." If he enters a service where he has to use defective agencies, he "assumes the risk, and must bear the consequences." *Pennsylvania Co. v. Lynch* (1878) 90 Ill. 333. There, in the first part of his opinion, Schottel, J., lays down the rule that the servant *assumes the known risks* of the service, and after stating the evidence, asks the question: "If appellant [the master] was negligent in not furnishing different platforms, in what respect does that negligence differ from appellee's negligence in continuing to use them, without objection, and without an effort to change or improve them?"

"The general rule is that an employee who continues in the service of his employer after notice of a defect augmenting the danger of the service *assumes the risk*, as increased by the defect. But this rule is subject to qualifications.

The servant is not chargeable with *contributory negligence* if he knows that defects exist, but does not know, or cannot know by the exercise of ordinary prudence, that risks exist." *Illinois Steel Co. v. Schymanski* (1896) 162 Ill. 459, 44 N. E. 876.

In *Swift & Co. v. O'Neill* (1900) 187 Ill. 337, 58 N. E. 416, the case was held to be for the jury, inasmuch as the servant can only be held to have assumed such risk when the defect of which he had notice makes a continuance of work so dangerous that no ordinarily prudent person would remain at work.

In one case it was laid down that a servant acting under the specific orders of his foreman is not required by law to disobey him; or, by obeying, assume the hazard of obedience, unless the danger to which he was so exposed was so imminent that a man of ordinary prudence would not have incurred the risk. *William Graver Tank Works v. O'Donnell* (1901) 191 Ill. 236, 60 N. E. 831.

The servant was "not bound to disobey on pain of assuming the risk." *Dallemand*

v. Knalfohl (1898) 175 Ill. 319, 48 L. R. A. 753, 51 N. E. 645.

"A party who voluntarily exposes himself to a danger that he knows, or by reasonable attention to the means might know, *assumes all the risks*.

Such voluntary exposure is necessarily incompatible with the exercise of ordinary care." *Chicago & T. R. Co. v. Simmons* (1882) 11 Ill. App. 147.

See also *Camp Point App. Co. v. Rutan* (1874) 71 Ill. 417; *Chicago, R. I. & P. R. Co. v. Clark* (1882) 11 Ill. App. 104; *Illinois C. R. Co. v. Jones* (1882) 11 Ill. App. 324; *Chicago, R. & Q. R. Co. v. Montgomery* (1884) 15 Ill. App. 265; *Howe v. Madaris* (1898) 82 Ill. App. 515; *Pioneer Fireproof Constr. Co. v. Howell* (1901) 189 Ill. 123; 59 N. E. 535; *Wabash R. Co. v. Propst* (1900) 92 Ill. App. 485.

Indiana:—"If the employee had actual knowledge of its [the appliance's] unsafe condition, then it would be *negligence* to use it, and if, knowing the unsafe condition of the appliance, the employee attempted to use it, he would *assume the extra hazard* in so doing." *Ohio & M. R. Co. v. Pearey* (1890) 128 Ind. 197, 27 N. E. 479.

"When an employee has within his own control the manner of using an obviously defective tool, and the means of securing safety if he choose to employ them, if he *neglects the means of security to himself*, he elects to take the risk." *Jeanen Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 570, 18 N. E. 30.

Speaking of the position of a servant who is injured in obeying a direct command of the master, the same court has used this language: "Where the master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent danger is such that a man of ordinary prudence would not take the risk the servant acts at his peril. But, unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or as-

of this form of judicial blunder mentioned in the last note are ever, less reprehensible than one found in those cases in which

assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed." *Nall v. Louisville, V. A. & C. R. Co.* (1891) 129 Ind. 268, 271, 24 N. E. 183, 611 (repeated in *Brazil Block Coal Co. v. Hoodlet* (1891) 129 Ind. 327, 330, 27 N. E. 741).

"If the risk is great, or is such as a prudent person would not assume, then the person who does assume it is guilty of such contributory negligence as will preclude a recovery." *Lake Shore & M. N. R. Co. v. Pinckin* (1887) 112 Ind. 590, 13 N. E. 677.

In *Shurtz v. Chicago & I. Coal R. Co.* (1894) 139 Ind. 682, 39 N. E. 154, the court speaks of a plaintiff who had negligently placed himself in front of moving cars as having assumed all the dangers incident to such exposure.

In another case "assumption of a needless risk" is spoken of. *Spencer v. Ohio & M. R. Co.* (1892) 130 Ind. 181, 29 N. E. 915.

In the following passage the confusion of terms is particularly objectionable. The phrase "assume the risk" is used in different senses in sentences which are in immediate juxtaposition: "There is a class of cases where a man has no right to assume the risk. Society has an interest in the lives of its members, and no citizen has a right to knowingly and voluntarily place himself in a position of immediate and certain danger. . . . Where the danger is not immediate and certain, a man may assume the risk without violating the rule last stated, but, in doing so, he devotes himself of a right to recover from his employer in cases where the danger is fully and seasonably brought to his knowledge, since the known danger becomes in such cases one of the risks he assumes as an incident of his service. He may not be guilty of contributory negligence in taking some risk, since he may be doing what other reasonably prudent men likewise do; but, like all the others in the common service in which he engages, he assumes all the risks arising from dangers of which he has full notice, by continuing in service after he obtains that knowledge." *Louisville, N. A. & C. R. Co. v. Sanford* (1888) 117 Ind. 269, 19 N. E. 770. The distinction between the two defenses is plainly intended to be noted here, and therefore

precision in the use of words was specially necessary.

Iowa:—In *McQuirk v. Illinois Co.* (1888) 70 Iowa, 340, 41 N. E. 101, the court speaks of the neglect of the plaintiff in remaining in a position of danger as being an "assumption of the risk." There is a confusion of terms in *Brantingham v. Chicago, R. I. & P. R. Co.* (1890) 101 Ill. 254, 77 N. W. 1038.

Kansas:—In *Rush v. Missouri Co.* (1887) 36 Kan. 129, 12 Pac. 254, 77 N. W. 1038, the court uses the phrase: "If there is such that an ordinarily prudent person could assume it without being guilty of negligence," etc.

Kentucky:—"Undoubtedly, if the employee, after discovering the defective condition of machinery furnished for his use, continues to use it without complaint or giving notice to the employer, or the proper officers of a company, he will be guilty of such contributory negligence as will prevent a recovery for an injury arising from the defect. He will be regarded as having assumed the risk of danger arising from its defective condition." *Laurie v. Hagemeyer & Co.* (1892) 93 Ky. 100, 18 S. W. 704.

Louisiana:—"Sufficient knowledge of the part of the deceased is not required to justify the assertion that he had assumed the risk of danger, and consequently guilty of contributory negligence, whereby the defendants are exonerated." *Esder v. New Orleans & E. R. Co.* (1897) 49 La. Ann. 86, 21 153.

The phrase "unnecessary assumption of risks" is used in discussing the defense of contributory negligence in *Die v. Southern P. R. Co.* (1890) 42 La. Ann. 680, 7 So. 792.

"Even in the presence of a known danger, to constitute contributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to it, unless it is of such character that the plaintiff must assume the risk from the very nature of the danger to which he is exposed." *Clemens v. Louisiana Electric Light Co.* (1892) 42 La. Ann. 692, 697, 16 L. R. A. 43, 11 51. See also *Pollich v. Sellers* (1894) 42 La. Ann. 623, 7 So. 786, where the defense was contributory negligence.

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been laid down that the question of the servant's "waiver"—meaning thereby, as is shown both by the context and by the authorities cited,

the plaintiff was said to have "assumed" the risk.

Maryland:—In *State use of Hamelin v. Halster* (1881) 57 Md. 287, the court denied the servant's right of recovery on the ground that, upon the undisputed facts, the servant directly contributed to his misfortune by his own want of caution, yet, after reviewing the evidence which showed that the servant fully understood the dangers of the situation, the opinion proceeds thus: "Now with this knowledge and this plainly apparent risk open to the senses of the deceased, upon which principle can the defendants be made liable for the accident that happened to the deceased in consequence of the risk thus knowingly assumed by him? The principle is perfectly well settled that an employee who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he had an opportunity to ascertain. And so, if a man chooses to accept an employment or continue in it with the knowledge of the danger, he must abide the consequences so far as any claim against the employer is concerned."

Massachusetts:—"It is for the plaintiff to show, not merely that the place was unsafe, and that he was injured thereby, but that he himself was in the exercise of due care. His evidence fails to show this, if it appears that, knowing and appreciating the danger arising therefrom, he voluntarily exposes himself thereto. Business is sometimes carried on in buildings or places obviously unsafe, and if, with a knowledge that a business is thus conducted, the workman engages in it, he takes the risks which he must know are incident thereto. . . . Where one capable of choosing and contracting for himself, with full notice of the risk he assumes, voluntarily uses a machine which, by reason of a known defect, exposes him to a particular and obvious danger, he is held to assume and take the risk of injury from that source. . . . In the case at bar the plaintiff knew of the defect [a well-hole], and he consented to incur the risk which he ran in passing along the floor, in the uncertain light, to examine and aid in putting on the

belts." *Taylor v. Carter Mfg. Co.* (1885) 140 Mass. 151, 3 N. E. 21.

"Under the decisions in this commonwealth, if he knew and appreciated this risk, and continued to work for the length of time and under the circumstances that appear in this case, he must be held voluntarily to have assumed it, so that his share in the responsibility for the accident charges him with negligence, and precludes him from recovery, if the use of the saw by the defendant constituted negligence." *Townly v. Boston Mfg. Co.* (1898) 170 Mass. 323, 19 N. E. 654.

"Our care depends on what is reasonable under the circumstances, and is generally a question of fact for the jury. It cannot be said, we think, as matter of law, that the probability that Duckworth would leave an unexploded cartridge in one of the chambers was so great as to require the plaintiff to examine them himself, or that, by continuing in the defendant's employment after finding an unexploded cartridge in a revolver handed to him by the defendant James after testing it, he thereby assumed the risk from such unexploded cartridges as might be accidentally left in revolvers by said James." *Anderson v. Duckworth* (1894) 162 Mass. 251, 38 N. E. 510.

In *Foran v. Old Colony R. Co.* (1887) 143 Mass. 197, 9 N. E. 608, the court, after declaring that, supposing certain inferences to be deducible from the evidence, they could not say, as matter of law, that the plaintiff assumed the risk, said that the evidence was sufficient to be submitted to the jury upon the question whether he was in the exercise of due care. It is not easy to say what precise point of view is indicated by the remark of Holmes, J., that even if the servant's conduct "was not negligent in the sense of culpable, still, as it involved danger manifest to him, he could not complain of the consequences." *Boyle v. New York & V. E. R. Co.* (1890) 151 Mass. 102, 23 N. E. 827. Is not culpability an essential element of negligence?

Michigan: . . . entering upon a particular and perilous and dangerous accident

with full knowledge of the danger, and understanding the increased risk occasioned thereby, consents to enter into the employment, then he voluntarily incurs the risk, and, if he suffer damages in consequence of injury received thereby, he will be without remedy. The fact that he remains in the master's employment under such circumstances, and with such knowledge, is what constitutes contributory negligence on his part. In such a case the master, in permitting his machinery to be thus more than ordinarily dangerous, is guilty of negligence; but the servant, with full knowledge thereof, by remaining, contributes thereto, and hence he cannot recover if he has such knowledge. *King v. Ford River Lumber Co.* (1892) 93 Mich. 172, 182, 53 N. W. 10.

In the following cases negligence and assumption of risks are used to express the same conception: *Burnside v. Norcitty Mfg. Co.* (1899) 121 Mich. 115, 79 N. W. 1108 (last paragraph but one); *Leppala v. Cleveland Iron Min. Co.* (1900) 122 Mich. 633, 81 N. W. 553 (first paragraph); *Deering v. Canfield & W. Co.* (1901) 126 Mich. 373, 85 N. W. 874; *Chilton v. Lansing Wagon Works* (1901) 128 Mich. 43, 87 N. W. 79; *Sweet v. Michigan C. R. Co.* (1891) 87 Mich. 559, 49 N. W. 882.

Minnesota:—If a servant enters upon and continues in the service of the company with knowledge of the unsuitableness or inadequacy of the instrumentalities furnished for the operation of the road, it is his own negligence, and he assumes the known risks of the employment. *Fleming v. St. Paul & D. R. Co.* (1880) 27 Minn. 111, 6 N. W. 448.

Missouri:—*Hurst v. Kansas City, P. & G. R. Co.* (1901) 163 Mo. 309, 63 S. W. 693; *Pauck v. St. Louis Dressed Beef & Provision Co.* (1901) 159 Mo. 467, 61 S. W. 806; *Hamman v. Central Coal & Coke Co.* (1900) 156 Mo. 252, 56 S. W. 1091. See also cases cited in § 310, note 7, *infra*.

Nebraska:—"Where a servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such character that they may not be safely used, by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident resulting from the master's negligence." *Lee v. Smart* (1895) 45 Neb. 318, 63 N. W. 940 (syllabus by court).

New York:—In discussing the ques-

tion whether the servant's knowledge of a defect rendered him chargeable with contributory negligence, the court remarked that it was "for the jury to say whether or not he voluntarily assumed the risks." *Laning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417.

"It would seem to be unreasonable that one who has undertaken a service which, in itself, has some elements of danger, whenever he shall see that the danger has been increased through some negligence of his employer, must either stop his employment or be deemed to have accepted the increased risk. We do not think that this is the rule. And it seems to us that the plaintiff had a right to go to the jury on the question whether he was, under the circumstances, justified in going on with his work." *McMahon v. Port Henry Iron Ore Co.* (1881) 24 Hun, 48.

In *Cullen v. Norton* (1889) 52 Hun, 9, 4 N. Y. Supp. 774, the court stated the defendant's contention to be that the deceased knew all about the facts and voluntarily assumed the risks, and thus, by his contributory negligence, precluded recovery.

In *Guenther v. Lockhart* (1891) 40 N. Y. S. R. 942, 16 N. Y. Supp. 717, the court first remarked that the risk was assumed, and then that the plaintiff failed to show the decedent to have been free from contributory negligence.

"A servant does not assume the risks unless he can be properly charged with negligence arising from the master's negligence in accepting the place of labor assigned to him by his master." *Heavey v. Hudson River Water Power & Paper Co.* (1890) 57 Hun, 339, 10 N. Y. Supp. 585.

For similar instances of this confusion of terms, see *Farley v. New York* (1896) 9 App. Div. 536, 41 N. Y. Supp. 622; *Wallace v. Central Vermont R. Co.* (1892) 43 N. Y. S. R. 639, 18 N. Y. Supp. 280; *Clary v. Long Island R. Co.* (1900) 54 App. Div. 284; *Baker v. Sutton* (1896) 11 App. Div. 271, 42 N. Y. Supp. 116.

North Carolina:—In *Crutchfield v. Richmond & D. R. Co.* (1878) 78 N. C. 300, the court, while holding the plaintiff unable to recover on the ground of contributory negligence, speaks of his continuance at work with knowledge of the defect as being "assumption of the risks." In another case, while discussing the negligence of the plaintiff, this court said that the circumstances "must

his contributory negligence,—is for the jury.⁴ This mistake has not even the imperfect excuse which popular usage supplies in cases where assumption of risks and contributory negligence are treated as synonymous phrases.

310. Doctrinal confusion between the defenses.—The inexactness of

be such as to show that the employee had full knowledge of the unusual risk, and deliberately assumed it." *Sims v. Lindsay* (1898) 122 N. C. 678, 30 S. E. 19. See also *Lloyd v. Hanes* (1900) 126 N. C. 363, 35 S. E. 611.

Pennsylvania:—In *Nuss v. Rafsnnyder* (1896) 178 Pa. 397, 35 Atl. 958, as applicable to the case, the court, after laying down the rule as the assumption of known risks, declared the plaintiff to be negligent in using the appliance under the circumstances.

In *Davis v. Baltimore & O. R. Co.* (1893) 152 Pa. 314, 25 Atl. 498, the court, after declaring the plaintiff negligent in using the appliance, summed up by saying that he accepted the risk of the employment.

The plaintiff "was under no obligation to continue working in a dangerous place or employment, and if he did so he assumed the risk himself. He could not excuse his own want of care by the allegation that someone else had promised to care for him." *Reese v. Clark* (1892) 146 Pa. 465, 23 Atl. 246.

"The very fact of the plaintiff's youth and weakness is one of the elements that go to make up the charge of negligence on the part of the defendant in putting such a person upon such a service. It seems to us the master, in such circumstances, and not the servant, must be held to have assumed the risks of the service." *Kehler v. Schuenk* (1892) 151 Pa. 505, 25 Atl. 130.

The sentence, "The plaintiff has no one but himself to blame," occurs in a case where the risk was said to be assumed. *Beittemiller v. Bergner & E. Brewing Co.* (1888) 22 W. N. C. 33, 12 Atl. 599.

Rhode Island:—The phrase assumption of risk is used in a case where the defense raised was contributory negligence. *Laporte v. Cook* (1899) 21 R. I. 158, 42 Atl. 519.

South Carolina:—In *Donahue v. Enterprize R. Co.* (1890) 32 S. C. 299, 11 S. E. 95, it was said that a servant who continued to work with knowledge of the dangerous character of the appliances assumed the risks of the situation, and that his knowledge defeated his ac-

tion on the ground that he had, by his negligence, contributed to his injury.

Texas:—When a servant remains in an employment known to be dangerous because of defective machinery, implements, or appliances not sufficient for the safe conduct of the business, "he is said to assume the risks incident to the business thus conducted, and to be guilty of contributory negligence, if an injury occurs to him through their use." *Gulf, C. & S. F. R. Co. v. Brentford* (1891) 79 Tex. 619, 15 S. W. 561.

In *St. Louis & S. F. R. Co. v. Doyle* (1894; Tex. Civ. App.) 25 S. W. 461, the court uses the phrase "assumption of risk" as a description of an act alleged to be negligent.

Virginia:—"If he continued the work without exercising ordinary prudence and care for his own safety, he must be held to have assumed not only the risks ordinarily incident to the service," but such as became known to him, actually or constructively, in the progress of the work. *Russell Creek Coal Co. v. Wells* (1898) 96 Va. 416, 31 S. E. 614.

In one case the phrase "assumption of the risk," is used, though the court also speaks of the servant's "folly" in undertaking the work. *Robinson v. Dinwiddie* (1898) 96 Va. 41, 30 S. E. 442.

Washington:—This court has used "assumption of the risk" as the verbal equivalent of contributory negligence, in *Lewis v. Simpson* (1892) 3 Wash. 641, 29 Pac. 267; *Richardson v. Carhon Hill Coal Co.* (1893) 6 Wash. 52, 20 L. R. A. 338, 32 Pac. 1012.

West Virginia:—In *Graham v. Newburg Orrel Coal & Coke Co.* (1893) 38 W. Va. 273, 18 S. E. 584, the phrase "assumption of risk" occurs in a discussion of the defense of contributory negligence.

Wisconsin:—See next section, note 7. In *Hew v. Charleston & S. R. Co.* (1898) 55 S. C. 90, 32 S. E. 828, the court lays down the rule that the question whether the servant had waived his right of action is for the jury, where two inferences are possible; and in support of this doctrine cites *Bussey v. Charleston & W. C. R. Co.* (1898) 52 S. C. 438, 30 S. E. 477, where the defense

terminology which has been discussed above is doubtless responsible, principally, if not altogether, for the doctrinal confusion between the two defenses, which is frequently found in the arguments of judges. Indeed, it will be seen from an examination of some of the passages quoted in the notes to the preceding section, that some of the courts to which a merely verbal confusion has been attributed might, without applying any very vigorous standards, be treated as chargeable with the more serious error which now invites attention. That error manifests itself under various forms.

In some cases the reasoning is vitiated by the misconception that the servant's duty to use care may be referred to as a standard by which to test the fact of his assumption of the risks of the employment.¹

raised and discussed was contributory negligence. In one part of its opinion the court puts the alternative: "Whether the matter of assumption of risk by an employee is to be tested by the law of waiver or by the law of negligence?"

In another case, after saying that the servant did not waive all right to damages, the court remarked that the jury would have been authorized to find that he was not guilty of contributory negligence. *Anderson v. Illinois C. R. Co.* (1899) 109 Iowa, 524, 80 N. W. 561. The correct logical situation is, however, recognized in earlier Iowa cases. *Perigo v. Chicago, R. I. & P. R. Co.* (1879) 52 Iowa, 276, 3 N. W. 43 (see § 307, note 3, *supra*); *Crabell v. Wapello Coal Co.* (1886) 68 Iowa, 751, 28 N. W. 56 (see § 506, note 1, *supra*).

In *Porter v. Western North Carolina R. Co.* (1887) 97 N. C. 74, 2 S. E. 584, it was urged that the facts ascertained by one of the special findings did not, in legal effect, constitute contributory negligence, but was, in effect, a finding that the intestate of the plaintiff "agreed with the defendant company to risk the consequences of this dangerous contact and association" with the engineman. The court thus explained its reasons for declining to accept this view as correct: "The law implies that the servant agrees to accept the ordinary risks incident to the business or service which he engages to do, but it does not imply that he shall or will take upon himself extraordinary hazard, and especially such danger as the employer is bound to prevent and avert by the exercise of reasonable diligence on his part. . . . The most that can be said in this respect is that the

intestate, by remaining in the defendant's service after he had certain knowledge of the unfitness of his fellow-servant engineman—the defendant having the like knowledge—assumed the extra hazard as to his fellow servant, and thereby waived his right to redress against the defendant in case of injury arising to him from that servant's reckless act. But by thus remaining in the defendant's service he was negligent as to his own safety." The elaborate accumulation of erroneous language in this passage may fairly be described as a veritable piling of Pelion upon Ossa. Other cases bearing upon this particular form of the confusion of terms will be found cited in the next section, note 6.

"When the employee undertakes to perform labor that is necessarily attended with danger to himself, he so far assumes the risks as to require the exercise of ordinary prudence and caution on his part. The employee is not bound to engage in work that places his life in peril; and when labor of that sort is voluntarily assumed, and an injury occurs, he cannot look to his employer for damages upon the ground of negligence, if, by the exercise of ordinary vigilance, he could have avoided the accident." *Sullivan v. Louisville Bridge Co.* (1872) 9 Bush, 81. This statement is plainly a blunder either in phraseology or doctrine. It is erroneous on the former score, if it is intended to embody the principle that the master is not warranted in exposing the servant to any risks except those from which he can preserve himself by the exercise of due care. It is erroneous on the latter score,

A still more serious error is the partial or complete obliteration of the boundary line between the defenses themselves. The mildest form of this logical heresy is the view that, although there may be a distinction between the two defenses, it often becomes too subtle to be

if the implication is that the servant's exercise or omission of such care can affect in any degree his rights as regards recovery for an injury resulting from a risk assumed.

The "rule (as to the assumption of augmented perils) rests upon the principle that, while it is the duty of the employer to furnish reasonably safe machinery, and to make reasonable inspections for the discovery of defects, yet it is equally the duty of the employee to be vigilant for his own safety; and if he carelessly overlooks or silently acquiesces in a dangerous situation that results in his injury, the fault is laid at his door, and he cannot recover therefor." *McFarlan Carriage Co. v. Potter* (1899) 153 Ind. 107, 53 N. E. 465.

Other instances of the same perverted logic are not wanting.

In the case of perils incident to the employment, assumption of risks has been spoken of as "the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract;" while contributory negligence is "that action or nonaction in regard to personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences." *Nargamore v. Clelland, C. C. & St. L. R. Co.* (1899) 37 C. C. A. 499, 48 L. R. A. 68, 96 Fed. 298, Certiorari Denied in 175 U. S. 724, 44 L. ed. 327, 20 Sup. Ct. Rep. 1021.

In *Fleming v. St. Paul & D. R. Co.* (1880) 27 Minn. 114, 6 N. W. 448, the court, after using the language quoted in note 2 to § 302, *supra*, proceeded thus: "This is not against public policy, for while public policy is concerned for the safety of human life and limb, it will not offer a premium for negligence or recklessness by relieving a servant who, voluntarily, and with open eyes, undertakes a service under the circumstances mentioned, from the consequences of his own folly by charging them upon his employer. One of the most effectual ways to discourage such negligence and folly and thereby to prevent injurious consequences both to the servant and to others upon the train, whether fellow servants or passengers, is to throw the whole risk in such cases

upon the servant himself. The power of the employee to assume known risks of his employment and the consequent exemption of the master from liability in such cases is well settled in law."

In *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285, the court in one part of its judgment (p. 296) adopts a statement of Judge Cooley that a servant who goes on working with a knowledge of a fellow servant's incompetence takes upon himself all risk of injury from that incompetence, "as much as if he had expressly contracted with reference to possible injury from such unfitness." Then, in another passage (p. 299), it sums up its conclusion by declaring that, if the servant knew that he was constantly exposed to peril by such incompetence, he could not continue in the service without complaint, and not be chargeable with contributory negligence.

In *Stager v. Troy Laundry Co.* (1901) 38 Or. 480, 53 L. R. A. 459, 63 Pac. 645, the court enunciated the doctrine that if the servant voluntarily continues to work, without complaint or objection, after obtaining knowledge of the existence of a risk superadded to the employment after he has begun work, under conditions which charge him with an appreciation of the danger, "and where ordinary prudence would require of him a different course," he is held to take upon himself the responsibility entailed by the risk he continues to incur.

In *Russell Creek Coal Co. v. Wells* (1898) 96 Va. 416, 31 S. E. 614, it was laid down that a servant who continues work in an unsafe place, without exercising prudence and care for his own safety, must be held to have assumed not only the risks ordinarily incident to his employment, but such as become known, actually or constructively, to him during the progress of the work.

See also *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582, referred to in note 4, *infra*, and the Missouri cases reviewed in note 6, *infra*.

Not less objectionable are the statements that, if the servant knew of the defects in the cars or machinery, and, "without taking the necessary and proper precaution to guard against danger,

of any practical importance,² or that it is not of much practical value.³ But the transition from the point of view in which the distinction is regarded as being immaterial, to the conception that the distinction is

continued to use them, he took upon himself the risk, and waived his right as against the company" (*Mad River & L. E. R. Co. v. Barber* [1856] 5 Ohio St. 541, 565, 67 Am. Dec. 312); and that the servant "assumed . . . the dangers incident to the employment," and "undertook to observe all proper care for his own personal safety" (*Chicago & E. L. R. Co. v. Maloney* [1898] 77 Ill. App. 191).

See also *Northern P. Coal Co. v. Richmond* (1893) 7 C. C. A. 485, 15 U. S. App. 262, 58 Fed. 756, where the court, after declaring that the plaintiff, a minor, was not, as a matter of law, guilty of contributory negligence, remarked that he only assumed the risk of services which he contracted to perform, and not those which neither he nor his father had reason to believe that he would be required to encounter.

² *McMullen v. Missouri, K. & T. R. Co.* (1895) 60 Mo. App. 231.

³ *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582. A corollary drawn by one court from the immateriality of the distinction is that a trial judge is justified in refusing to grant the defendant's request for a specific charge on the issue of an assumption of the risk, when an instruction dealing with contributory negligence has already been given. *Rittenhouse v. Wilmington Street R. Co.* (1897) 120 N. C. 544, 26 S. E. 922. There the plea of *volenti non fit injuria*, which counsel seem to have regarded, though, it would appear, incorrectly (see § 371, *post*), as the equivalent of "assumption of risks," had been expressly relied on, and a request had been made to the defendant to submit to the jury this issue: Did plaintiff's intestate voluntarily attempt to cross the railroad bridge, knowing the condition of track and car? Clark, J., said: "It is true that in strict parlance, and logically, there is a distinction between contributory negligence of the intestate and his voluntarily taking a risk which he knew to be dangerous. . . . But upon the issue of 'contributory negligence' both phases of the matter, negligence and voluntary assumption of risk, could be submitted to the jury, and the charge shows that the judge did so submit this case. The defendant was not cut off from presenting

any phase of his defense, and it can serve no good purpose to more minutely divide the issues. . . . It would rather serve to confuse the jury. The jury readily comprehend that, by the issue of contributory negligence, they are asked to find whether the plaintiff's fault was the proximate cause of his injury, and it is immaterial whether that fault was carelessness or a reckless assumption of risk, provided the jury are given to understand (as they were in this case by the evidence, the argument of counsel, the prayers for instruction, and the charge of the court) that the issue was broad enough to cover both phases. 'Reckless assumption of risk' has always been taken in our courts as being embraced in the issue of contributory negligence. *Burgin v. Richmond & D. R. Co.* (1894) 115 N. C. 673, 20 S. E. 473; *Doster v. Charlotte Street R. Co.* (1895) 117 N. C. 651, 34 L. R. A. 181, 23 S. E. 449; *Turner v. Goldsboro Lumber Co.* (1896) 119 N. C. 387, 26 S. E. 23. No harm has come from this course, and there is no need of further refinement." For the phrase "reckless assumption of risks" there is the respectable authority of the supreme court of Michigan, which in one case speaks of circumstances under which the servant cannot be said to have "either heedlessly or voluntarily assumed the risk." *Schlacker v. Ashland Iron Min. Co.* (1891) 89 Mich. 253, 50 N. W. 839. But this court, although it has used this phrase, *arguendo*, in a case where the addition of the antithetical word "voluntarily" at once indicates that the distinction between the two defenses was not forgotten, would scarcely have approved of the singular proceedings which are here described as taking place on the trial. That the North Carolina court wholly misunderstood the true import and rationale of the request for the instruction refused is evident. The language used by Judge Clark presupposes that the only question requiring an answer was whether the plaintiff's injury was caused by his "fault," whereas the charge asked for presented an issue which was entirely independent of the culpability or nonculpability of the plaintiff. It was an attempt by counsel, in short, to induce the court to apply the doctrine of assumption of risks un-

nonexistent, is manifestly short and easy. This crowning error is exemplified in some of the cases already cited, as well as in others.⁴

It will be remarked that the concluding sentence of the passage quoted in the Kansas case cited below embodies a conception of the meaning of waiver for which it is safe to say there is no authority to be found outside the line of employer's liability cases which are now under review. That word is commonly understood to import a voluntary and intentional renouncement of a right of action. It is evident that there is an essential difference between the position of a person who deliberately abstains from claiming damages for an injury, and the position of a person whom the law declares to have forfeited, by his own breach of duty, the right to maintain an action for that injury.⁵ Nor is this the sole flaw in the argument. The state-

der circumstances in which, whether by accident or design, the plaintiff's rights had always, in North Carolina, been considered solely from the standpoint of contributory negligence. It would be of deep psychological interest to learn precisely what ideas on the subject of assumption of risks and contributory negligence the jury carried with them to their consulting room, after "the argument of counsel, the prayer for instruction, and the charge of the court." The twelve *boni et legales homines* suffer many things from the perverse ingenuity with which verbose, hair-splitting instructions are accumulated in employer's liability cases, but they can rarely, we should imagine, have been reduced to profounder depths of mental perplexity than in this instance.

Another scarcely less singular illustration of the illogical position into which the confusion between the two defenses has led the courts is furnished by a Wisconsin case, where it was held that the defendant in an action against a railroad company for negligently causing the death of a railroad employee is entitled to have an interrogatory presented to the jury on the question of the decedent's assumption of risk, where the question has not been covered by the instructions on contributory negligence. *Hennecy v. Chicago & N. W. R. Co.* (1898) 99 Wis. 109, 74 N. W. 554. The argument by which this conclusion was justified was that, while assumption of risks is a form of contributory negligence, it is a specific phase of such negligence, and is not likely to be so considered by a jury without careful and special instructions. It was therefore

considered not to be enough to submit to them the general question of the servant's contributory negligence, in a case where the defendant asks for a special finding in answer to the question whether he ought to have known the danger to be apprehended from the defective conditions. They should be informed plainly that assumption of risk,—the defense presented by such a question,—is a species of contributory negligence, and that, if they found the servant did assume the risk of such unusual danger, then he was in law guilty of a want of ordinary care.

⁴ In a very recent case in the Kansas court of appeals, assumption of risks was spoken of as being a "species of contributory negligence." *Greif Bros. v. Brown* (1894) 7 Kan. App. 394, 51 Pac. 926.

⁵ In *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582, the court, after referring to the two principles, that where the danger is not obvious or imminent the servant may rightfully continue in the employment of the master without being chargeable with contributory negligence, and that, if the servant has full knowledge of the danger, and continues in the master's employment without complaint, receiving from the master full pay for his services, he assumes the risk himself of the known danger, and waives any negligence that might otherwise be imputable to the master, proceeded thus: "This distinction between contributory negligence on the part of the servant and the waiver of the master's negligence on the part of the servant has been recognized in some of the books; but while it may be

ment contained in the final clause of the same sentence is not correct, for there are many cases in which the servant is unable to recover damages for the master's negligence, although he be entirely free from negligence,—at least under the doctrine accepted by the vast majority of the states, including Kansas itself. But even if the statement were correct, the circumstance mentioned would merely furnish one more illustration of what is an extremely common situation in jurisprudence, *viz.*, that the same set of facts is often susceptible of being considered under more than one juridical aspect.⁶ This, however, is very far from being an adequate reason for altogether throwing down the barrier between the fundamental logical conceptions upon which, according as the case is approached from one side or the other, the rights and liabilities of the parties depend.

Obvious and elementary as these considerations are, the authorities in favor of this theory as to the practical identity of the defenses are quite numerous.⁷

admitted that there is ample room for such a distinction, still it is doubtful whether the distinction can be of much practical value. In all cases of contributory negligence the employee has in some sense waived the negligence of the master: for by encountering the danger he says in effect, 'there is no danger except such as I will wholly assume myself;' and in all cases of the waiver of the master's negligence, the servant has in some sense, by his own negligence, contributed to the resulting injury."

⁶ See the remarks of Bowen, L. J., in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516.

⁷ In addition to the cases already cited, the following may be referred to as embodying an erroneous conception of the relation between the two defenses:

The opinion was expressed by Brewer, J., that there was some force in the doctrine that there was really no such thing as a separate and distinct defense of waiver, and that what was called waiver was simply one form of "contributory negligence;" that the difference between waiver and contributory negligence is the difference between passive and active negligence; that what was meant by waiver was passive negligence, in omitting to do a thing which the employee ought to have done. In the case before him, it would be said that the plaintiff omitted to call for a flag,—omitted to take precautions which

he ought to have taken, and that this was nothing more nor less than passive negligence. *O'Rourke v. Union P. R. Co.* (1884) 22 Fed. 189. The theory thus put forward, it will be observed (see note 5 to this section), is similar to that of the supreme court of Kansas, of which the learned judge had been a member before he was transferred to the Federal bench. But he has contrived to go even further than that court in the wrong direction, inasmuch as it is evident, from the concluding reference to the concrete facts of the case, that he failed to differentiate clearly in his mind the two separate questions, What inference should be drawn from the fact that the servant had gone on working in an environment known to be dangerous? and, What particular precautions a prudent man would have taken to protect himself while he remained in that environment? See § 308, *supra*.

Waiver and contributory negligence have also been treated as interchangeable concepts in Alabama. "For a servant or employee to persist in exposing himself to danger on the faith of such a promise may often be a want of that ordinary prudence which the law exacts of him at every stage of his employment, according to the degree and nature of the danger. His continuance in the service for an unreasonable length of time after such promise is a waiver of the defects agreed to be remedied by his employer. The risk, therefore, again becomes his own, and his conduct, as we have said,

311. Concluding remarks.— The foregoing summary sets in a strong light two deplorable consequences, sometimes amounting to a miscarriage of justice, which an inaccurate terminology and logical laxity have combined to produce, and shows that it is high time for every lawyer who attaches a proper value to clarity of thought and precision of language to devote special attention to seeing that, both in the conduct of trials and in the examination of cases in courts of review, the defenses shall be properly differentiated. The present confusion is a state of affairs for which counsel seem to be mainly responsible, as a court is naturally apt to discuss a case solely upon the theory under which the record and the arguments present it. It is not too much to say that, in view of the very appreciable advantages which the master obtains in most instances by relying on the defense of assumption of risks, an advocate who does not take care that, whenever the evidence admits it, that defense is presented as an alternative and entirely separate ground for denying the right of action is guilty of in-

although not necessarily or *per se* negligent, may or may not become negligent, according to the circumstances of the particular case." *Enrick Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216.

So, also, in Wisconsin the theory now accepted is that assumption of risks is "a form of contributory negligence." *Nolan v. White River Lumber Co.* (1890) 76 Wis. 120, 43 N. W. 1135; *Darwin v. Farmers' Lumber Co.* (1894) 87 Wis. 245, 58 N. W. 382; *Hazen v. West Superior Lumber Co.* (1895) 91 Wis. 208, 64 N. W. 857; *Peterson v. Sherry Lumber Co.* (1895) 90 Wis. 8, 62 N. W. 948; *Krafft v. Mayer* (1896) 92 Wis. 252, 65 N. W. 1032.

See also the South Carolina case cited in § 309, note 3, *supra*.

The theory of a large group of Missouri cases, though to some extent similar to that of the courts just referred to, is in other respects *sui generis*. In one of these cases it was regarded as an open question, whether the defense of assumption of risks is based upon the doctrine of waiver, or upon the doctrine of contributory negligence, but it was considered immaterial what answer was given to that question, as "the facts which, in the one set of cases are held to show the waiver, are such, in effect, as are held to constitute the concurring negligence in the other." *Thorpe v. Missouri P. R. Co.* (1886) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3. "The question then is," it was said, "whether the plaintiff, in remaining at work under these

circumstances, must be held to have waived the discharge of defendant's duty to him in this behalf, and to have assumed the risk incident to the performance, . . . or, in other words, was his knowledge of the dangers and risks involved in his undertaking to carry on the work with the reduced force such as will necessarily charge him with negligence." Yet the opinion immediately afterwards notices the fact that recovery has been denied in other cases on the different grounds of waiver or assumption of the risk, and of contributory negligence.

In another case the phrase "contributory negligence," or, what is tantamount thereto, "waiver," occurs. *Alcorn v. Chicago & A. R. Co.* (1891) 108 Mo. 81, 18 S. W. 188. Yet the court recognizes the doctrine commonly applied, that the effect of the servant's knowledge of extraordinary risks is to convert them into ordinary risks, so far as the master's liability is concerned. This doctrine certainly does not rest on the contributory negligence of the servant. Compare *Wainwright v. Atchison, T. & S. F. R. Co.* (1891) 46 Mo. App. 159, where, in the argument, the servant's assumption of the risk and waiver of claim for damages is spoken of while the action is finally declared to be barred on the ground of contributory negligence.

But the formal doctrine which has been evolved from this supposed identity seems to be peculiar to Missouri, and may be said to represent the high-water

excusable remissness. Few courts, if any, are irrevocably and unservedly committed to the doctrine that, where the master has been guilty of a breach of duty, the servant can be debarred from recovery *only* by his own negligence; and it can scarcely be supposed that the peculiar theories which prevail in North Carolina (see preceding section, note 3), as to the absence of any necessity of differentiating the defenses in instructions to a jury, will ever find acceptance in other states. As long as both defenses remain open in the jurisdiction where the action is brought, an employer's counsel ought always to in-

mark of the confusion between the defenses. Stated in its simplest form, that doctrine is that the servant does not, as matter of law, "assume a risk" due to a breach of duty on the master's part, unless it was such that no prudent man would have remained in an employment in which it was necessary to encounter it. "The servant does not assume the risk of danger from the use of unsafe machinery, unless the defects are so glaring or obvious that a reasonably prudent man would not attempt to use them." *Bender v. St. Louis & S. F. R. Co.* (1896) 137 Mo. 240, 37 S. W. 132.

The following extract from *Conroy v. Vulcan Iron Works* (1876) 62 Mo. 33, contains the earliest formulation of this doctrine: "Where the defect is so glaring that with the utmost care and skill the danger is still imminent, so that none but a reckless man would incur it, then, if the servant will engage in the hazardous undertaking, he must be considered as doing it at his peril. But if the defective machinery or appliances, though dangerous, are not of such a character that they may not be reasonably used by the exercise of skill and diligence, the servant does not assume the same risk. He is required to take, and will be held responsible for, the care incident to the situation in which he is placed, and whether he exercised that degree of caution is a fact for the determination of the jury. The timbers in the present case, though loose and not properly fastened, had been used and were still being used and the plaintiff might have supposed that by using care they would be entirely safe." Compare the ruling that an engineer is "not bound to quit the service, nor did he assume all risks from want of repair [in a track], unless the track was so far out of repair . . . that it would be necessarily dangerous, to the mind of a prudent person, to run an engine over

it." *Derlin v. Wabash, St. L. & P. R. Co.* (1885) 87 Mo. 545.

See also the following passage: "Under former rulings of our supreme court, and of the courts of most other jurisdictions, if the defect in the fellow servant, or in the machine, was equally apparent to the servant and to the master, the servant was deemed, as matter of law, to accept the risks of injury from such defect, as one of the risks of his employment; and, if injured in consequence of it, he could not recover damages from the master. This rule declined to recognize any inequality in the situation of the master and the servant, but placed them on an equal footing. It was analogous to the well-known rule in respect of contributory negligence, under which any negligence on the part of the person injured, materially contributing to the injury, was a bar to a recovery of damages. But later decisions of our supreme court, and of other courts, seemingly recognizing the inequality in the situation of the master and the servant, and proceeding upon conceptions more just and humane, are to the effect that the servant is not, as matter of law, deemed to accept the risks of injury from the unfitness of the fellow servant, the machine, or the appliance, unless such unfitness is so glaring and palpable that a prudent man would not remain in the service; and that, whether the servant does accept the risks by remaining in the service is ordinarily a question to be submitted to a jury." *Hughes v. Fagin* (1891) 46 Mo. App. 43. See also the majority opinion in *Fugler v. Bothe* (1890) 43 Mo. App. 44; *McMullen v. Missouri, K. & T. R. Co.* (1895) 60 Mo. App. 231. If this statement be construed liberally, it must, according as the phrase "assume the risk" is taken in one or other of its two possible senses, either express the bald truism that the servant's action is not

sist that their client shall receive the benefit of a consideration of his rights with reference to each of them. There are doubtless cogent reasons of abstract justice and public policy in favor of the doctrine that the servant's claim should be barred only by contributory negligence, and that this should not, except in the clearest cases, be inferred, as a matter of law, from mere knowledge of the dangerous conditions, and the present writer owns that he would be glad to see this doctrine everywhere accepted. But, until the day of that acceptance arrives, counsel are in duty bound to take every advantage of the more stringent doctrine, and never to pass by an opportunity of utilizing it.¹

barred on the ground of contributory negligence unless he was imprudent, or amount to the assertion of a doctrine which would be an entirely novel addition to the law of contracts, since it would imply that the intention of the servant to include the given risk among those covered by his agreement may depend upon whether a prudent man would have accepted the risk under the circumstances. See note 1, *supra*. But what the court really means, as is shown by all the decisions embodying the doctrine in question, is simply that whenever the servant was imperiled by a breach of duty on the master's part, the only ground on which his recovery can be barred is that his own want of care either in remaining in the employment, or in failing to take proper precautions at the time of the accident, was an efficient cause of the injury. See § 301, *supra*. In the formulation of this doctrine any reference to the conception of an assumption of the risk must obviously, if that phrase is to bear its usual technical signification, be wholly beside the mark. It would be difficult, if not impossible, to find in the books a more singular example of confused logic than that which has here resulted from this at-

tempt to link together two wholly distinct ideas by means of an ambiguous phrase.

A very instructive example of the extremely slipshod way in which the two defenses are sometimes dealt with is furnished by the case of *De Forest v. Jewett* (1882) 88 N. Y. 264, where the court, in denying the servant's right to recover on the ground that the risk was known and assumed, thought it necessary to distinguish *Plank v. New York C. & H. R. R. Co.* (1875) 60 N. Y. 607, which involved very similar facts. The servant's want of actual knowledge of the danger was declared to be the rationale of the earlier decision. If we turn to the report of that case, however, we find that what the court really said was that the fact that the plaintiff knew of the existence of the conditions, though it was important, was not a preponderating one, on the question of contributory negligence. The two cases, therefore, were presented upon wholly different theories, and the decision in the earlier one was absolutely irrelevant as a precedent, favorable or the reverse, for the latter.

Another curious misuse of a precedent is mentioned in § 309, note 3, *supra*.

CHAPTER XIX.

CONTRIBUTORY NEGLIGENCE AT THE TIME THE INJURY WAS RECEIVED.

312. Introductory.

A. GENERAL PRINCIPLES.

313. Servant is bound to use proper care in performing his duties.

314. Local doctrines as to contributory negligence.

a. Alabama.

b. Florida.

c. Georgia.

d. Illinois.

e. Kentucky.

f. Tennessee.

315. Rule in the case of seamen.

316. Contributory negligence of deceased servant bars action by personal representative.

317. Contributory negligence as a defense to actions by parents for loss of services.

318. Negligence of another person; when imputed to servant.

319. Negligence not predicable unless servant was aware of the conditions which caused his injury.

320. — and understood the dangers created by those conditions.

321. Unexpected situations; negligence not predicable in regard to.

322. Incurring of known danger; negligence not necessarily predicable with regard to.

323. Servant's negligence not a bar to his action unless it was an efficient cause of his injury.

324. Illustrative cases turning upon proximity of cause.

325. Negligence of fellow servant of injured servant a partial cause of the injury.

326. Servant's negligence not a bar to the action if it is merely a condition of the injury.

327. Contributory negligence of servant followed by negligence on the part of the master or another employee.

B. WHAT CONSTITUTES CONTRIBUTORY NEGLIGENCE ON THE PART OF A SERVANT.

328. Generally.

329. Care proportionate to the danger must be exercised.

330. Respective provinces of court and jury in determining the servant's negligence.

331. Failure to use appropriate precautions in dangerous situations.

332. Failure to give proper attention to surroundings.

332a. Duty omitted in respect to stable or persistent conditions.

- 332b. Omission of duty in respect to transitory and sporadic conditions.
- 333. Selection of the more dangerous of two available courses of action; generally.
- 334. Taking or remaining in an unnecessarily dangerous position; cases relating to work on railways.
- 335. — cases not relating to work on railways.
- 336. Going into a dangerous position without notifying persons from whose acts danger may be anticipated.
- 337. Going into or remaining in an unauthorized position.
- 338. Doing work in an unnecessarily dangerous manner; cases relating to work on railways.
- 339. Doing work in an unnecessarily dangerous manner; cases not relating to work on railways.
- 340. Doing acts with undue haste.
- 341. Negligence inferred from the use of defective or unfit appliances.
- 342. Negligence inferred from the use of appliances for a purpose other than that for which they were designed.
- 343. Negligence in respect to the creation of the material conditions which caused the injury.
- 344. Negligence in respect to the exercise of functions of control.
- 345. Failure of injured servant to influence the conduct of coemployees not under his control.
- 346. Departure from customary methods of work.

C. QUALIFYING CIRCUMSTANCES TENDING TO NEGATIVE THE INFERENCE OF GUILT-ABILITY.

- 347. Qualifying circumstances enumerated.
- 348. Minority of injured servant.
- 349. Conditions or methods of work not under the control of the injured servant.
- 350. Temporary forgetfulness of danger; contributory negligence negated on account of.
- 351. Limits of this doctrine.
- 352. Compliance with a rule.
- 353. Conformity to a customary practice.
- 354. Course of conduct selected by the servant, with reference to the presumption that the plant was not defective.
- 355. — and that the work done in connection with the plant will be prudently done.
- 356. Limits of the servant's right to act upon these presumptions.
- 357. Necessity of act which caused the injury.
- 358. Act done in an emergency.
- 359. Act done under the influence of bodily pain.
- 360. Act done in attempting to save the life of another person.
- 361a. Act done in attempting to preserve the employer's property.

D. COMMISSION OF ACTS SPECIFICALLY FORBIDDEN.

- 362. Unlawful acts.
- 363. Acts done in contravention of orders.
- 364. Doing acts against which the servant has been warned.
- 365. Negligence usually inferred, as matter of law, where violation of a rule is proved.
- 365a. Decisions illustrative of this principle.

366. Limits of the doctrine that a servant violating a rule cannot recover.

367. Doctrine that violation of a rule does not imply negligence, as matter of law.

As to contributory negligence considered with reference to the right of the servant to be at the place where he was when the accident occurred, see chapter XXXIII., *post*.

As to the burden of proving contributory negligence, see chapter XLIII., *post*.

As to the availability of the defense of contributory negligence under the French law, see chapter XLVII., *post*.

The cases dealing with contributory negligence as an inference from the fact that the servant was, when injured, in a place where he was not required by his duties to be, are collected in chapter XXXIII., *post*.

312. Introductory.—The third defense available to a master is that the servant's conduct in respect to the particular act which was the immediate cause of his injury was negligent. As already noticed (see §§ 307, 308, *ante*), this defense is not infrequently suggested by the evidence in cases where one or both of the defenses discussed in the last two chapters may be put forward.¹ This situation is a natural result of the fact that, in any given instance, the servant's comprehension of a risk, which is an essential element of these defenses, is very likely to point to the conclusion that he knew or ought to have known how he could have avoided it. Obviously, if he did not make a proper use of the knowledge, he must have been wanting in due care. In other words, he did something which, in view of his possession of a knowledge of the dangerous conditions, indicated carelessness.²

Some of the cases which we shall have occasion to cite in this chapter involve circumstances which render it extremely difficult to say whether they should be treated as illustrations of that species of negligence which is examined in the preceding chapter, or of that which now claims our attention. It is manifest that, in differentiating these two kinds of negligence, the essential point to be decided is whether the servant was guilty of a breach of the duty to refuse altogether to

¹In *Northern P. R. Co. v. Marks* (1887) 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321, it was alleged that the plaintiff had been negligent in two particulars,—first, that he had continued to work with knowledge of the incompetence of the delinquent fellow servant; and secondly, that he had not taken proper precautions at the time of the accident.

²See the language used in *Helfrich v. Ogden City R. Co.* (1891) 7 Utah, 186, 26 Pac. 295, and in many of the cases reviewed in the ensuing sections,—more especially those cited under §§ 331-339, *infra*.

do the act which led to his being injured, or of the duty to do that act in a prudent manner. Theoretically, it may be said that the former duty becomes a binding obligation the moment he discovers the existence of an abnormal risk which is certain, or very likely, to result in injury. But in practice the time given for forming an opinion as to the prudence or imprudence of continuing to work is often so short that it is virtually impossible to go through a process of mental deliberation, having for its object the determination of the question whether such continuance is justifiable under the circumstances. The present writer is of the opinion that, whenever such a predicament is encountered by the servant, the quality of his conduct ought in reason and fairness to be tested exclusively by considering whether he did the work in hand in a proper manner.

A. GENERAL PRINCIPLES.

313. Servant is bound to use proper care in performing his duties.—In *Priestley v. Fowler*¹ it was laid down by Lord Abinger that "the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself," and in later cases this statement has been frequently repeated, either in the same words or in a logically equivalent form.² It is apparent, therefore, that from the earliest period in the development of this branch of the law, it has been recognized that the right of a servant to maintain an action against his master for a personal injury is conditioned upon its being shown that the former did not contribute to his injury by his own want of care. In other words, a servant injured as a result of his own negligence in whole or in part, cannot recover damages from his master.³

This doctrine is available whether the occupation is dangerous or not.⁴ It also remains open to the master, although, on account of his

¹ (1837) 3 Mees. & W. 1. Murph. & H. 305, 1 Jur. 987, 7 L. J. Exch. N. S. 42.

² See, for example, *Karr Supply Co. v. Koenig* (1897) 167 Ill. 560, 47 N. E. 1051, Reversing (1895) 63 Ill. App. 219; *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216. The servant "is under as great obligation to provide for his own safety from such dangers as are known to him, or discoverable by the exercise of ordinary care on his part, as the master is to provide it [such safety] for him." *Wormell v. Maine C. R. Co.* (1887) 79 Me. 397, 10

Atl. 49; *Russell Creek Coal Co. v. Wells* (1898) 96 Va. 416, 31 S. E. 614 (instruction approved).

³ *Shaffer v. Haish* (1885) 110 Pa. 575, 1 Atl. 575.

A verdict for the plaintiff was set aside where the answer to one of the questions left to the jury was that there was "a certain amount of contributory negligence." *Ayres v. Bull* (1889) 5 Times L. R. 202.

⁴ *Craven v. Smith* (1894) 89 Wis. 119, 61 N. W. 317 (instruction leaving jury to suppose otherwise, held erroneous).

having given a promise to remedy the dangerous conditions (chape XXII., *post*), or for some other reason, he is unable to rely upon the plea of assumption of risks.⁵

It is error to instruct a jury in words which allow them to suppose that an absolute right of recovery is established, as soon as it appears that the servant was injured by abnormal conditions which the employer might have discovered and remedied by the exercise of ordinary care.⁶

On the other hand, any instruction is proper which informs the jury sufficiently of the consequences of contributory negligence, as creating a bar to the action.⁷ A refusal to give a charge to this effect

⁵ *McPeck v. Central Vermont R. Co.* (1897) 25 C. C. A. 110, 50 U. S. App. 27, 79 Fed. 590.

⁶ Where the defendant has requested a charge that, if the defect was unknown to the defendant, but could have been discovered by the plaintiff by an inspection which he was bound, but failed, to make, the plaintiff was guilty of contributory negligence, it is error, in giving the charge, to annex the qualification: "This is true, provided, however, that the defect was not only unknown to the defendants, but was also one which they would not have known by the exercise of ordinary care." *Cooper v. Butler* (1883) 103 Pa. 412. An instruction that, if defendant was negligent, plaintiff could recover, though he himself may have been negligent, is erroneous. *Texas & P. R. Co. v. Maupin* (1901; Tex. Civ. App.) 63 S. W. 346.

⁷ In *Crane v. Missouri P. R. Co.* (1885) 87 Mo. 588, an instruction to the following effect was approved: That, if the jury believed plaintiff's own negligence contributed directly to the injury, he could not recover; that, in determining whether he was negligent, they should consider and determine, from the evidence, whether he knew of the danger or might have known of it, and have avoided it by the exercise of ordinary care and caution under the circumstances in evidence; that, if he could have seen the danger and avoided it by the use of such care, then he was negligent; and that, if such negligence contributed to the injury, they should find for defendant. In *Depp Win. & Distilling Co. v. Fitzgerald* (1895) 21 Colo. 533, 43 Pac. 210, the court approved an instruction to the effect that the omission by an employee to perform some act which, if performed, would have protected him from injury through the neg-

ligence of the employer's representative, will prevent a recovery by the employee.

In *Washington & G. R. Co. v. McHade* (1890) 135 U. S. 551, 34 L. ed. 245, 10 Sup. Ct. Rep. 1044, the jury was held to have been properly instructed that an employee injured while attempting to place a belt upon a moving pulley cannot recover therefor, although the accident was occasioned by a defect in the machinery, where he was wanting in such reasonable care and prudence as would have prevented the happening of the accident.

An objection that no instruction as to contributory negligence had been given was without merit, where the court had instructed that the plaintiff could not recover if the injury was received as the result of any imprudent, careless, or negligent act on his part. *Lourenco v. Palmer Mfg. Co.* (1900) 60 S. C. 153, 38 S. E. 430. It is not error for a trial judge, after instructing the jury that to entitle the plaintiff to recover he must be free from fault or negligence contributing in any material degree to the injury, to fail further to charge that if the plaintiff, by the use of ordinary care, could have avoided the injury, he could not recover. *Louisville & N. R. Co. v. Thompson* (1901) 113 Ga. 983, 37 S. E. 483. An instruction that, if certain facts were found, then plaintiff was entitled to recover for injuries received while working with defendant's machinery, unless it were also found that he was not defendant's servant, but was a volunteer, and that he was guilty of contributory negligence, was erroneous, since either fact alone would have defeated recovery. *Virginia & N. C. Wheel Co. v. Chalkley* (1900) 98 Va. 62, 34 S. E. 976. Where plaintiff was injured while removing shavings from a planer and in an action for the injuries defend-

is deemed to be prejudicial error.⁸ But it is not a misdirection to tell a jury without qualification in one paragraph of a charge that, if the master was negligent the plaintiff was entitled to recover, if the charge also includes other paragraphs negating the right to recover if the servant was guilty of contributory negligence.⁹

Where it appears from a portion of the facts established that the injured servant was guilty of contributory negligence, the propriety or relevance of other testimony introduced at the trial for the purpose of showing that the employer was culpable is manifestly not a point which it is necessary for a court of review to consider.¹⁰

314. Local doctrines as to contributory negligence.—The simple doctrine, accepted in most jurisdictions, that the servant's action cannot be maintained if it is proved that his own negligence was an efficient cause of his injury, is now, or was at one time, subject in a few of the American states to some qualifications. The effect and scope of these will be briefly explained.

a. Alabama.—In this state it has been laid down that an action for an injury caused by wilful and wanton negligence on the part of an employee for whose acts the master is responsible is not barred by proof merely of the injured servant's contributory negligence.¹ The

plaintiff requested an instruction that, if plaintiff placed his hand into the recesses of a going machine without knowing what he would meet, defendant was not liable, such instruction was properly modified by the statement that defendant would not be liable unless the jury found the act was one of ordinary prudence, and that, if they found a person of ordinary prudence would not have thrust his hand into the machine in the way and under the circumstances the act was done, the verdict should be for defendant. *Bennett v. Warren* (1901) 70 N. H. 561, 49 Atl. 105.

⁸ As, where the instruction asked for was that, if the evidence showed that plaintiff contributed towards the accident of which he complained by his own negligence or carelessness, and that such negligence or carelessness was the proximate cause of his injuries, and could have been avoided by the use of ordinary care on plaintiff's part, defendant was not liable. *Southern R. Co. v. Manzy* (1900) 98 Va. 692, 37 S. E. 285.

⁹ *Chicago, M. & St. P. R. Co. v. Dond* (1886) 115 Ill. 659, 4 N. E. 368. See, generally, as to instructions in which the imperfections of one part of the statement of the law are rectified by the words of another, chapter XLV., *post*.

¹⁰ In an action to recover for injuries from falling into an elevator well not properly guarded, it was held that, as the evidence showed that the plaintiff was not in the exercise of proper care, the fact that all the other floors of the factory were provided with self-closing hatches was immaterial. *Taylor v. Carter Mfg. Co.* (1887) 143 Mass. 470, 10 N. E. 308.

¹ *Louisville & N. R. Co. v. Markee* (1893) 103 Ala. 160, 15 So. 511 (engineer failed to stop engine in time to avoid running over section foreman); *Louisville & N. R. Co. v. Watson* (1889) 90 Ala. 68, 8 So. 249 (engineer ran cars together with unnecessary force, after he saw that brakeman was between them); *Louisville & N. R. Co. v. York* (1900) 128 Ala. 305, 30 So. 676.

In one case the language used is that contributory negligence is no defense to an action for the death of an employee, where it was caused by such gross negligence on the part of the employer as shows a wanton and reckless indifference to the safety of human life. *Jones v. Alabama Mineral R. Co.* (1895) 107 Ala. 400, 18 So. 30.

Wanton or wilful misconduct on the part of a fireman, precluding a plea of contributory negligence, is not shown by

reason assigned for this doctrine is that the "theory of contributory negligence, as a defense, is that, conjointly with negligence on the part of the defendant, it conduces to the damnifying result;" that "if defendant's conduct is not merely negligent, but worse, there is nothing for plaintiff's want of care to contribute to,—there is no lack of mere prudence and diligence of like kind on the part of defendant to conjunctively constitute the efficient cause;" that, in short, "mere negligence on the one hand cannot be said to aid wilfulness on the other."² The theory thus propounded as to the nature of the defense is evidently not that which is accepted by the majority of courts. See § 323, *infra*. An examination of the facts of the cases cited, however, shows that the circumstances which are deemed appropriate for the application of the doctrine based upon the different degrees of negligence of the parties are really the same as those which, in other jurisdictions, are deemed to indicate that the plaintiff is entitled to recover because the defendant might, by the exercise of ordinary care after the dangerous position of the plaintiff was discovered, have avoided inflicting the injury. See § 327, *infra*.³ It would seem,

a count of complaint for the death of a brakeman, which merely avers that the fireman knew the deceased's peril, that by giving a proper signal or information to the engineer his safety would have been conserved in spite of the perils which his position involved, and that with a consciousness that the engineer was unaware of the situation, the fireman failed to give such signal or information, it not being averred that he wilfully or wantonly so failed, or that he was conscious of the failure. *Louisville & N. R. Co. v. Brown* (1898) 121 Ala. 221, 25 So. 609.

A charge to the effect that an injury was caused "negligently, carelessly, and recklessly" is not the equivalent of a charge that it was done wantonly, wilfully, or intentionally. *Kansas City, M. & B. R. Co. v. Crocker* (1891) 95 Ala. 412, 11 So. 262.

A plea of contributory negligence to a complaint charging a wilful infliction of injury by the defendant is bad on demurrer. *Alabama G. S. R. Co. v. Frazier* (1890) 93 Ala. 45, 9 So. 303 (action by stranger).

²*Georgia P. R. Co. v. Lee* (1890) 92 Ala. 262, 9 So. 230. Compare the following statement: "Negligence on the part of the injured employee can only coalesce and combine with the same quality of act on the part of the employee inflicting the injury,—with his negli-

gence, and not with his intentional wrong,—to the relief from liability of the common employer." *Louisville & N. R. Co. v. York* (1900) 128 Ala. 305, 30 So. 676.

³In a case already cited it was declared that contributory negligence was not a bar to the action, where the defendant or his agents discovered the perilous situation of the injured person in time to prevent disaster by the exercise of due care and diligence, and failed, after the peril of such person became known to them as a fact, and not merely after they should have known it, to resort to all reasonable effort to avoid injuring him. *Georgia P. R. Co. v. Lee* (1890) 92 Ala. 262, 9 So. 230. The limits of the doctrine and its real significance are also shown clearly enough by the following extract from the opinion in *Anniston Pipe Works v. Dickey* (1890) 93 Ala. 418, 9 So. 720, where the court thus discussed the doctrine: "To a recovery notwithstanding such negligence on the part of the plaintiff, it was essential to be shown that Calhoun, with respect to running his crane against that operated by plaintiff, acted recklessly or wantonly, in such sort as that the law imputes to him a willingness to inflict the injury, or an intention to do so. We have had occasion at this term to consider with much care the elements necessary in the constitu-

therefore, that the difference between the doctrines of the Alabama and other courts is more apparent than real.

b. Florida.—See chapter xxxv., *post*.

c. Georgia.—The cases dealing with contributory negligence as a defense to actions brought under the statute which enables servants of railway companies to recover for injuries caused by the negligence of their coemployees are collected in chapter xxxv., *post*. The rights of servants of employers other than railway companies are controlled by the principle which is deemed to be applicable whenever a defendant, whether a railway company or not, is being sued by a stranger, *viz.*, that the consequence of the contributory negligence of the injured person is merely to diminish the amount of damages recoverable.⁴ For the purposes of this rule a servant off duty is considered to be a stranger.⁵

tion of that recklessness or wantonness which will neutralize and overcome the defense of contributory negligence. Our conclusion was that knowledge of the probable consequences of the wrongful act was essential to the imputation of wilfulness in respect to it; that there must be a consciousness on the part of the person charged with misconduct, resulting in injury, that his conduct will necessarily or probably produce the harmful result complained of, before the law will impute to him a willingness to inflict the injury. *Georgia P. R. Co. v. Lee*, 92 Ala. 262, 9 So. 230; *Richmond & D. R. Co. v. Vance* (1890) 93 Ala. 144, 9 So. 574; *Alabama G. S. R. Co. v. Hill* (1890) 93 Ala. 514, 9 So. 722. We find nothing in the evidence adduced in this case to justify the conclusion that Calahan was conscious the injury sustained by the plaintiff, or any injury to the plaintiff, would probably result, or that he had any cause to believe or anticipate that such injury would result, from the manner in which he operated the crane on the occasion in question. It is true the crane was moved rapidly, but not more so, it appears, than was usual, or than the exigencies of the service reasonably required. It seems to have been moved in that way for a considerable length of time, without casualty of any kind. It is also true that he must have known that plaintiff and others were near the point to which the crane was being moved; but, in view of the fact that, to his knowledge, those employees, including plaintiff, knew the crane was then being operated, and must have expected it to be swung back to that place at any moment, and were re-

quired to keep a look-out for the crane and keep out of the way of it, had always previously done so, and could easily get out of the way at any time, he had no right to assume, and is not chargeable with reckless indifference to consequences in failing to assume, that plaintiff, in violation of his duty, would in this instance be and remain in a place of danger; and without such gratuitous assumption, it cannot be said that he acted with a consciousness that the result complained of would ensue. Of course, if, after seeing that plaintiff continued in a position of peril, Calahan had omitted any effort calculated to avoid the collision, such omission would have been conscious wrongdoing on his part, of which such willingness to injure the plaintiff as would authorize a recovery notwithstanding the latter's negligence could be predicated. *Georgia P. R. Co. v. Lee*, 92 Ala. 262, 9 So. 230; *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621. But the evidence is satisfying to the point that, as soon as plaintiff's peril became manifest, Calahan not only hallooed to him, but used every effort to stop the crane before it reached him, and in so doing broke the machine so that he lost control of it. The defense of contributory negligence is not overborne by proof of recklessness or wantonness on the part of Calahan."

⁴*Atlantic & R. Air Line R. Co. v. Myers* (1874) 53 Ga. 12; *Pierre v. Atlanta Cotton Mills* (1887) 79 Ga. 782, 4 S. E. 381. See *Shearm. & Redf. Neg.* § 103, for the cases involving injuries to strangers.

⁵*Savannah, F. & W. R. Co. v. Flanagan* (1889) 82 Ga. 579, 9 S. E. 471;

d. Illinois.—Under the doctrine formerly applied in Illinois the contributory negligence of a servant was a complete defense to his action where his negligence was gross,⁶ but not where his negligence was slight, and that of the employer was gross by comparison.⁷ This doctrine has been specifically rejected in the majority of the American states, and is now abolished even in Illinois.⁸ Under the present doctrine in that state a servant who has been guilty of contributory negligence is allowed to recover only when his employer has been wilfully negligent.⁹

e. Kentucky.—In chapter xxxv., *post*, it is shown that a servant's failure to exercise ordinary care is not sufficient to bar an action brought under the statute of 1854 for causing his death by wilful neglect. But the want of ordinary care will prevent recovery in a common-law action, however high the degree of negligence on the part of the defendant may have been,¹⁰—provided, that is to say, the circumstances were not such as to show a proper case for the application of the rule exemplified in § 327, *infra*.

f. Tennessee.—The rule prevailing in this state is that, if the defendant was guilty of a wrong by which plaintiff was injured, and the plaintiff was also in some degree negligent or contributed to the injury, the plaintiff's negligence should go in mitigation of damages, but cannot justify or excuse the wrong.¹¹

Central R. & Bkg. Co. v. Henderson (1882) 69 Ga. 715 (putting the case of a servant traveling on a pass and injured by the negligent operation of the train).

⁶ *Foster v. Chicago & A. R. Co.* (1876) 84 Ill. 164; *Chicago & N. W. R. Co. v. Donahue* (1874) 75 Ill. 106; *Illinois C. R. Co. v. Patterson* (1879) 93 Ill. 290. In one case a new trial was ordered, where the terms "want of ordinary care" and "gross negligence" were used as equivalents of one another in stating to a jury the rule of contributory negligence. *Chicago, B. & Q. R. Co. v. Avery* (1880) 8 Ill. App. 133.

⁷ *Calumet Iron & Steel Co. v. Martin* (1885) 115 Ill. 358, 3 N. E. 456; *Illinois C. R. Co. v. Hoffman* (1873) 67 Ill. 287; *Chicago, B. & Q. R. Co. v. Gregory* (1871) 58 Ill. 272; *Chicago, B. & Q. R. Co. v. Warner* (1887) 123 Ill. 38, 14 N. E. 206.

⁸ See *Shearm. & Redf. Neg.* § 102. An instruction implying that nothing but equality in negligence can prevent a recovery has been held erroneous in *Catawissa R. Co. v. Armstrong* (1865) 49 Pa. 186. The abolition of the doctrine in Illinois involves the consequence that

the failure of a servant to exercise ordinary care will always prevent recovery. Hence, an instruction that an employer is responsible for an injury to an employee resulting from the negligence of his servants, except when caused by a fellow servant of the injured party, or when the latter himself is guilty of gross negligence, is erroneous. *Chicago, B. & Q. R. Co. v. Rutka* (1895) 59 Ill. App. 56.

⁹ *Chicago & A. R. Co. v. Myers* (1901) 95 Ill. App. 578.

For a general review of the cases, showing how far the doctrine as to comparative negligence has been adopted in the United States, see Whittaker's *Smith, Neg.* ed. 1896, p. 463, note.

¹⁰ *Louisville & N. R. Co. v. C.* (1894) 16 Ky. L. Rep. 296, 27 S. W. 865. In this case it was said that gross neglect was not a synonym of the wilful neglect specified in the statute. The latter phrase denoting a higher degree of neglect than was known to the common law. But in the report of the case in (1890) 90 Ky. 560, 14 S. W. 543, gross and wilful neglect are used as interchangeable terms.

¹¹ *Louisville, N. & G. S. R. Co. v.*

The doctrine of the French law, as administered in Quebec, is stated in chapter XLVII., *post*.

315. Rule in the case of seamen.—Except in Tennessee (see chapter xxxv., *post*), the effect of contributory negligence, in the case of ordinary employees, is not merely to diminish the amount of damages recoverable, but to prevent recovery altogether.¹ But it is held in the Federal courts of the United States that the servant of a shipowner, who is injured by the negligence of agents for whose acts the employer is responsible, may recover damages, although his own negligence contributed to the injury. The amount recoverable depends on circumstances.² The rule thus applied seems to be different from that followed in England. See Beven, Neg. p. 207.

316. Contributory negligence of deceased servant bars action by personal representative.—The right of action given by the damage acts being coextensive with that which the injured person would have possessed if he had survived the accident, the personal representative of a servant killed through the negligence of his master or of an employee representing the master *ad hanc vicem* cannot recover if the decedent was guilty of contributory negligence.³

Fleming (1884) 14 Lea, 128. This rule was applied in an action by a servant in *East Tennessee, V. & G. R. Co. v. De Armond* (1887) 86 Tenn. 73, 5 S. W. 900; *Louisville & N. R. Co. v. Wallace* (1891) 90 Tenn. 53, 15 S. W. 921.

This doctrine is assumed in all the cases cited *passim* in this chapter.

The Max Morris (1890) 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29. The lower court in that case allowed one half the damages sustained, and the Supreme Court seems to approve of this application of the ordinary rule as to divided damages in cases of marine tort. But the amount in dispute was not sufficient to give the Supreme Court jurisdiction of the whole case, the decision being simply as to whether the contributory negligence of the plaintiff barred his action for damages; and the case leaves it an open question whether a judge might not, in his discretion, award a greater or less amount than one half the actual damages. This case was followed in *The Julia Fowler* (1892) 49 Fed. 277, in which it does not appear that the amount was fixed by any rigid rule of division.

Other cases which have applied the same principle are *Wm. Johnson & Co. v. Johanson* (1898) 30 C. C. A. 675, 58 U. S. App. 104, 86 Fed. 886; *The Cyprus* (1893) 55 Fed. 372 (partial dam-

ages allowed,—admiralty rule); *The Saratoga* (1898) 87 Fed. 349; *The Julia Fowler* (1892) 49 Fed. 277; *Anderson v. The Ashbrooke* (1890) 44 Fed. 124; *The City of St. Louis* (1893) 56 Fed. 720 (plaintiff was allowed the expenses incurred in being cured); *The Explorer* (1884) 20 Fed. 135; *The Wanderer* (1884) 20 Fed. 140; *The Teuro* (1887) 31 Fed. 158; *The Eddystone* (1887) 33 Fed. 925, in which the amount of the damages was treated as a matter in which the court might exercise a conscientious discretion.

The cases of *Peterson v. The Chandos* (1880) 6 Sawy. 544, 4 Fed. 645, and *Holmes v. Oregon & C. R. Co.* (1881) 6 Sawy. 275, 5 Fed. 523, hold that contributory negligence debarring the plaintiff entirely from a recovery must be regarded as being overruled by the above decisions.

In the recent case of *The Samuel S. Thorpe* (1900) 99 Fed. 108, some language is used which seems inconsistent with the doctrine of the Supreme Court. But the inability of the servant to recover was really put upon the ground that the ship owner was not negligent; and the remarks with reference to the servant's want of caution have no material bearing upon the decision.

¹ In *Senior v. Ward* (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur.

317. Contributory negligence as a defense to actions by parents for loss of services.— It is well settled that, where a parent is suing for loss of services arising from an injury received by his infant child, the law will not permit him to recover damages, if the evidence shows that the child's own negligence was an efficient cause of that injury.¹ This rule is applicable where the loss of services was the consequence of the parent's allowing a child of tender years to undertake an employment for which he was unfitted.² But in considering the question of the parent's negligence, he is entitled to the benefit of the presumption that the child will not be exposed to any risks but those properly incident to the position for which he is hired. The parent's failure to inquire as to the duties the latter would be required to perform in that position is not such contributory negligence as will prevent recovery.

N. S. 172, 7 Week. Rep. 261, the availability of the defense under such circumstances is thus discussed: "We conceive that the legislature, in passing the statute on which this action is brought, intended to give an action to the representatives of a person killed by negligence only where, had he survived, he himself, at the common law, could have maintained an action against the person guilty of the alleged negligence. Under the circumstances of this case could the deceased, if he had survived, have maintained an action against the defendant for what he suffered from the accident? We think that he could not; for although the negligence of the defendant might have been an answer to the defense that the accident was chiefly caused by the negligence of a fellow servant, the negligence of the plaintiff himself which materially contributed to the accident would, upon well-established principles, have deprived him of any remedy."

This rule has been explicitly affirmed in the following cases: *Central R. & Bkg. Co. v. Kitchens* (1889) 83 Ga. 83, 9 S. E. 827 (where Bleckley, Ch. J., made the characteristic remark that "indirect suicide gives no title to a post mortem award"); *Central R. Co. v. Sears* (1878) 61 Ga. 279; *Devine v. Savannah, F. & W. R. Co.* (1892) 89 Ga. 541, 15 S. E. 781; *Georgia, C. & N. R. Co. v. Hallman* (1895) 97 Ga. 317, 23 S. E. 73. It is also taken for granted in numerous cases cited in this chapter.

¹ See the cases cited in Shearn. & Redf. Neg. § 71, note 1.

² In *McCool v. Lucas Coal Co.* (1892) 150 Pa. 638, 24 Atl. 350, the supreme

court of Pennsylvania, in holding that a father who suffers his son of tender years to engage or continue in a dangerous service cannot recover for loss of his services where he is killed by going without direction to a dangerous place to comply with a proper order when there was a perfectly safe place, used the following language: "If the unfortunate boy, for the loss of whose services the father seeks compensation in this suit, had escaped death, and were here asking indemnity for injuries received while in the service of the defendant, it might be a question whether the employer did not owe him the duty of exercising such watchfulness and oversight, or at least giving such instruction and admonition, as would, with proper obedience on his part, have insured him against serious harm. But it is not his cause that is to be passed upon; it is that of an adult father, who, if he did not actually place his son in a dangerous service, at least suffered him to engage and continue in such service. Such sufferance is said to have the sense of permission, and where the danger is great, and the child is of tender years, it is said to be negligence *per se*." *Philadelphia & R. R. Co. v. Long* (1874) 75 Pa. 257; *Smith v. Hestonville, M. & F. Pass. R. Co.* (1880) 92 Pa. 450, 37 Am. Rep. 705. The father owes to his infant child the duty of protection, and this includes restraint from exposure to dangers, with which one of its years and discretion is unlit to cope. When this duty is neglected the father is said to be *in pari delicto* with a negligent defendant, and though the infant may recover against a wrongdoer for an injury

for an injury to the child, while engaged in performing duties which were outside the scope of the employment.³

The contributory negligence of a minor servant is a bar to an action brought by his parent for loss of services resulting from the injury.⁴

318. Negligence of another person; when imputed to servant.—

A full discussion of the nature and scope of the doctrine of imputed negligence does not fall within the scope of this treatise. For a review of the authorities, the reader is referred to general treatises on the law of negligence. But it will not be amiss to state the effect of the few cases in which the doctrine has been applied in actions by servants against their employers. One well-established rule is that the negligence of a superior servant in regard to matters affecting the safety of his subordinates cannot be imputed to them.¹ Another is that a servant is not chargeable with the negligence of a coemployee of the same grade as himself, even though the former may, for the time being, have a right to exercise some degree of control over the latter, in respect to the performance of the duties in which they are both engaged.²

In an action against a stranger the negligence of a coemployee is imputed or not to the injured servant, according as the former was or was not the agent of the latter. Such agency must be proved by specific evidence, and cannot be inferred merely from the fact of co-service.³

caused partly by his own imprudence, the father cannot. *Smith v. O'Connor* (1864) 48 Pa. 223, 86 Am. Dec. 582; *Gilman v. Hestonville, M. & P. Pass. R. Co.* (1868) 57 Pa. 172."

¹ *Texas & N. O. R. Co. v. Wood* (1893; Tex. Civ. App.) 24 S. W. 569.

² *Chicago & G. E. R. Co. v. Harney* (1867) 28 Ind. 28, 92 Am. Dec. 282, and cases cited in *Shearn. & Redf. Neg.* § 71, note 3.

³ *Hoben v. Burlington & M. River R. Co.* (1866) 20 Iowa, 562 (section boss managed hand car negligently); *Galbreath, H. & S. A. R. Co. v. Garteiser* (1895) 9 Tex. Civ. App. 456, 29 S. W. 939 (section boss failed to send out flagman in foggy weather).

A negligent disregard of rules by the superior servant who was in immediate control of the plaintiff cannot be imputed to him, but he will be debarred from recovery if he voluntarily joins his superior in breaking the rule. Thus a sectionman who, without hesitation or objection, gets on a hand car after a remark of the foreman which does not

amount to a command, but is a mere suggestion, put interrogatively to ascertain if the men are willing to take the car without taking the precautions prescribed by the rules to guard them against the regular trains, becomes a participator in the breach of such rules, and cannot recover for injuries caused by a collision with a special train which would have been avoided if the rules had been observed. *McGrath v. New York & N. E. R. Co.* (1885) 15 R. L. 95, 22 Atl. 927.

¹ The pilot of a tugboat, who is himself free from fault, may recover from the owner of a steamboat for injury by a collision caused by such owner's negligence, although negligence on the part of other employees on the tugboat contributed to the disaster. *Perry v. Lansing* (1879) 17 Hun. 34. See also *Chicago, St. P. & K. C. R. Co. v. Chambers* (1898) 15 C. C. A. 327, 32 U. S. App. 253, 68 Fed. 148 (fireman's negligence contributed to the injury of his engineer).

² See *Gray v. Philadelphia & R. R. Co.*

319. Negligence not predicable unless servant was aware of the conditions which caused his injury.—(Compare §§ 279a, 279b, 295, 298, *ante*, and § 366, *infra*.)—It is manifest that a servant cannot be deemed to have been in fault for the reason that he failed to take precautions which he did not know to be necessary for his safety.¹ Hence his action will not be barred on the ground that he was guilty of contributory negligence in respect to the act which was the immediate cause of his injury, unless it is shown that he knew, or ought to have known, of the material conditions which rendered the act, so done, an imprudent one.²

In the majority of instances the only specific subject of investigation is the servant's knowledge of the conditions from which his injury resulted. Obviously, if his excusable ignorance of these conditions is a proper inference from the facts in evidence, he cannot be declared, as a matter of law, to have been guilty of contributory negligence. Under these circumstances it is unnecessary for a court to pursue the inquiry into the second stage, by considering whether he comprehended the danger to which the conditions exposed him. This is the situation involved in the cases cited in the note below.³

(1885) 23 Blatchf. 263, 24 Fed. 168 (fireman held not to be chargeable with the negligence of his engineer); *Chicago, M. & St. P. R. Co. v. Chambers* (1895) 15 C. C. A. 327, 32 U. S. App. 253, 68 Fed. 148 (engineer held not to be chargeable with negligence of fireman).

In *Abbott v. Lake Erie & W. R. Co.* (1895; — Ind. —) 40 N. E. 40, it was laid down that the negligence of an employee engaged in holding a light for a coemployee at work under a car standing upon a track in such a position that he cannot observe the approach of cars, in failing to keep a lookout for approaching cars, is not attributable to the latter; but on the second appeal (1898) 150 Ind. 498, 50 N. E. 729, it was held that the jury should have been directed to consider whether the relation of principal and agent existed between the negligent and the injured servants.

Hatchins v. Johnson (1886) 105 Ind. 29, 55 Am. Rep. 169, 4 N. E. 172; *Douglas v. Allen* (1878) 6 Mo. App. 195.

"Negligence can only be affirmed in respect of situations and conditions known to the party to whom it is imputed." *Brown v. Louisville & N. R. Co.* (1895) 111 Ma. 275, 19 So. 1001.

Gannon v. Scammon Mills (1896) 165 Mass. 221, 43 N. E. 82; *Hawkins*

v. Johnson (1886) 105 Ind. 29, 55 Am. Rep. 169, 4 N. E. 172; *Boyer v. Chicago, M. & St. P. R. Co.* (1897) 103 Iowa 665, 72 N. W. 780; *Hollenbeck v. Missouri P. R. Co.* (1897) 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; *Johnson v. Oregon Short Line R. Co.* (1892) 23 Or. 94, 31 Pac. 283; *Crouse v. Union & N. W. R. Co.* (1899) 102 Wis. 196, 78 N. W. 416, 778; *Whitney v. Queens City Ice Co.* (1900) 49 App. Div. 185, 63 N. Y. Supp. 535; *Dzimburski v. J. I. Mott Iron Works* (1900) 56 App. Div. 58, 67 N. Y. Supp. 256; *Johnson v. Steam Gauge & Lantern Co.* (1893) 72 Hun. 535, 25 N. Y. Supp. 689; *Hess v. Ocean S. S. Co.* (1900) 56 App. Div. 259, 67 N. Y. Supp. 782; *Galveston v. Hermann* (1889) 72 Tex. 558, 11 S. W. 29; *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598 (electric engine); *Chicago & E. I. R. Co. v. Knapp* (1897) 74 Ill. App. 148, affirmed in (1898) 176 Ill. 127, 52 N. E. 927 (unsuitable coupling pin); *Hagan v. Chicago, St. M. & O. R. Co.* (1893) 89 Iowa 329, 56 N. W. 507 (d. c. railway track); *Brown v. Ohio & T. R. Co.* (1894) 138 Ind. 648, 37 N. E. 717, 38 N. E. 176 (brakeman, in haste dismounting from a moving train, stumbled over plank projecting slightly above the general level of a platform); *Leach*

v. New Orleans & N. E. R. Co. (1897) 40 La. Ann. 86, 21 So. 153 (railway servant struck guy wire of another company, which his own employers allowed to be maintained over the track); *Harg v. New York C. & H. R. R. Co.* (1889) 2 Sily. N. Y. 260, 21 N. E. 425, Affirming (1888) 47 Hun. 632 (car coupler fell into a ditch); *Leak v. Carolina C. R. Co.* (1899) 124 N. C. 455, 32 S. E. 884 (brakeman, while attempting to get on a moving car, was injured by the guying away of a defective stirrup); *Bomar v. Louisiana N. & S. R. Co.* (1890) 42 La. Ann. 983, 8 So. 478 (defective car belonging to another company); *Illinois C. R. Co. v. Cozby* (1898) 174 Ill. 109, 50 N. E. 1011, Affirming (1896) 69 Ill. App. 256 (brakeman's foot caught in a hole in the track while he was endeavoring to couple moving cars); *Hertrick v. Quigley* (1900) 41 C. C. A. 294, 101 Fed. 187 (brakeman stumbled over up turned plank after he had coupled two moving cars); *Donahue v. Boston & M. R. Co.* (1901) 178 Mass. 251, 59 N. E. 663 (switchman injured by pile of stones near track, while attempting to pump on a moving engine); *North Chicago Street R. Co. v. Dudgeon* (1900) 184 Ill. 477, 56 N. E. 796, Affirming (1898) 83 Ill. App. 528 (similar accident, where conductor of street railway car tried to mount a moving car); *Sullivan v. Thorndike Co.* (1899) 175 Mass. 41, 55 N. E. 472 (overloaded elevator fell, operator did not know how much it would carry safely); *Washington & G. R. Co. v. McBade* (1889) 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044 (inexperienced servant was injured in putting a belt on a pulley attached to a countershaft while it was in motion, there being no loose pulley and lever or shifter as there should have been); *Dorling v. Allen* (1878) 6 Mo. App. 195 (servant injured by projecting set-screw); *Tully v. New York & T. S. R. Co.* (1900) 162 N. Y. 614, 55 N. E. 1127, Affirming (1896) 10 App. Div. 463, 42 N. Y. Supp. 29 (inexperienced laborer fell down an open hatchway in a ship he was helping to load,—his own testimony was that he did not know it was open, and that he had been sent to that part of the ship without any warning); *Baker v. Maryland Coal Co.* (1896) 84 Md. 19, 35 Atl. 10 (miner injured by being crushed between a car and the side of a tunnel at a place where it had always been safe before the track was straightened); *McNamara v. Logan* (1893) 100 Ala. 187, 14 So. 175 (log

blocking wheels of car in mine caught in a dangerously narrow place in the tunnel, while running alongside a car); *Salem Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141, 38 N. E. 411 (servant who has no knowledge which would suggest that he should look for dangerous projections upon cars passing alongside an otherwise safe walk is not negligent in going upon the walk without looking to see if any car is approaching); *Juratzski v. Osmond & R. Mfg. Co.* (1900) 80 Minn. 333, 83 N. W. 389 (hood over blower of planer being defective, sleeve of servant's coat was drawn into it by the current of air, and his arm was injured); *Folk v. Schenker* (1898) 186 Pa. 253, 40 Atl. 401 (knot uniting two pieces of rope by which a weight was supported, slipped); *Cate v. Lawrence Mfg. Co.* (1901) 178 Mass. 295, 59 N. E. 650 (servant, not knowing that on the occasion of a former fire in a factory chimney, several burning planks had been thrown down by the man sent to put it out, stepped inside the chimney while the same man was putting out a second fire, and was struck and killed by a plank); *Lee v. American Mfg. Co.* (1901) 160 Mo. 608, 61 S. W. 678 (rods covering gearing had become so bent as to leave an opening); *McKreer v. Westinghouse Electric & Mfg. Co.* (1899) 194 Pa. 149, 44 Atl. 689 (servant's sleeve caught by broken edge of pulley across which he was reaching); *Flynn v. Shaw* (1901) 22 R. I. 328, 47 Atl. 883 (stones piled near trench fell on servant working in it).

A railway servant is not negligent, as a matter of law, in failing to look out for a structure dangerously close to the track, where he has no knowledge, actual or constructive, of the existence of such structure. *Boss v. Northern P. R. Co.* (1891) 2 N. D. 128, 49 N. W. 655; *Pikesville, R. & E. G. R. Co. v. State* (1898) 88 Md. 563, 42 Atl. 214 (street car conductor injured, while collecting fares, by a pole unusually near the track); *International & G. N. R. Co. v. Stephenson* (1899) 22 Tex. Civ. App. 220, 54 S. W. 1086 (engineer struck by small crane unusually close to track).

Contributory negligence is not inferable, as a matter of law, where, owing to the servant's having no time for examination, and being obliged to look down to see where to step, he was caught between a car, which he was pushing and a hook beside the track. *Stuckman v. Chicago & N. W. R. Co.* (1891) 80 Wis. 428, 40 N. W. 194.

A switchman who grasps a brake staff on the front of a flat car as it approaches him, for the purpose of mounting the car as his duties require him to do, and in the manner that he is expected to mount, is not, as matter of law, guilty of contributory negligence, although the staff is loose in its socket and is bent, where it appears to him to be straight, as the bend is directly away from him. *Prosser v. Montana C. R. Co.* (1895) 17 Mont. 372, 30 L. R. A. 814, 43 Pac. 81.

An effort by a railroad employee to couple cars with a drawbar which, just previously, had become fixed and failed to operate, is not necessarily negligent, where the bar had been shaken loose, and, had it been in order, it would probably have remained loose long enough to make the coupling. It is at least a question for the jury whether the plaintiff was warranted in making the second effort to effect the coupling. *Ousley v. Central R. & Bkg. Co.* (1890) 86 Ga. 538, 12 S. E. 938.

A brakeman is not, as matter of law, guilty of negligence in stepping between the rails of a smooth track to walk 20 or 25 feet to a switch in advance of cars moving at a rate of speed much less than his own, so as to prevent recovery for injury, from his foot being caught between the guard and main rails because of a defect in the blocking, of the existence of which he was ignorant, and which he had no reason to apprehend. *Kroener v. Chicago, M. & St. P. R. Co.* (1893) 88 Iowa, 16, 55 N. W. 28.

To give a water spout used in filling engines and water cars, a start upward in the usual manner after using it, by an employee who knows of no defect therein, is not negligence. *Texas & P. R. Co. v. Crow* (1893) 3 Tex. Civ. App. 260, 22 S. W. 928.

An inexperienced employee was not, as a matter of law, negligent in again attempting to feed a machine in the usual manner, after an indication of danger in doing so, where he did not know what he ought to do, and first applied for advice to the superintendent by a look, and received a laugh in reply, his knowledge of English being imperfect. Under such circumstances, he might not have known to what the unusual action of the machine was due, nor what he ought to have done under the circumstances. *Bijhjan v. Woonsocket Rubber Co.* (1895) 164 Mass. 214, 41 N. E. 265.

A servant is not negligent in failing

to provide for the contingency of the breaking of a chain, caused by a defect of which he could not have been expected to be aware. *Rooncy v. U.S.* (1883) 10 So. Sem. Cas. 4th Series, 1224; *Haskell v. Cape Ann Iron Works* (1901) 178 Mass. 485, 50 N. E. 1113 (chain broke from inherent defect).

A servant injured by the breaking of a supporting chain while he was handling iron girders cannot be declared negligent, as matter of law, in adopting a method of doing the work which was dangerous in case the chain gave way where the evidence fails to show that he had any knowledge as to the condition of the chain. *Vincent v. Allen* (1901) 62 App. Div. 538, 71 N. Y. Supp. 149. On the first appeal (1899) 45 App. Div. 627, 61 N. Y. Supp. 62, the plaintiff had been declared guilty of negligence, principally, as it would seem from a comparison of the two decisions because his own testimony showed that he knew the method of procedure to be unsafe.

Where a servant in a sawmill, while pulling backwards a slab that was too heavy for one man to carry, slipped on some wet bark and fell against certain cogwheels, his contributory negligence for the jury, if there is evidently that he had not been warned and did not know that the wheels were uncovered. *Siroboda v. Ward* (1879) 40 Mich. 420.

The defendant in an action for injuries caused by the bursting of a check valve in an air hoist was not exonerated from liability on the ground that plaintiff, who was operating the hoist, had the full pressure on, in violation of directions previously given, and hence was making an improper use of the apparatus, the evidence being that it was impossible for the operator to know the amount of pressure being used. *Shotton v. Walker & P. Mfg. Co.* (1901) 179 Mass. 307, 60 N. E. 782.

A servant is not to be held guilty of negligence in returning to protect his master's property (see § 361, supra) after he has reached a place of safety because some unforeseen cause intervenes which, concurring with the master's negligence, produces an injury which reasonable and prudent foresight could not have anticipated. *Palladin Palace Car Co. v. Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285, Affirming (1891) 41 Ill. App. 34.

Dropping the reins and gently lift-

Where several dangerous conditions combine to produce an injury the servant cannot be held guilty of contributory negligence, as a matter of law, where he knew of only a part of those conditions.¹

ing a sapling that has been bent across the road, after first applying the brakes to his wagon, by one employed as a driver and peddler, who has been informed and believes that he is driving a gentle team, is not such negligence, as matter of law, as will prevent a recovery against the employer for injuries inflicted by their running away. *Martin v. Wrought Iron Range Co.* (1893) 4 Tex. Civ. App. 185, 23 S. W. 387.

A mine employee, who has been injured by inhaling bad air while in the interior of a mine, was held not guilty of contributory negligence in going to his work because he knew that the air was bad at the entry, where it had been bad at the entry on previous occasions while it was safe in the interior. *Mosgrove v. Zimbleman Coal Co.* (1899) 110 Iowa, 169, 81 N. W. 227.

The question of contributory negligence on the part of a lineman killed by a shock from an electric current received from a wire he took up with his bare hands is for the jury, where he had, shortly prior thereto, seen another person handle the wire without injury. *Newark Electric Light & P. Co. v. McGilvery* (1898) 62 N. J. L. 451, 41 Atl. 955, Affirmed in (1899) 63 N. J. L. 591, 44 Atl. 637. Whether a lineman at work on a telegraph pole was guilty of contributory negligence precluding recovery for his death due to a shock of electricity communicated through an iron brace on the pole from an electric light wire not borne by the pole, but which came in contact with the brace, is for the jury upon the evidence that the facts that the electric-light wire and brace were in contact, and that the insulation of the wire at the point of contact had been worn off, were not observable to one standing on the ground, and that the deceased had no knowledge of the conditions, notwithstanding that he did not use gloves, it appearing that none were used by the employees of the telegraph company. *Dwyer v. Buffalo General Electric Co.* (1897) 20 App. Div. 124, 46 N. Y. Supp. 874. Where the evidence on the part of plaintiff tends to show that he was never before in that particular part of a room where he was injured by coming into contact with machinery which he did not see, owing to the obscurity; that he had no actual

knowledge of the location of the machinery; and that his general duties were not such as to require him to have such knowledge,—a finding of the jury that he was not guilty of contributory negligence will not be disturbed. *Garrison v. Schoenbacher* (1893) 99 Cal. 419, 34 Pac. 104.

Where a servant comes to his death by inhaling poisonous gases permitted to escape by the negligence of the master, while obeying an order of the master to remove some boards from the upper part of a building, he having no knowledge of the presence or existence of the gases, it is immaterial that he might have shortened the period of his exposure by ascending to the place of danger on a longer ladder than the one he used. *Citizens' Gaslight & Heating Co. v. O'Brien* (1886) 118 Ill. 174, 8 N. E. 310.

Evidence that plaintiff had said soon after the accident that he knew that the hole into which he fell was there is admissible, not only to contradict his testimony that he did not know of it, but to show his knowledge thereof. *Barker v. Lawrence Mfg. Co.* (1900) 176 Mass. 203, 57 N. E. 366.

A complaint which, in an action against a railroad company to recover for injuries sustained by an employee in coupling cars, avers that the injury was occasioned by stumbling over certain rubbish left on the tracks, which complainant had requested the company to remove, and which he supposed had been removed, and that, being between the cars, he could not see the rubbish when he was injured, is not defective, as showing that the employee was negligent. *Pittsburgh, C. C. & St. L. R. Co. v. Elwood* (1900) 25 Ind. App. 671, 58 N. E. 866.

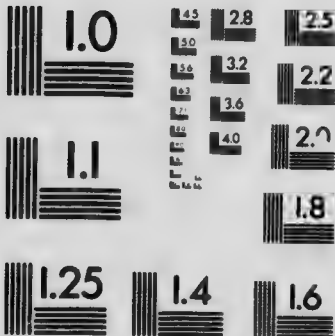
Where a brakeman attempted to uncouple a car at night, with knowledge of the absence of its drawhead and that it was coupled with an iron chain, and was crushed between the ends of the two cars, an action may be maintained for his death unless he also knew that the deadwood, bumpers, and crossbeam, which, if in place and in proper condition, were sufficient to hold the cars apart, were lost or worthless for the purposes intended. *Hannay v. Missouri P. R. Co.* (1899) 80 Mo. App. 667.

In *Illinois Steel Co. v. Schymanowski*



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An instruction on contributory negligence is not required where there is no evidence that the servant had any knowledge of such defective condition.⁵ But it is not error to leave a case to the jury under those circumstances with instructions that, if the servant knew of the defect and comprehended that it was dangerous to attempt to perform the duty which he was engaged upon when the injury was received, unless he took certain precautions, he was guilty of contributory negligence if, notwithstanding his knowledge, he undertook to perform the duty in question without observing the proper precautions.⁶

Where the servant was not chargeable with notice of the fact that the circumstances under which the course of action prescribed by the rule was to be followed had arisen at the time when the accident occurred.⁷

320. — and understood the dangers created by those conditions.—

In cases where the servant's knowledge of the conditions is not disputed, or is so apparent that a jury cannot be permitted to declare that he did not know of them, the essential question is whether he also comprehended the danger to which those conditions would subject him, if he pursued a certain course of conduct. Whenever the evidence is not such as to justify a court in saying that only an affirmative answer can be rendered to this question, it is for the jury to determine the quality of his act.¹

(1896) 162 Ill. 459, 44 N. E. 876, the court, after remarking that the servant usually "assumes" the risks of the service as increased by a known defect, states that this rule is subject to the qualification that "the servant is not chargeable with contributory negligence" if he knows that defects exist, but does not know, actually or constructively, that risks exist. See § 298a, *ante*. But as the actual ruling was that the plaintiff's knowledge of the insufficiency of the lights furnished for work on a dark and stormy night did not indicate that he knew of the unsafe condition of the pile of ore and of the risk in working near it, it is plain that the decision might better have been put on the ground that the material conditions creating the danger were not fully known to him.

⁵ *Denver Tramway Co. v. Crumbaugh* (1897) 23 Colo. 363, 48 Pac. 503.

⁶ *Herrick v. Quigley* (1900) 41 C. C. A. 294, 101 Fed. 187.

⁷ In *Chicago & A. R. Co. v. Stevens* (1901) 189 Ill. 226, 59 N. E. 577, Af-

firming (1900) 91 Ill. App. 171, it was held that negligence was not predicable, as matter of law, in regard to the act of a brakeman who transgressed a rule of the company in descending a moving car on the side towards a coal chute, the evidence being such that it was not certain that he knew or ought to have known that the car was drawing near the chute.

¹ *Collins v. Greenfield* (1898) 172 Mass. 78, 51 N. E. 454; *Mather v. Rillston* (1895) 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464 (plaintiff's own testimony not contradicted); *Chicago & E. I. R. Co. v. Knapp* (1898) 176 Ill. 127, 52 N. E. 927, Affirming (1897) 74 Ill. App. 148; *Leonard v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1896) 63 Minn. 489, 65 N. W. 1084; *Sueda v. Libera* (1896) 65 Minn. 337, 68 N. W. 36; *Wuotilla v. Duluth Lumber Co.* (1887) 37 Minn. 153, 33 N. W. 551; *Pruke v. South Park Foundry & Mach. Co.* (1897) 68 Minn. 305, 71 N. W. 276; *Durant v. Lexington Coal Min. Co.* (1888) 97 Mo. 62, 10 S. W. 484; *Victor*

The instructions should be couched in such language as to make it clear to the jury that the servant cannot be precluded from recovering on the ground of contributory negligence, unless he was chargeable with a knowledge not only of the defective conditions, but also of the dangers created by those conditions.²

Coal Co. v. Muir (1894) 20 Colo. 320, 26 L. R. A. 435, 38 Pac. 378; *Greenleaf v. Dubuque & N. C. R. Co.* (1871) 33 Iowa, 58; *Crocker v. Banks* (1888) 4 Times L. R. 324 (girl in soda-water factory failed to protect her face by a mask); *Bartolomeo v. McKnight* (1901) 178 Mass. 242, 59 N. E. 204 (unshored trench); *Scott v. Springfield* (1899) 81 Mo. App. 312 (side of trench fell in, owing to the bursting of a water pipe which was caused by blasting in the neighborhood); *Hobbold v. Chicago Sugar Ref. Co.* (1892) 44 Ill. App. 418 (dust and refuse matter, not being thoroughly removed from a kiln, ignited and exploded when water was thrown on it); *Gulf, C. & S. F. R. Co. v. Newman* (1901; Tex. Civ. App.) 64 S. W. 790 (rod was used to lift off the balance wheel of an engine and set the machinery in motion).

The foreman of a blacksmith shop is not, as a matter of law, guilty of negligence in using a wooden crane and chain furnished him for holding up heavy matter while working thereon, instead of using trusses, while working upon a shaft much heavier than usual, or in standing close to it while supervising the work. *Nichols v. Crystal Plate Glass Co.* (1894) 126 Mo. 55, 27 S. W. 516, 28 S. W. 991.

The question of contributory negligence is for the jury in an action against an elevator proprietor to recover damages for personal injuries sustained by a machinist who was engaged to repair a broken freight elevator carriage, where at the time of the accident he was at work on machinery, facing another workman, with his back to a passenger elevator, and was caught and pressed against the crossbar of the freight elevator by the elongation of the piston rod of the other elevator, which he testified he did not know was dangerous, or he would not have worked there. *Kann v. Meyer* (1898) 88 Md. 541, 41 Atl. 1065.

The rule that a man who voluntarily, i. e., unnecessarily, encounters a seen danger, which by ordinary care and attention to his own safety, he might have avoided, shall not recover, is applicable

only when the danger was visible and avoidable, so that a man with ordinary care of his own safety would avoid it, and be chargeable with want of ordinary care if he did not. Lord Young in *Grant v. Drysdale* (1883) 10 Sc. Sess. Cas. 4th series, 1159.

A servant is not guilty of contributory negligence where, owing to the lack of instruction, he does an act which he does not know to be likely to injure him. *Cleveland Rolling Mill Co. v. Corrigan* (1889) 46 Ohio St. 283, 3 L. R. A. 385, 20 N. E. 466, the court remarking: "Ignorance may be a misfortune, but when it is not wilful, and no duty arises to be informed with the means of information at hand, it is not negligence of which the person charged with the duty of giving proper instructions on the subject, which he failed to perform, can complain or take advantage."

A complaint alleging that plaintiff, while engaged in unloading boxes from a dump car, was injured by their having been carelessly and negligently placed on the car, sufficiently states a cause of action, since the servant is not bound to allege his ignorance of the defect in the machinery, but merely his ignorance of the risk of using it. *Derore v. St. Louis & S. F. R. Co.* (1900) 86 Mo. App. 429.

A general allegation that the plaintiff was free from contributory negligence is not overthrown by a specific averment of facts, unless they show that he knew, or had opportunity to know, of the danger. *Salem Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141, 38 N. E. 411.

A finding that the plaintiff ought to have known of the existence of a defect is not inconsistent with the absence of contributory negligence. *Le May v. Canadian P. R. Co.* (1890) 17 Ont. App. Rep. 293, affirming (1889) 18 Ont. Rep. 314.

² A requested instruction that an employee who voluntarily puts himself in a place of danger, and is injured in consequence thereof, cannot recover damages, is properly modified by adding the conditional clause, "if he appreciated the danger, or in the exercise of reasonable diligence ought to have been aware

In determining whether the danger was comprehended, it is, of course, material to consider the extent of the servant's experience. See chapter XXI., *post*. And compare §§ 394-397, *post*. Ordinarily, a servant who possesses special skill and experience will be unable to recover damages for an injury caused by his improper handling of an appliance with the properties of which he may be presumed to be perfectly well acquainted.³ On the other hand a dangerous mode of dealing with an appliance does not necessarily betoken negligence, where the servant was unfamiliar with the instrumentality which he was required to use.⁴

Another element for consideration in this connection is the opportunity which the servant may have had for acquainting himself with the peril incident to the situation which led to his being injured. See chapter XXI., *post*, and compare §§ 401-404, *post*.

321. Unexpected situations; negligence not predicable in regard to.—

of it." *Murphy v. City Coal Co.* (1899) 172 Mass. 324, 52 N. E. 503.

Instructions which predicate the insteate's contributory negligence on his doing certain acts, with which he was charged in a particular way, and premitting all inquiry as to the fact of whether or not he had knowledge that such acts were negligent, are erroneous. *Louisville & N. R. Co. v. Jones* (1901) 130 Ala. 456, 30 So. 586.

It is not error to charge that though the appliance was defective, and plaintiff knew, or by the use of ordinary care could have known, of the defect, yet, if the danger was not apparent, and would not have been apparent to him by the use of ordinary care, then he would not be guilty of negligence in trying to use it, if he otherwise used reasonable care. *International & G. N. R. Co. v. Gourley* (1899) 21 Tex. Civ. App. 579, 54 S. W. 307.

In an action for injuries caused by a defective machine, it was held to be improper to instruct a jury that, if they found that the servant was negligent and that his negligence was the direct cause of his injury, then, even though this machinery was defective, the servant was not entitled to recover if he knew of the defects. The position of the court was that, under such an instruction, the servant's negligence would only defeat recovery in case he knew of the defects, which is not the law. *Christianson v. Pioneer Furniture Co.* (1896) 92 Wis. 649, 66 N. W. 699. It would seem, however, that such an instruction might have been more properly pro-

nounced objectionable on the ground that it did not direct the attention of the jury to the necessity of proving that the servant was chargeable with a comprehension of the dangers created by the defects.

³ *Ray v. Jeffries* (1887) 86 Ky. 367, 5 S. W. 867. See also § 134, note 1, *ante*.

⁴ *James B. Clow & Sons v. Boltz* (1899) 34 C. C. A. 550, 9 Fed. 572; *The Lizzie Frank* (1887) 31 Fed. 477; *Hill v. Southern P. Co.* (1901) 23 Utah, 94, 63 Pac. 814.

An employee is not, as matter of law, guilty of contributory negligence in working next a pile of lumber piled without cross pieces, by the falling of which he is injured, unless he is sufficiently acquainted with the piling of lumber to know that lumber piled in that way is liable to fall. *Pilling v. Narragansett Mach. Co.* (1896) 19 R. I. 666, 36 Atl. 130. Whether an inexperienced person set to work at a planer, and injured while attempting to remove the shavings when the machine was in operation, is guilty of contributory negligence, is a question for the jury. *Bennett v. Warren* (1901) 70 N. H. 564, 49 Atl. 105. It is proper to instruct that in determining whether an employee injured by putting his hand in a linter to remove motes, as he had seen others do, was negligent, the breast board of the linter having been caused to jump by an accumulation of motes, of which he was unaware, his inexperience may be considered. *Hillsboro Oil Co. v. White* (1899) Tex. Civ. App. 54 S. W. 432.

Where the injury resulted solely from abnormally dangerous conditions of an essentially temporary and sporadic character, or from such conditions operating in combination with permanent defects in the plant, the absence of contributory negligence may often be referred to the conception that the situation which thus supervened was not one which the servant was required to anticipate.¹

"A person is not culpable and answerable at law for failure to avert or avoid peril that could not have been foreseen by one in like circumstances, and in the exercise of such care, as would be characteristic of a prudent person so situated." *Turner v. Goldsboro Lumber Co.* (1896) 119 N. C. 387, 26 S. E. 23.

A car repairer is not, as matter of law, guilty of contributory negligence in placing a plank a foot wide edgewise on his shoulder next to cars on a side track crossed by him, so as to cut off his vision and deaden his sense of hearing, where he had good reason to believe that such cars would not be moved because of the presence of a flag showing that they were being repaired. *Southern P. Co. v. Wellington* (1896; Tex. Civ. App.) 36 S. W. 1114. In a case where a servant was thrown off a car in a work train by a sudden jerk resulting from the fact that a car was cut off behind and more steam put on, it is not error to allow him to show that the occurrences which thus caused the injury were unusual. *Jeffrey v. Keokuk & D. M. R. Co.* (1881) 56 Iowa, 546, 9 N. W. 884. In a case where defendant's tracks at a certain point in a yard were frequently covered with smoke, and plaintiff's decedent was on a hand car which proceeded along the main track through the smoke, behind an incoming train, and collided with a switch engine which came on to the same track from the opposite direction, immediately after the incoming train had passed, it was held that a charge which purported to show all the circumstances which, if proved, would preclude recovery, was properly refused, for reason that it made no reference to the unusual speed of the switch engine in coming out on to the main track. *Woodward Iron Co. v. Herndon* (1901) 130 Ala. 364, 30 So. 370.

An employee is not guilty of contributory negligence, as matter of law, in attempting to pass between a bunting post and a standing car about 3 feet distant, upon which the brakes were set,

in the performance of his duty, precluding recovery for his death from being crushed between such post and car, owing to the sudden and violent striking of other cars against the standing car. *Murray v. Fitchburg R. Co.* (1896) 165 Mass. 448, 43 N. E. 190. The considerations emphasized were that the employee had no reason to anticipate such an accident, that the route taken was apparently a safe one, and that cars approaching the stationary ones could not be seen on account of a curve. One working in a shallow trench under the tracks of a cable-car line in reliance upon the assurance of his superior that no car will pass over the place where he is working is not, as matter of law, guilty of contributory negligence in instinctively placing his hand on the track under a car in consequence of the vibration of the cable near his head, in the absence of timely notice to him of the approach of the car, or of knowledge on his part that the car, having stopped, would proceed in its transit before he could relax his grasp and change his position. *Floettl v. Third Ave. R. Co.* (1896) 10 App. Div. 308, 41 N. Y. Supp. 792. The decision on the second appeal (1897) 19 App. Div. 136, 45 N. Y. Supp. 980, was put upon a different ground. See § 360, *infra*.

A female servant who puts her arm inside a machine for the purpose of cleaning it is not, as matter of law, guilty of negligence, so as to be unable to recover for injuries caused by the machine starting of itself, when she had never known it so to start, although she did know that other machines equipped with other pulleys and belts had started in this manner. *Donahue v. Brown* (1891) 154 Mass. 21, 27 N. E. 675. An employee is not, as matter of law, guilty of negligence in proceeding to oil a machine, in accordance with orders and in the usual manner, while the belt is off from the machine for repairs, which will prevent his recovery for injuries from the sudden starting of the machine by the putting on of the belt by the superintendent of the factory, where he is not

322. Incurring of known danger; negligence not necessarily predicable with regard to.—(Compare § 341, note 1, *infra*.)—The cases to which the principle discussed in the last three sections is exclusively applicable are those in which it is assumed not only that the dangers in question were avoidable if the servant had acted prudently after he had become aware of them, but also that they were such as no prudent man would have encountered. It cannot be laid down as a universal rule that knowledge of a danger is conclusive evidence of negligence in failing to avoid it,¹ or that the fact that the servant vol-

aware that such superintendent has come with another belt and has no intimation that he is about to put the machine in motion, and, because of his stooping position and the attention required by his work, he does not see the superintendent come into the room, or the belt put on. *Hughlett v. Ozark Lumber Co.* (1893) 53 Mo. App. 87. That a machine which an employee is repairing is set in motion by power communicated by him to any part thereof does not prevent a recovery for an injury which would not have happened but for the fact that the power was on without his knowledge, and contrary to his reasonable expectation. *Martineau v. National Blank Book Co.* (1896) 166 Mass. 4, 43 N. E. 513. An employee engaged in driving piles is not, as a matter of law, guilty of negligence in placing his hand on the top of a pile, directly in the line of descent of the driving hammer 5 feet above his hand, while he is swinging the pile into position, as the fall of the hammer at such time is not to be expected. *McPhee v. Scully* (1895) 163 Mass. 216, 39 N. E. 1007. One who, as was customary, inclined his head within an elevator shaft to hear orders given from another floor, and was injured by the fall of an unloaded dumb-waiter, is not guilty of contributory negligence because he did not look for danger where there was no reason to suspect it. *Winkelmann & B. Drug Co. v. Colladay* (1898) 88 Md. 78, 40 Atl. 1078. An experienced machinist did not, as matter of law, voluntarily assume the danger from flying chips of steel from his machine by leaving the head of the machine and going to a lunch box some 8 or 10 feet distant, and then turning round and facing the machine, which was working regularly, where this machine only threw chips occasionally, and gave notice by its irregular action when it was about to do so. *Denning v. Midvale Steel Co.* (1899) 192 Pa. 182, 43

Atl. 965. Whether an employee was guilty of contributory negligence in not anticipating and avoiding injury is a question of fact for the jury to determine, where he was injured by a shaver of steel projected from the worn edges of a claw-bar used in his employment when it was struck a blow with a hammer. *Booth v. Kansas City & I. Ry. Co.* (1898) 76 Mo. App. 516. The foreman in a dimly lighted kiln, whose duty requires him to keep the shafting clean and oiled, is not, as matter of law, guilty of contributory negligence in getting so close to an unguarded shafting that his clothing is blown in to it by a draft of wind, while he is attempting to discover by means of his hearing the exact location of a squeaking noise in the shafting. *Knuth v. Geo. A. Weiss Milling & Elevator Co.* (1897) 72 Ill. App. 389. Where a carpenter in leaving the building where he is working, by a dark passageway, becomes confused as to his whereabouts and falls through an opening in the floor, testimony going to prove that it is not the custom of builders to light up such openings in a building which is under construction is competent, in connection with testimony as to the carpenter's experience in such work, since it tends to show what he had reason to expect, and therefore whether he was in the exercise of due care. *Murphy v. Gochen* (1888) 146 Mass. 196, 15 N. E. 651.

A plea is sufficient as an allegation of contributory negligence, where it states that the plaintiff went under a car at nighttime to repair it, without putting out a signal flag or notifying anyone, when he knew, or ought to have known, that cars would "probably" be switched at any moment on to the side track where the car was standing. *Alabama G. S. R. Co. v. Roach* (1895) 110 Ala. 266, 20 So. 132. See also § 355, *infra*.
¹*Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506.

untarily took some risk is conclusive evidence, under all circumstances, that he was not using due care.²

His knowledge of the abnormal conditions is only one of the probative facts from which the ultimate fact of negligence must be determined.³ That he exposed himself to dangers which he could have avoided imports negligence only where they were so great or so imminent that a man of ordinary prudence would have refused to encounter them in the performance of his duty.⁴ But if a servant is advised of a particular danger, and of the proper precautions to avoid it, it is no excuse for a negligent exposure of himself to this danger, or for a negligent omission of such precautions,

A special finding to the effect that the plaintiff, by the exercise of ordinary prudence, could have known that it was dangerous to do work in a certain way is not necessarily inconsistent with a general verdict against the defendant. *Barber v. Rembarz* (1894) 150 Ill. 192, 37 N. E. 239.

²In *Laureless v. Connecticut River R. Co.* (1883) 136 Mass. 1, a case in which a brakeman was injured by the overlapping of drawheads, it was held that the following instruction was properly modified by the insertion of the clause in brackets: "If the plaintiff knew that the drawbars were of unequal height, and that there was danger of their passing each other [and knew the probability and extent of the danger thereby], and rode upon the platform of the engine when about to make the coupling, then he was not in the exercise of due care. The court said: "The plaintiff was engaged in performing the duty required of him, and it was necessary that the cars should be moved quickly to make way for an expected train. If the plaintiff had the knowledge supposed in the requests for instructions, the question of his due care depended to some extent upon the view the jury might take of his necessity for immediate action, the distance the bunters would have to pass each other before the car and engine would come so near together as to injure him, the speed at which the engine was moving, the knowledge he had that the engineer knew the danger, the confidence he was entitled to have that the engineer would so manage the engine as not to injure him, the reliance he was reasonably entitled to place upon his ability to make the connection so as to prevent the bunters passing, and probably other circumstances."

It is not necessarily negligence on the part of a servant to attempt, in compliance with a request, to repair a machine which is out of order. *Martineau v. National Blank Book Co.* (1896) 166 Mass. 4, 43 N. E. 513.

An employee is not chargeable with negligence in respect to working in a dangerous place, merely because he works under a running belt, if there is nothing more to indicate that it is not a proper place. *Kaiser v. Flaccus* (1890) 138 Pa. 332, 22 Atl. 88.

The fact that a servant knows there is some danger in passing over stairs slippery with ice does not, as a matter of law, show that he is negligent in attempting to make the passage. To warrant the court in pronouncing him to be negligent, it must appear that he knew that the stairs were so slippery that it would be careless to try to use them. *Mahoney v. Dore* (1892) 155 Mass. 513, 30 N. E. 366. See also § 341, note 17, *infra*.

³*Sanborn v. Madera Flume & Trading Co.* (1886) 70 Cal. 261, 11 Pac. 710. "Knowledge of a danger possessed by a given person whose conduct comes into question forms a very important element to consider in ascertaining whether his action in its presence was careful, or the reverse, but it is not always conclusive of that issue. The complete facts of each case must be noted to determine what weight and significance such knowledge should have." *Aborn v. Chicago & A. R. Co.* (1891) 108 Mo. 81, 18 S. W. 188.

⁴*Louisville, N. A. & C. R. Co. v. Hobbs* (1891) 3 Ind. App. 4, 29 N. E. 934.

that he did not realize the full magnitude of the injury which would result therefrom.⁵

323. Servant's negligence not a bar to his action unless it was an efficient cause of his injury.—(See also chapter XLII., *post.*)—In one case it was said that a "servant takes the chances of his own negligence."¹ In another it was laid down that a servant assumes the risk of his own negligence.² In others the availability of the defense of contributory negligence has been referred to the theory of an implied undertaking on the servant's part to exercise reasonable care to avoid injury.³ But it seems to be unnecessary, if not logically erroneous, to introduce in this connection, the notion of a duty resting upon a contract.⁴ It is submitted that there is no adequate reason for taking this position that the defense of contributory negligence, when viewed as a bar to an action by a servant against his employer, is based upon a conception different from that to which it is always referred when the action is brought by or on behalf of a party between whom and the defendant there were no contractual relations at the time the accident occurred,—the conception, namely, that no one is entitled to recover an indemnity for an injury of which his own want of care was, either wholly or partially, the efficient cause.⁵ This incapacity may be treated as being deducible from one or other of two possible theories of the juristic situation.

On the one hand the servant's negligence may be regarded as an efficient cause, in such a sense that the injury would have been avoided if he had not been negligent. This point of view is apparent in those numerous cases in which the servant has been declared or denied to have been guilty of contributory negligence, according as he could

¹ *Truntle v. North Star Woolen-Mill Co.* (1894) 57 Minn. 52, 58 N. W. 832.

² *Stringham v. Hilton* (1888) 111 N. Y. 188, sub nom. *Stringham v. Stewart*, 1 L. R. A. 483, 18 N. E. 870.

³ *Malcolm v. Fuller* (1890) 152 Mass. 160, 25 N. E. 83.

⁴ *Lake Shore & M. S. R. Co. v. McCormick* (1881) 74 Ind. 440; *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 152, 5 N. E. 187.

⁵ The doctrine propounded in the cases just cited may possibly be regarded as an outcome of the curious laxity with which the defenses of assumption of risks and contributory negligence have sometimes been treated by the courts. See chapter XVIII., subtitle B, *ante*.

⁶ See 1 Beven, Neg. pp. 168 *et seq.*; Shearm. & Redf. Neg. § 63.

"The plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident." *Radley v. London & N. W. R. Co.* (1876) L. R. 1 App. Cas. 754, 40 L. J. Exch. N. S. 573, 35 L. T. N. S. 637, 25 Week. Rep. 147, per Lord Penzance.

"Contributory negligence in a plaintiff only means that he himself has contributed to the accident in such a sense as to render the defendant's breach of duty no longer its proximate cause." Bowen, L. J., in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 694, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516.

or could not have prevented the accident by the exercise of proper care.⁶

On the other hand the inability of a servant to cover for an injury to which his own negligence contributed may be put upon the ground that, under such circumstances, the injury was the result partly of the negligence of the master and partly of the negligence of the servant, the consequence being that, as they have each been in fault, neither is entitled to recover damages from the other.⁷

Evidence as to the servant's negligence, which could have no bearing on the case if the injury was caused as alleged, is immaterial on the question of contributory negligence.⁸

The question whether the plaintiff's negligence was an efficient

⁶ See, for example, *Washington & O. R. Co. v. McDade* (1890) 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1014; longer solely by the negligence of the defendant." Lord Esher in *Thomas v. Smith v. Irwin* (1889) 51 N. J. L. 507, 18 Atl. 852; *Michael v. Stanley* (1892) 75 Md. 464, 23 Atl. 1094; *Louisville & A. R. Co. v. Fox* (1897) 20 Ky. L. Rep. 57, 42 S. W. 922.

Contributory negligence on the part of an employee injured through the employer's negligence is the want of ordinary care and prudence, without which the injury would not have occurred. *Bonar v. Louisiana, N. & S. R. Co.* (1890) 42 La. Ann. 983, 1206, 8 So. 478, 9 So. 244. Under the English employers' liability act of 1880, and the American and colonial statutes modeled upon it, in which a servant is declared to be entitled to recover for an injury "caused" by a defective condition of the plant (see chapter X.), it is clear that the servant's negligence does not exist as an immediate cause of the accident, but as a servant's own negligence. See *Connell v. Connah's Quay Alkali Co.* (1885) 33 Week. Rep. 216, where this specific ground was assigned for denying recovery in a case where the plaintiff signaled for the starting of a locomotive before a brake, known to him to be defective, had been prepared for use by a temporary device.

⁷ In an action for injuries arising from negligence it always was a defense that the plaintiff had failed to show that, as between him and the defendant, the injury had happened solely by the defendant's negligence. If the plaintiff, by some negligence on his part, directly

contributed to the injury, it was caused by the joint negligence of both, and no recovery could be had. Lord Esher in *Thomas v. Smith* (1889) 51 N. J. L. 507, 18 Atl. 852; *Michael v. Stanley* (1892) 75 Md. 464, 23 Atl. 1094; *Louisville & A. R. Co. v. Fox* (1897) 20 Ky. L. Rep. 57, 42 S. W. 922.

"To warrant a recovery, it must appear that the injury was caused by the want of ordinary care on part of the employer; and the injury is not so caused when it is caused by the want of ordinary care on part of the employer, combined with want of ordinary care on part of the employee. If it took the want of ordinary care of both the employer and employee to produce the injury, both are at fault, and there can be no recovery by either. Where both parties are negligent, and the injury is caused by such combined negligence, there can be no recovery by either party." *Pittsburgh & W. Coal Co. v. Estierneard* (1895) 53 Ohio St. 43, 40 N. E. 725.

"A defense of contributory negligence is only an amplified form of denial that the injury was caused by the negligence of the defendant." *M'Eroy v. Waterford S. S. Co.* (1886) Ir. L. R. 18 C. L. 159, 165.

To entitle a servant to recover, he must show that the master was wholly in fault. *Sunney v. Holt* (1883) 15 Fed. 880 (charge to jury).

⁸ *Consolidated Coal Co. v. Bokamp* (1898) 181 Ill. 9, 54 N. E. 567, *Affirming* (1897) 75 Ill. App. 605.

cause of his injury is for the jury when the facts are in dispute, or more than one conclusion may reasonably be drawn from those facts.

Otherwise, this question is for the court. See cases cited in the next section.

The instructions in any case in which the defense of contributory negligence is relied upon should be couched in phraseology which will make it clear to the jury that, on the one hand, the servant cannot maintain the action if his negligence was an efficient cause of his injury, and that, on the other hand, his negligence will not debar him from recovery, unless it was an efficient cause of his injury.¹⁰

An independent act of negligence on the servant's part, subsequent

¹⁰ *Lake Shore & M. & R. Co. v. Parker* (1890) 131 Ill. 557, 23 N. E. 237.

It is for the jury to say whether there is a causal connection between the breach of a rule which required that employees who entered the blow pit of a pulpmill for the purpose of washing the pulp should shovel the pulp off the plank walk on which they stood while doing the washing, and an injury which one of such employees received through being forced off the walk into the pulp by a jet of steam from the blow pipe, which would have been cut off by the time he came opposite the pipe if he had proceeded in the first place to shovel off the pulp. *Fickett v. Lisbon Falls Fibre Co.* (1898) 91 Me. 268, 39 Atl. 996.

In *Lake Erie & W. R. Co. v. Craig* (1896) 19 C. C. A. 631, 37 U. S. App. 654, 73 Fed. 642, where a brakeman who had, in violation of a rule, attempted to couple cars while in motion, caught his foot in an unblocked frog, and was run over, the court said that the question presented was whether the intervention of the unblocked frog was, as distinguished from the original negligence of Craig in going between the moving cars, so new and independent a cause of the injury that it was the sole proximate cause; and proceeded thus: "Much reliance was placed by the defendant in error on the case of *Smithwick v. Hall & C. Co.* (1890) 59 Conn. 261, 12 L. R. A. 279, 21 Atl. 924 (see § 324, note 2, *infra*). In that case a workman had been warned not to go to the end of an unfenced platform, because of the danger of slipping on the ice which was there, and falling off to the ground below. He went there, nevertheless, and while there the wall of an adjacent building fell on him and he was injured. The supreme court of Er-

rors of Connecticut held that his negligence in not heeding the warning was not contributory to the injury which happened to him. The case is easily distinguished from the one at hand. There the injury which happened proceeded from a manifestly different cause from that which the plaintiff had been warned against, and, while he might have assumed the risk from the one, he did not assume the risk from the other. Here, if the jury were to find that the accident, as it happened, by the cutting of the foot in the frog, was entirely different in its character from that which the plaintiff might have expected by falling over any obstruction, or by slipping, they would be at liberty to decide, and to find that his negligence in going between two rapidly moving cars was not a proximate cause of the accident. All that we hold is that the jury might reasonably have found, from the evidence in this case, that the danger from the frog was not substantially different from the dangers which he had reason to anticipate, and, therefore, that his negligence did contribute to the accident, as a proximate cause. Hence the question of proximate cause should have been submitted to the jury."

"It is proper to give an instruction to the effect that contributory negligence by an employee precludes recovery for personal injury resulting in whole from the employer's neglect of his duty to use ordinary care to provide safe and safe machinery. *Mulligan v. Montana Union R. Co.* (1897) 19 Mont. 145, 47 Pac. 795. A charge that, if the plaintiff, in doing the act which he was engaged in when the accident occurred, was negligent, and if, but for such negligence, he would not have been injured, he cannot recover, is not objectionable as tending to confuse or mislead the

in point of time to the accident, and not committed in the discharge of his duties, is not regarded as a circumstance which interrupts the chain of causation between the employer's negligence and the final results of that negligence.¹¹

The mere fact that, if the servant had not done a certain act, he would not have been injured, is, of course, not a bar to his mainte-

jury. *Texas & P. R. Co. v. McCoy* *Delaware, L. & W. R. Co.* (1895) 92 (1897) 17 Tex. Civ. App. 494, 44 S. W. 2d. Hun, 74, 36 N. Y. Supp. 339.

An instruction to the effect that if a railroad employee is injured solely on account of negligence in disregarding the rules of the company, he cannot recover, is erroneous, because it is calculated to mislead the jury into the error of finding in his favor in case his negligence only contributed to the injury. *Hoda v. Chicago, R. I. & P. R. Co.* (1886) 69 Iowa, 104, 28 N. W. 488.

It is error to give a charge ignoring the effects of the plaintiff's contributory negligence, where evidence is offered which tends to sustain the defense. *Meredith v. Cranberry Coal & I. Co.* (1888) 99 N. C. 576, 5 S. E. 659; *Louisville & N. R. Co. v. Robinson* (1868) 4 Bush, 507.

An instruction which tells the jury without qualification that the servant cannot recover if he failed to use ordinary care is erroneous. They should be told that his action is barred, and then only when his negligence was the proximate cause of the injury. *Smith v. Irwin* (1889) 51 N. J. L. 507, 14 Atl. 552; *Farley v. Charleston Basket & Veneer Co.* (1897) 51 S. C. 222, 28 S. E. 193, Rehearing Denied in (1897) 51 S. C. 244, 28 S. E. 401; *Savannah, F. & W. R. Co. v. Barber* (1883) 71 C. 644; *Youngblood v. South Carolina R. Co.* (1900) 60 S. C. 9, 38 S. 232; *Louisville v. Palmer Mfg. Co.* (1900) 60 S. C. 153, 38 S. E. 430; *Bonner v. Moore* (1893) 3 Tex. Civ. App. 342, 22 S. W. 272; *Gulf, C. & S. F. R. Co. v. John* (1895) 9 Tex. Civ. App. 342, 29 S. W. 558; *Houston & T. C. R. Co. v. Kelley* (1896) 13 Tex. Civ. App. 1, 34 S. W. 809, Rehearing Denied in (1896) 13 Tex. Civ. App. 25, 46 S. W. 863.

An instruction that negligence on the part of an employee contributing to his death will not prevent a recovery against the employer for his negligence, where death would have occurred if there had been no negligence on the part of the former, is correct. *Kuhn v.*

A charge given that, if plaintiff's conduct was the "efficient cause" of the accident, he could not recover, is not substantially different from a requested charge that he could not recover, if it "contributed directly and proximately" thereto. *Houston & T. C. R. Co. v. Higgins* (1900) 22 Tex. Civ. App. 430, 55 S. W. 744.

In a case where an employee in a mine was injured through the collision of some cars which he was operating, with some rocks which had fallen from the roof of a tunnel, and the only negligence alleged on his part to which the instruction could apply was that he tried to operate too long a train of cars, it is proper to refuse to charge the jury that, if they believed from the evidence that plaintiff did any careless or negligent act which materially contributed to his injury, he cannot recover. *Consolidated Coal Co. v. Bokamp* (1899) 181 Ill. 9, 54 N. E. 567, Affirming (1897) 75 Ill. App. 605.

In Texas an instruction to the effect that, if the plaintiff was running his engine at a forbidden rate of speed when it was derailed and injured him, he cannot recover, has been declared erroneous both on the ground that the trial judge cannot, in that state, declare that any act or omission constitutes negligence, and on the ground that it allows the jury to find for the plaintiff irrespective of whether the excessive speed was the cause of the injury. *Gulf, C. & S. F. R. Co. v. John* (1895) 9 Tex. Civ. App. 342, 29 S. W. 558.

The fact that a servant, in an action against the master for personal injuries, disobeyed the instruction of his physician in taking improper exercise, thereby contributing to his diseased condition, will not prevent a recovery of damages for the original injury, but is merely a ground for reducing the amount of damages. *Standard Oil Co. v. Bowler* (1895) 141 Ind. 12, 40 N. E. 128.

nance of an action if that act was not a culpable one, considering the circumstances.¹²

324. Illustrative cases turning upon proximity of cause.—Under one or other of the aspects mentioned in the last section the negligence of the injured servant has been declared or denied to be a bar to an action, on the explicit ground that it was or was not the proximate cause of the injury, in various cases presenting circumstances varying and bringing them under one or other of the categories of culpable conduct enumerated in the next subtitle. The same principle is, of course, impliedly recognized in all the other decisions cited in this chapter.

In a portion of the cases the servant's negligence, which is affirmed or denied to have been the efficient cause, consisted merely in a breach of his general duty to conduct himself as a prudent person would have done under the circumstances.¹ In other cases the servant is charged

¹ "A delay of a brakeman, to put on his overcoat and gloves,—rendered necessary by the weather,—after being ordered to the top of the cars by the conductor, is not negligence contributory to injuries received while climbing a ladder at the side of the car, from a rock projecting too near the track, although by instant obedience he might have reached the roof before the car passed the obstruction." *Georgia P. R. Co. v. Davis* (1891) 92 Ala. 300, 9 So. 252.

¹ (a) *Recovery denied.*—An experienced section hand who, knowing the danger, releases his hold on the handle of a hand car upon which he is riding, which he knows to be necessary to support his equilibrium, and steps upon the track in front of a moving car, and there stands still or walks toward it,—is guilty of such negligence as will preclude his recovery, notwithstanding negligence on the part of the railroad company in supplying defective cars. *Chicago & N. W. R. Co. v. Davis* (1892) 3 C. C. A. 429, 10 U. S. App. 422, 53 Fed. 61.

A brakeman who stands with his left arm against a stationary car waiting for a moving car to come, and while feeling for the coupling-pin has his arm caught between the dead ends, assumes the risk, and cannot recover because the track was not ballasted, although this made it more difficult to reach the pin and drawbar. *Mueller v. Lake Shore & M. S. R. Co.* (1895) 105 Mich. 77, 63 N. W. 416. A railroad company is not liable for the death of a brakeman because of its failure to provide whipping straps for the purpose of giving warning

of the approach to a bridge, where there is sufficient room for a man standing erect at the center of the car when a brakeman's duties require him to be, and such brakeman was familiar with the condition of the bridge, and was killed while sitting on the side of the car with his feet hanging over the edge in a position where such straps would be of no service. *Schluff v. Louisville & N. R. Co.* (1893) 100 Ala. 377, 14 So. 103. A railroad employee who, while on duty, goes from the coach to the engine, where neither necessity nor duty binds him, and, in negligently attempting to return to the coach while the train is in rapid motion on a sharp curve, falls between the engine and coach and is injured, cannot recover against the company, even though the engineer was also negligent or although the fall was caused by a defective air brake. *McDaniel v. Highland Ave. & Belt R. Co.* (1889) 90 Ala. 64, 8 So. 41. A miner cannot recover for a personal injury due to the falling of a portion of the roof of a mine where he was working, when the proximate cause was his omission to perform his duty, after a blast, of examining the roof and placing necessary props to support it, notwithstanding the mining boss employed did not have the certificate required by the Pennsylvania mining act of 1885, and a stretcher was not kept at the mine as required by the act. *Christner v. Cumberland & E. L. Coal Co.* (1892) 146 Pa. 67, 23 Atl. 221. Contributory negligence on the part of the servant is a bar to his recovery for injuries which would not have been sustained but for the concurring negligence

of an incompetent fellow servant, with which, in the absence of such contributory negligence, the master would have been chargeable. *Turner v. Chicago & N. W. R. Co.* (1893) 54 Mo. App. 523. Neglect of an employee engaged in drilling holes for blasting, to make an examination to ascertain whether a blast had exploded in a hole which he was directed to clean out, is the proximate cause of his injury by the explosion of such blast while he is holding the drill in cleaning the hole, which will prevent his recovery, although the foreman directing the work was also negligent in making examination. *Scotton v. Turner* (1892) 89 Va. 841, 15 S. E. 802. A master is not liable for injuries to an employee who, while negligently attempting to shift a belt upon a running shaft by hand, instead of using the belt shifter, was caused by the motion of the belt to step upon the outer edge of a platform which tipped under his weight and precipitated him to the floor below, although the master was responsible for the condition of the platform. *Hearing v. Bassett* (1899) 39 App. Div. 196, 57 N. Y. Supp. 230. A servant who, after being warned against doing so, handles a telegraph wire negligently left hanging down over an electric light wire, cannot recover. *Hearing v. Western U. Tel. Co.* (1890) 41 Fed. 864. An employer is not liable to an employee who has been engaged for eight or nine weeks in pushing a coal car into an elevator car which is not provided with automatic gates, as required by statute, running the elevator to the roof, and pushing the coal car out to a chute, and dumping it and returning, for an injury which happens by reason of the elevator's descending without fault of the employer, and the employee's pushing the coal car into the elevator well and falling with it. *Keenan v. Edison Electric Illuminating Co.* (1893) 159 Mass. 379, 34 N. E. 366.

The court remarked that, although very possibly a guard would have prevented the injury, the servant's conduct was nearer to the event. The negligence of a brakeman in riding on the brake beam of an engine at a place where he could not alight except upon an open trestle and out of sight of the engineer or fireman, and known by him to be dangerous, when a safe place was provided in the cab of the engine, is the proximate cause of his death caused by contact with a gate left unfastened so as to swing across the track. *Bentley v. Lake Shore & M. S. R. Co.* (1894) 102

Mich. 72, 60 N. W. 286. Affirmed on rehearing in (1894) 102 Mich. 79, 62 N. W. 1921. Negligence of a brakeman who has general charge of switching cars, in leaving cars on a switch at a place with which he is familiar, so near to cars that pass on the main track that he is afterwards crushed between them, has such a proximate connection with the injury that no recovery can be had, on account of his death, against the company, although when killed he was endeavoring to climb upon cars in order to stop them, after they had been kicked by an engine in disobedience to his orders. *Yerman v. Chicago, M. & St. P. R. Co.* (1890) 80 Iowa, 672, 45 N. W. 1054 (continuing act of negligence, operative up to the time of the injury).

In a state where the doctrine of common employment is abolished as to rail companies the failure of a railway servant to extricate himself from a perilous situation in which he is placed by the negligence of a coemployee, when he could do so by the use of ordinary care, will prevent his recovering against the company. *Parker v. Georgia P. R. Co.* (1889) 83 Ga. 539, 12 S. E. 233.

(b) *Recovery allowed.*—The fact that, at the time a railway employee was injured by being struck by a car left in dangerously close proximity to the adjacent track on which he was performing his duties, he had formed a purpose to jump off the train when it was moving at from 8 to 15 miles an hour, will not prevent a recovery, where he was not at that moment in the execution of such purpose. *Kansas City, M. & St. P. R. Co. v. Burton* (1892) 97 Ala. 240, 12 So. 88. The defective lever of an engine, and not the negligence of the servant himself in undertaking repairs on a car without displaying certain signals, is the proximate cause of an injury due to the collision of the car with that car, where the train would have been run towards it whether the signals were displayed or not, reliance being placed upon the lever's acting properly when the time came to check it. *Texas & N. O. R. Co. v. Wynn* (1893) Tex. Civ. App. 22 S. W. 1064. That a switchman on a moving switch engine passed from one end of the footboard to the other over the bumpers will not prevent a recovery for an injury received by him after crossing, where he was in a proper place at the time of the injury. *Louisville & N. R. Co. v. Bouldin* (1896) 110 Ala. 185, 29 So. 325. An employee of a railway company killed while riding

able with having failed to comply with some specific order or warning.² In other cases the duty alleged to have been violated was one prescribed by a rule promulgated for the protection of the servants,

to his work on the platform of a passenger car in front of several freight cars, all of which are derailed or broken in pieces by reason of a defective track and switch, is not, as a matter of law, guilty of such contributory negligence in riding on the platform as will prevent a recovery for his death. *Woods v. Southern P. Co.* (1893) 9 Utah, 146, 33 Pac. 628. A brakeman is not guilty of such contributory negligence as will prevent recovery for an injury resulting from being caught between two cars while attempting to couple them, because of his entering on the inside curve instead of the outside, or from coupling a common drawhead to a Miller drawhead, instead of the other way, where the accident would not have happened but for an unknown defect in the track. *Texas, S. V. W. R. Co. v. Gay* (1893; Tex. Civ. App.) 23 S. W. 633. A switchman is not prevented from recovering for an injury by negligently attempting to make a dangerous kind of coupling after learning that the cars were negligently loaded, unless his negligence contributed to, or was a contributory cause of, the injury. *Houston & T. C. R. Co. v. Kellen* (1896) 13 Tex. Civ. App. 1, 34 S. W. 809, 46 S. W. 863.

Evidence which fails to show that a prior act of the servant, alleged to be negligent, was connected with the event which caused the injury, will not suffice to bar the action. *Ebert v. Hartley* (1899) 72 Conn. 453, 44 Atl. 723.

² An employee struck by brick from a falling wall, while standing on a platform helping to put ice in a brick building, in consequence of which he was knocked or fell to the ground, is not guilty of contributory negligence which will defeat a recovery for his injuries because, in violation of his orders, he had left the part of the platform which had a railing and gone to a part which had none, and on which he had been warned not to stand on account of the danger of falling, where he had no warning of any danger from the wall, and his injuries, though chiefly caused by his fall, would have been greater if he had not fallen out of the way of the brick. *Smithwick v. Hall & U. Co.* (1890) 59 Conn. 261, 12 L. R. A. 279, 21 Atl. 924. That an employee rode upon an elevator after being warned not to do so will not

prevent a recovery for an accident caused by the giving way of the elevator while he was unloading a stone therefrom several minutes after reaching his destination. *McDonigle v. Kane* (1894) 20 Colo. 292, 38 Pac. 367. The servant's failure to comply with an order to stand in a certain position on a building in course of erection will not prevent his recovery, where he would in all probability have been injured even if he had obeyed the order. *Seaman v. Deane & Bridge & Iron Works* (1899) Rap. Ind. Quebec, 16 C. S. 264. A laborer who rides on a scraper in violation of orders and is kicked by a vicious horse cannot recover. *Knickerbocker Ice Co. v. De Haas* (1890) 37 Ill. App. 195.

³ (a) *Recovery denied.*—An engineer's violation of a rule fixing a maximum for the speed of trains will prevent a recovery for an injury caused by a collision at a place which he would not have reached if that maximum had not been exceeded. *Sutherland v. Troy & R. R. Co.* (1891) 125 N. Y. 737, 26 N. E. 609 on second appeal in supreme court (1893) 74 Hun. 162, 26 N. Y. Supp. 237. The breach of a rule requiring an engineer to stand in "close places" is the proximate cause of an accident caused by the fact that his engine got out of his control on a high trestle, and ran over the stop block at the end. *Louisville & N. R. Co. v. Stutts* (1894) 105 Ala. 368, 17 So. 29. A servant cannot recover for an injury proximately caused by his breach of a rule forbidding employees except those specially designated, to ride on an engine. *McGucken v. Western N. Y. & P. R. Co.* (1894) 77 Hun. 69, 28 N. Y. Supp. 298. No recovery can be had for the death of a railroad employee who, in violation of a rule of the company, went between cars, one of which was in motion, for the purpose of coupling them, instead of using a coupling pin for the purpose, by the use of which the accident would have been avoided, although he would not have been injured but for the falling of trucks with which the moving car was loaded. *Shorter v. Southern R. Co.* (1898) 121 Ala. 158, 25 So. 853. The court said that the load and the car together made up the element of danger which the rule forbade deceased to encounter.

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In *Gleason v. Detroit, G. H. & M. R. Co.* (1896) 19 C. C. A. 636, 43 U. S. App. 89, 73 Fed. 647, where a rule forbidding the coupling of cars in motion had been violated, it was contended on behalf of the plaintiff that, even if the course which plaintiff took was negligent, it was not the proximate cause of the accident, because he did not know of the presence of the grade stake over which he stumbled. But the court said:

The obstruction offered by the grade stake was not different from that which was offered by the cross ties and the cross rails. It was exactly of the same character and it was of the class of dangers which the plaintiff had every reason to anticipate in going in between the rails and in front of the moving car, under the circumstances. It seems to us clear, as a matter of law, therefore, that his negligence was the proximate cause of his injury."

In *Louisville & N. R. Co. v. Ward* (1894) 10 C. C. A. 166, 18 U. S. App. 683, 61 Fed. 927, the rules of the company required that coupling sticks be furnished to employees of certain classes, and the coupling of cars by hand was strictly forbidden. The injured servant admitted his knowledge of the rules in this respect, and testified that he had been supplied with a coupling stick, that he did not use it, and that when he was hurt he was attempting to make the coupling by hand. Upon these facts the trial judge was asked, but refused, to instruct that if the plaintiff was injured by reason of his neglect to use the coupling stick he could not recover. The contention of the plaintiff was that the cases laying down the rule as to the consequences of a violation of a rule were not applicable, for the reason that, under the charge which the court gave, the verdict necessarily meant that the accident was caused solely by a hole in the track, into which the servant had stumbled, and that the coupling stick was in no way connected with it. The court, however, said: "While the court did instruct to the effect that, to entitle the plaintiff to recover, it should appear that the hole or depression between the ties was the sole cause of the injury, it is impossible to say that, if the further instruction asked had been given, the jury would not have found that the plaintiff's neglect to use the coupling stick, and his undertaking to effect the coupling by hand, were efficient contributory causes. The instruction asked should have been

given, and if there were considerations —of which, however, no suggestion has been made here—tending to show that in this instance the failure of the plaintiff to comply with the rules of the company was not culpable, or did not contribute to the injury, they should have been submitted to the determination of the jury."

(b) *Recovery allowed.*—An employee's failure to obey a rule will not prevent a recovery for an injury due to the master's negligence, where such disobedience did not in any manner contribute as a proximate cause to the injury. *Fickett v. Lisbon Falls Fibre Co.* (1898) 91 Me. 268, 39 Atl. 996. In other words, a servant is not debarred from recovering by the fact that, at the time his injury was received, he was acting in intentional violation of the master's rules, unless the injury was due, in whole or in part, to such violation. *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598. See *Peck v. New York C. & H. R. R. Co.* (1895) 85 Hun. 184, 32 N. Y. Supp. 482 (engineer did not take a position on inside of curve as he was approaching it, collision caused injury); *Conners v. Burlington, C. R. & V. R. Co.* (1887) 71 Iowa, 490, 60 Am. Rep. 814, 32 N. W. 465 (brakeman riding on engine was injured by derailment); *Daniel v. Chesapeake & O. R. Co.* (1892) 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. 162 (brakeman out of his place was injured by a collision); *Gulf, C. & S. F. R. Co. v. John* (1895) 9 Tex. Civ. App. 342, 29 S. W. 558 (engine run at prohibited rate of speed); *Southern R. Co. v. Boston* (1896) 99 Ga. 798, 27 S. E. 163 (facts not stated); *Louisville & N. R. Co. v. Feach* (1898) 20 Ky. L. Rep. 403, 46 S. W. 493 (brakeman did not use coupling stick); *Reed v. Burlington, C. R. & V. R. Co.* (1887) 72 Iowa, 166, 33 N. W. 451 (same facts); *Rome R. Co. v. Thompson* (1897) 101 Ga. 26, 28 S. E. 429 (same facts); *Horan v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 328, 56 N. W. 507 (same facts); *White v. Louisville, N. O. & T. R. Co.* (1894) 72 Miss. 12, 16 So. 248 (same facts).

The proximate cause of injury to a brakeman from being caught between cars in coupling or uncoupling them is the defect in a brake upon the engine, where the injury was caused by the engine not operating as the engineer anticipated in ordering such brakeman to get between the cars, and not the failure of the latter to observe a rule requiring him to couple with a stick from the out-

side of the train, where the engineer used the appliances most convenient, and they failed to operate properly. *Finley v. Richmond & D. R. Co.* (1893) 59 Fed. 419. The failure of a railroad brakeman to comply with his express contract to use a coupling knife in coupling cars will not prevent his recovery for an injury sustained by being caught between deadwoods, if the use of the knife would not have removed the danger. *Bonner v. Bean* (1891) 80 Tex. 152, 15 S. W. 798. Breach of a rule requiring employees to use a safety coupler will not prevent recovery by one who, while about to couple cars, is struck by a car owing to defects in the engine which prevent the engineer from controlling its movements properly, and is thereby caused to throw his hand between the deadwoods. *Wabash & W. R. Co. v. Morgan* (1892) 132 Ind. 430, 31 N. E. 661. The violation of a rule requiring employees to examine the coupling apparatus before making a coupling is not the proximate cause of an injury received by a brakeman through being struck in the eye by a sliver of iron which the shock of the collision between the drawheads detached from one of them, where the uncontradicted evidence shows that immediately before the accident he had in fact ascertained that the coupling could not be made, and had desisted from the attempt to make it. *Denver, T. & Ft. W. R. Co. v. Smock* (1897) 23 Colo. 456, 48 Pac. 681. Where a rule of the company prohibits generally the use of intoxicating liquors by its officers and employees, the use thereof by an employee who sues for personal injuries will not defeat a recovery, unless such use contributed in some appreciable degree to producing the injury sustained. That the violation of such rule might have done so, if it did not in fact so contribute, will not defeat a recovery. *Western & A. R. Co. v. Bussup* (1894) 95 Ga. 584, 23 S. E. 207. Disobedience by an engineer of a rule requiring a train to be kept under control and prepared to stop in case the track is obstructed does not affect the liability of the company for his death caused by a collision with an animal on the track where the road was not fenced as required by law, if the most diligent care and careful control of the engine could not have prevented the collision after the danger appeared. *Dickson v. Omaha & St. L. R. Co.* (1894) 124 Mo. 140, 25 L. R. A. 329, 27 S. W. 476. The violation of a rule requiring car repairers to put out a signal flag when they are at

work is not the proximate cause of injury received through the car being struck by an engine which would have been brought to a standstill by reaching the car, if the lever had been in good order. *Texas & N. O. R. Co. v. Wynne* (1893) Tex. Civ. App. 22 S. 1064. The negligence of a brakeman being upon the top of a car, engaged in setting brakes, instead of being on the ground acting as flagman, as required by a rule of the company, is a proximate cause of injury to a passenger caused by his being thrown to the ground while passing from one car to the other by their separation because of a defective coupling pin. *Tenn. R. Co. v. Mansberger* (1895) 1 C. A. 574, 24 U. S. App. 551, 65 196. Rehearing Denied in (1895) 1 C. A. 306, 24 U. S. App. 687, 67 67. Where a brakeman is injured in a collision, the fact that he was not on top of the train, as required by the rule, is not conclusive against him, where there was a dense fog at the time of the accident. *Phillips v. Chicago, St. P. R. Co.* (1885) 64 Wis. 475, 2 W. 544. A railroad employee is guilty of negligence contributing to an accident from his foot being caught in a frog left unblocked in violation of a rule, although he went between the cars in violation of a rule of the company, and in the nighttime, for the purpose of uncoupling them, where the jury would not have happened had the frog been blocked. *Lake Erie & W. Co. v. Craig* (1896) 19 C. C. A. 631, U. S. App. 654, 73 Fed. 642 (instruction to jury; new trial granted). (1894) 1 Toledo Legal News. Where an engineer is injured by falling of an embankment, the fact that he had with him in the locomotive at the time of the accident, another engineer, contrary to a rule of the company, will not prevent his recovery of damages against the company, if the presence of the other engineer did not contribute to the disaster. *Central Co. v. Mitchell* (1879) 63 Ga. 173. Also cases cited in note 6 to last section. An instruction which predicates contributory negligence upon the existence of a certain rule prohibiting a particular course of action is of course proper, where none of the defendant's rules can be construed in such a way as to cover the circumstances in which the accident occurred. In *Western & A. R. Co. v. Bussup* (1894) 95 Ga. 584, 23 S. E. 207, complaint was made that the defendant's

Compare §§ 365 *et seq.*, *infra*. In other cases the servant's dereliction of duty consisted in the breach of a statute,⁴ or of a municipal ordinance.⁵

325. Negligence of fellow servant of injured servant a partial cause of the injury.—The fact that the negligence of a fellow servant of the injured person concurred with that of the latter as an efficient cause of the injury is sometimes mentioned in cases of this type, but obviously it does not affect the right of recovery either one way or the

in refusing to charge the jury, at the request of the defendant's counsel, as follows: "If you believe from the evidence that . . . the engineer in charge of the train violated a rule of the defendant which was in force and effect at the time of the accident, of which . . . [he] had knowledge, which provided that, while passing switches, the speed of the train should be slackened, and this collision was occasioned in whole, or at least in large part, from his not observing this rule, and that from such collision Bussey received injuries from which he subsequently died, the plaintiffs cannot recover, although the defendant may have been negligent in not having the switches properly set." But the court said: "This request was properly refused, we think, for the reason that there was no evidence in the record to justify the instruction therein contained. The only rule of the company in which we find the expression 'slacken the speed' employed at all is rule 35, which was introduced in evidence, and which provides that 'all trains will run with great care after rains, and slacken their speed when the track is in bad order, while passing switches, and when crossing long bridges and trestle work, and, when practicable, shut off steam.' There was no evidence submitted, so far as we have been able to gather from the record, that there had been recent rains, or that the track of the railroad company was in bad order. Indeed, the contrary of the latter condition seems to be established by the evidence in the case."

An instruction that if the failure to use a coupling knife contributed to the plaintiff's injury, he could not recover, is rightly refused, where there is no evidence in the case to show what a coupling knife is; how it is used; whether or not the defendants had an established rule requiring it to be used; whether

or not such a rule would be a reasonable rule; whether the failure to use it would have been negligence under the circumstances in this case; nor whether the failure to use the coupling knife contributed to the injury. *Bonner v. Hickoy* (1893; Tex. Civ. App.) 23 S. W. 85.

A rule forbidding employees to enter between moving cars to uncouple them is irrelevant where there is no evidence that the plaintiff did enter between the cars while they were moving. *Gulcreston, H. & S. A. R. Co. v. Pitts* (1897; Tex. Civ. App.) 42 S. W. 255.

A special charge that, if a freight conductor violated the rules of the company and a bulletin order, by failing to personally examine his cars and train and see that the cars were in order, and that the air cars were connected and put at the head of the train, he could not recover for personal injuries of which such failure was the proximate cause, is properly refused where he was injured in endeavoring to close a defective angle cock while rearranging the train and putting the air cars together, by the engine pushing a car back against the one on which he was working. *St. Louis & S. F. R. Co. v. Nelson* (1899) 20 Tex. Civ. App. 536, 49 S. W. 710.

In an action brought to recover for injuries received by an employee while being hoisted up the shaft of a mine in a cage, he cannot recover where the only operating cause of the injury was his carrying a drill upon the cage in violation of the law. *Illinois Fuel Co. v. Parsons* (1890) 38 Ill. App. 182.

Although an engineer in running a train at a rate of speed prohibited by a city ordinance is guilty of negligence *per se*, yet, unless that negligence contributed to his injury, a recovery will not be barred. *Lake Shore & M. S. R. Co. v. Parker* (1890) 131 Ill. 557, 23 N. E. 237.

other. The inability of the injured person to maintain the action must be precisely the same, whether this element is introduced or not.

326. Servant's negligence not a bar to the action if it is merely a condition of the injury.—Where the situation resulting from the servant's breach of duty merely amounts to the condition, as distinguished from the cause, of the injury, his action is not barred.¹

In Massachusetts it was held, before the Sunday law was repealed, as regards railway companies, that an engineer who was injured on Sunday owing to a defect in the track could not recover, as his illegal act contributed to his injury.² The same doctrine was possibly adopted in an Ohio case.³ But a different view is taken in Indiana,⁴ in New York,⁵ and in Iowa.⁶

¹ A railway company is not liable where a conductor of a gravel train is injured in a wreck caused by a broken rail, and the fault is partly his own and partly the engineer's in permitting the train to go too fast, and the conductor was also in fault in not having his caboose on the rear end of the train. *St. Louis, I. M. & S. R. Co. v. Morgart* (1885) 45 Ark. 318. A car inspector who is struck by a train which he might and should have avoided cannot recover, although the engineer is also in fault. *Bauer v. St. Louis, I. M. & S. R. Co.* (1885) 46 Ark. 388.

A mill owner which constructs its mill after a common and approved model is not liable for an injury to an employee caused by such employee and his coemployee permitting tools to accumulate on the floor of the mill at a place where their presence is dangerous. *Derlin v. Phoenix Iron Co.* (1897) 182 Pa. 109, 37 Atl. 927. A car repairer cannot recover for an accident due partly to his own violation of a rule promulgated to secure him from injury from moving trains, and partly to the negligence of a car inspector in failing to keep a lookout, as he had promised to do. *Illinois C. R. Co. v. Winslow* (1894) 56 Ill. App. 402.

² On this ground it has been held that the failure of a servant to follow the instruction of his master to go home at a certain hour is not, in a legal sense, a contributing cause of an injury which he receives while engaged in the discharge of his duties at a later hour. *McElligott v. Randolph* (1891) 61 Conn. 157, 22 Atl. 1094. Similarly, where plaintiff, who was rear brakeman on a freight train, was in the cupola of the caboose when an engine which was to assist in pushing the train up a grade was

negligently run against the caboose with such violence as to derail it, by which plaintiff was thrown to the ground and injured, it was held that, conceding that plaintiff's duty required him to be on top of the cars, his remaining in the caboose was not negligence which contributed to his injury in a legal sense, but was a mere condition of the injury, since the rule requiring him to be outside was not made for his protection, and, under any ordinary circumstances, he would be safer inside the caboose than on top of the train. *Tullis v. Lake Erie & W. R. Co.* (1901) 44 C. C. A. 597, 105 Fed. 534. So, the violation by an employee of a rule forbidding employees to change their clothes before quitting time did not, under the circumstances, prevent a recovery for his death caused by the bursting of a grindstone turning at an excessive rate of speed. *Helfenstein v. Medart* (1896) 136 Mo. 595, 36 S. W. 863. Affirmed in Banc in (1896) 136 Mo. 619, 37 S. W. 829. Affirmed on Rehearing in (1896) 136 Mo. 619, 38 S. W. 294.

³ *Read v. Boston & A. R. Co.* (1885) 140 Mass. 199, 4 N. E. 227. Following *Day v. Highland Street R. Co.* (1883) 135 Mass. 113, 46 Am. Dec. 447.

⁴ In *McGatrick v. Wason* (1855) 4 Ohio St. 566, a servant injured on Sunday while loading freight on a steamboat in an emergency was held entitled to recover on the ground that he was engaged in a "work of necessity." It seems to have been assumed by court and counsel that he could not have recovered in the absence of this element.

⁵ In *Louisville, N. A. & C. A. R. Co. v. Frauley* (1886) 110 Ind. 18, 9 N. E. 594, the following principle was formulated: The fact that one who sustains

327. Contributory negligence of servant followed by negligence on the part of the master or another employee.—In a leading English case, Lord Penzance, after laying down the general principle already quoted (§ 323, *supra*) as to the effects of contributory negligence, proceeded thus:

"There is another proposition equally well established, and it is a qualification upon the first,—namely, that, though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."¹

In any case, therefore, where the evidence is such as to justify the inference that this rule is available in the servant's favor, the liability of the employer still remains an open question, although the servant may clearly have been guilty of an antecedent act of contributory negligence.² The logical situation contemplated by the rule has been

an injury by the negligent or wrongful act of another may have been, at the time of such injury, acting in disobedience of his collateral obligation to the state, which required of him the observance of the Sunday laws, will not prevent a recovery from one whose wrongful or negligent act or omission was the proximate cause of such injury. To same effect, see *Louisville, N. A. & C. R. Co. v. Buck* (1888) 116 Ind. 566, 2 L. R. A. 520, 19 N. E. 453, where the court pointed out that, as the servant's danger was the same on week days as on Sundays, it could not be said that this breach of the law was an efficient cause of, or contributed to, his injury. See, generally, on this subject, Shearn & Redf. Neg. § 104; Cooley, Torts, p. 159, *Solarz v. Manhattan R. Co.* (1894) 8 Misc. 656, 29 N. Y. Supp. 1123.

¹ *Taylor v. Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249 (Citing *Gross v. Miller* [1894] 93 Iowa, 72, 26 L. R. A. 605, 61 N. W. 385).

² *Roddy v. London & N. W. R. Co.* (1876) L. R. 1 App. Cas. 754, 759, 46 L. J. Exch. N. S. 573, 35 L. T. N. S. 637, 25 Week. Rep. 147. This statement of the law has been extensively adopted in the United States. See Shearn & Redf. Neg. § 99, note 10. In that treatise the learned authors formulate the rule as follows: The plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed

him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him.

² (a) *Servant's right to recover affirmed.*—*Chesapeake & O. R. Co. v. Lee* (1888) 84 Va. 642, 5 S. E. 579 (arguendo); *Louisville & N. R. Co. v. Brown* (1898) 121 Ala. 221, 25 So. 609 (fireman failed to give such a signal to the engineer as would have prevented his moving his engine in such a way as to injure a brakeman who had gone in between the tender and a car); *Greer v. Louisville & N. R. Co.* (1893) 94 Ky. 169, 21 S. W. 651 (engineer operated locomotive so carelessly as to injure a brakeman who had gone between cars to couple them); *Louisville & N. R. Co. v. McCoy* (1883) 81 Ky. 403 (similar facts); *White v. Houston & T. C. R. Co.* (1898; Tex. Civ. App.) 46 S. W. 382 (train backed before switchman had time to get out of the way); *Hissong v. Richmond & D. R. Co.* (1890) 91 Ala. 514, 8 So. 776 (servant violated a rule by going between two cars to couple them, and was injured by the sudden starting of the train); *Kansas & A. Valley R. Co. v. Fitzhugh* (1895) 61 Ark. 341, 33 S. W. 960 (engineer might have stopped his engine in time to have avoided striking a trackman who did not hear it approaching); *Louisville & N. R. Co. v. Markee* (1895) 103 Ala. 160, 15 So.

said to be this—that the antecedent negligence of the injured person merely produces a condition upon which the subsequent negligence which caused the injury operates.³ But the conception thus intro-

511 (engineer in this case held not negligent, as the means which he had adopted for the purpose of stopping his engine when a collision with a hand car was imminent were such as a prudent man might have selected); *Snyder v. Cleveland, C. C. & St. L. R. Co.* (1899) 60 Ohio St. 487, 54 N. E. 475 (servant standing on track was struck by a train); *Schlereth v. Missouri P. R. Co.* (1892; Mo.) 10 S. W. 1134 (servant walking on track was struck by a train); *Warrington v. Atchison, T. & S. F. R. Co.* (1891) 46 Mo. App. 159 (train run at a rate which was dangerous in view of the position of the negligent servant); *Shumacher v. St. Louis & S. F. R. Co.* (1889) 39 Fed. 174 (conductor negligent in not managing train so as to avoid injuring an employee on a gravel train, who takes up a dangerous position); *Denver & B. P. Rapid Transit Co. v. Dwyer* (1894) 20 Colo. 132, 36 Pac. 1106, Reversing 3 Colo. App. 408, 33 Pac. 815 (laborer sat with his legs slightly projecting outside a motor car, and was struck by the side of a cutting into which a Y ran); *Haden v. Sioux City & P. R. Co.* (1894) 92 Iowa, 226, 60 N. W. 537 (section foreman stepped upon the track without looking, after the passage of a train, and was struck by a rear section which had been cut off); *Illinois C. R. Co. v. Josey* (1901) 22 Ky. L. Rep. 1795, 54 L. R. A. 78, 61 S. W. 703 (foreman checked speed of hand car suddenly, although he had observed that one of his men was not supporting himself by holding the lever); *Central R. Co. v. Lamb* (1899) 124 Ala. 172, 26 So. 969 (section hand was run down by a hand car while crossing a high trestle); *Texas & P. R. Co. v. Gale* (1896; Tex. Civ. App.) 35 S. W. 802 (section foreman shoved a tie against laborer's foot, while in a hole where he had negligently put it).

Even if a brakeman was negligent in going between a caboose with a bumper of the ordinary construction and one equipped with a "Miller" coupler, he may recover if his injury was proximately caused by the fact that a fellow employee, without waiting, as he should have done, for a signal from him, signalled to the engineer to back the caboose. *Romick v. Chicago, R. I. & P. R.*

Co. (1883) 62 Iowa, 167, 17 N. W. 511.

See also § 314, subds. a, f, *supra*.

(b) *Servant's right to recover denied*.—A railroad engineer is not negligent in not sooner concluding that sectionmen on a hand car on the track in front of the train are in danger where they could have removed the hand car and cleared the track before the train reached them if they had seen it when he first began to stop it. *Nelling v. Chicago, St. P. & A. C. R. Co.* (1896) 98 Iowa, 551, 63 N. W. 568, 67 N. W. 404. Negligence on the part of a railroad engineer on a switching engine in the railroad yard cannot be predicated of his failure to stop his engine after having struck a section hand attempting to cross the track, in response to warning cries of witnesses of the accident, in the absence of evidence that he understood the signals as meant for him. *Loring v. Kansas City, Ft. S. & M. R. Co.* (1895) 128 Mo. 349, 31 S. W. 6. A railroad engineer and fireman are not guilty of negligence, toward another employee walking along the track, in failing to keep a lookout ahead, where their attention is otherwise required by the work which they are doing. *Chicago, B. & Q. R. Co. v. Maney* (1894) 55 Ill. App. 588. An engineer is not negligent in assuming that a section hand will get out of the way of a train, where it is customary for such laborers to work on the track until trains are very close to them. *Sharp v. Missouri P. R. Co.* (1901) 161 Mo. 214, 61 S. W. 829. The engineer of a switch engine is not required to anticipate that an experienced section man, whose daily observation has taught him that the engine is constantly moving in the yard, will step on the track immediately in front of cars which are being switched, without even looking for them. *Loring v. Kansas City, Ft. S. & M. R. Co.* (1895) 128 Mo. 349, 31 S. W. 6.

See also *Louisville & N. R. Co. v. Wallace* (1891) 90 Tenn. 53, 15 S. W. 921 (liability to brakeman injured in trying to get on a moving train was declared to be dependent on whether the conductor could have averted the accident by ordinary care).

³ *Louisville & N. R. Co. v. Brown* (1898) 121 Ala. 221, 25 So. 609.

duced seems to be somewhat out of place. The rationale of the cases in which the servant has been allowed to recover by virtue of the rule is simply that the person responsible for the last link in the chain of causation was the master.

In any case of this description the instructions given should be so worded as to indicate clearly the effect of the rule.⁴

It is laid down by some of the authorities that, to entitle the servant to recover by virtue of the rule, it is not necessary that the defendant should have had actual notice of the injured party's fault in time to protect him. It is enough if the defendant could by reasonable diligence have discovered the danger in time to avert the injury.⁵ But the view has also been expressed that it is only in very exceptional cases that the servant can recover without proving that his dangerous position was actually known to the master or his agent.⁶ The former of these opposing theories seems to be the correct one. There is no apparent reason why any exception should be made in cases of this class to the general principle which treats constructive and actual knowledge as being, in a juridical point of view, equivalent factors.

It has been expressly held that a mere volunteer, although he has

*It is proper to charge a jury that a railroad company is liable to an employee guilty of contributory negligence, where, after becoming aware of his peril in time to prevent the injury, it negligently fails to apply means under its control by which the injury might be prevented, if such employee does all that he can to prevent the accident and save himself from harm after becoming aware of his peril. *Louisville & N. R. Co. v. Hurt* (1893) 101 Ala. 34, 13 So. 130.

An instruction that, if the injury to an employee could have been avoided, in spite of his negligence, by the exercise of due care on the part of defendant, then defendant would be liable, as that would show that plaintiff's negligence did not contravene to the injury, because it was not a direct cause thereof, is not erroneous where it is accompanied by explanations which show that the language thus used meant nothing more than that the employee could recover, unless his negligence was the proximate cause of the injury. *Bodie v. Charleston & W. C. R. Co.* (1901) 61 S. C. 468, 39 S. E. 715.

See also *Louisville & N. R. Co. v. Robinson* (1898) 4 Bush. 507; *Greer v. Louisville & N. R. Co.* (1893) 94 Ky.

169, 21 S. W. 649; *Wabash R. Co. v. Zerauck* (1897) 73 Ill. App. 670.

It is error to charge a jury that they cannot find against the plaintiff, though he may have been guilty of contributory negligence, if the delinquent employee could have prevented the injury by the exercise of ordinary care. The proper form of instruction is that, if the plaintiff was guilty of negligence but for which the injury would not have been inflicted, the jury should find for the defendant, unless the delinquent employee, after seeing plaintiff's danger, could have prevented the injury by the exercise of reasonable care. *Washington Mfg. & Min. Co. v. Barnett* (1897) 19 Ky. L. Rep. 958, 42 S. W. 1120.

⁵*Louisville & N. R. Co. v. McCoy* (1883) 81 Ky. 411; *Louisville & N. R. Co. v. Earl* (1893) 94 Ky. 368, 22 S. W. 607.

⁶In *Keeffe v. Chicago & N. W. R. Co.* (1894) 92 Iowa, 182, 60 N. W. 503, it was held to be error to give a charge to the effect that the defendant was liable if, by the exercise of ordinary care, the peril of the injured servant could have been discovered. To same effect, see *Georgia P. R. Co. v. Lee* (1890) 92 Ala. 262, 9 So. 230. See also § 314, subd. a, note 3, *supra*.

placed himself in a position of danger through his own negligence can recover of the master for injuries received by reason of the failure of servants to exercise reasonable care to prevent injury to him at discovering the danger.⁷

The rule now under discussion is generally considered to be applicable only where an appreciable interval of time elapsed between the negligent act of the servant and the final catastrophe, and there was accordingly a specific period during which it was in the defendant's power to prevent the injury by proper care and caution. It cannot be construed in such a manner as to absolve a servant from the consequences of his negligence in a case which presents the ordinary elements of a breach of duty on the master's part, resulting in more or less permanent conditions, and a want of caution on the servant's part in performing his functions during the continuance of those conditions. But a different theory has been propounded in North Carolina in respect to a statutory duty.⁸

B. WHAT CONSTITUTES CONTRIBUTORY NEGLIGENCE ON THE PART OF A SERVANT.

328. Generally.— The standard which a servant is, like any other person, required to satisfy in doing the acts which a performance of his duties involve, is that expressed by the phrases "ordinary care," or "ordinary care and diligence,"⁹ or "reasonable and ordinary care,"

⁷ *Evarts v. St. Paul, M. & M. R. Co.* (1894) 56 Minn. 141, 22 L. R. A. 663, 57 N. W. 459.

⁸ In *Cagney v. Hannibal & St. J. R. Co.* (1879) 69 Mo. 416, the court held erroneous an instruction to the effect that, even if the jury should believe that the plaintiff was guilty of negligence which contributed to the injury, yet they should find for him, if they also believed that the defendant might have avoided said injury by the use of ordinary care in furnishing plaintiff with safe instrumentalities upon which to perform the work on which he was engaged, and that such want of care was the proximate cause of the injury. See also *Rains v. St. Louis, I. M. & S. R. Co.* (1879) 71 Mo. 164, 36 Am. Rep. 459, where it was held error to give an instruction to the effect that, although the servant might have failed to exercise ordinary care, and might have been guilty of negligence which contributed to the injury complained of, yet, if the defendant might, by differently erecting or maintaining the bridge which caused that injury, or

by the exercise of ordinary care and caution, have avoided the injury, the jury should find for the plaintiff.

⁹ In a recent case it was laid down that a brakeman's contributory negligence in coupling cars would not preclude recovery for the continuing act of negligence of which the company was guilty in having failed to comply with a statute requiring the use of self-couplers on its cars. *Greenlee v. Southern R. Co.* (1898) 122 N. C. 977, 41 L. R. A. 399, 30 S. E. 115. See also *Troxler v. Southern R. Co.* (1899) 124 N. C. 189, 44 L. R. A. 313, 32 S. E. 550.

¹ *Carr v. Manchester Electric Co.* (1900) 70 N. H. 308, 48 Atl. 286; *Georgia Cotton Oil Co. v. Jackson* (1900) 112 Ga. 680, 37 S. E. 873.

² *Bessemer Land & Improv. Co. v. Campbell* (1898) 121 Ala. 50, 25 So. 793.

³ *Greenleaf v. Dubuque & S. C. R. Co.* (1871) 33 Iowa, 57; *Gates v. Pennsylvania R. Co.* (1893) 154 Pa. 566, 26 Atl. 598.

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or "ordinary diligence or common prudence."⁴ He is bound to exercise that degree of care which a reasonably prudent person would use in order to avoid being injured,⁵ or which might, under the given circumstances, be "reasonably expected of an ordinarily prudent person."⁶

Instructions are correct or erroneous, according as they recognize or ignore the standard thus fixed.⁷

⁴*Central R. & Bkq. Co. v. Lanier* (1889) 83 Ga. 587, 10 S. E. 279.

⁵*Wilson v. Williams* (1900) 22 Ky. L. Rep. 567, 58 S. W. 444.

⁶*Georgia Cotton Oil Co. v. Jackson* (1900) 112 Ga. 620, 37 S. E. 873.

⁷A jury is properly charged that, although it is the duty of a railroad company to use the highest degree of care to insure the safety of its passengers, the engineer of a passenger train is not required, as between himself and the company, to exercise more than ordinary care. *Hall v. Chicago, B. & N. R. Co.* (1891) 46 Minn. 439, 49 N. W. 239. In an action for injuries caused by the failure of the master's representative to give instructions to an employee regarding the direction in which he was to run when a tree which he was cutting down should fall, it is proper to refuse a charge implying that he could not recover if he did not run in a safe direction. *Postal Teleg. Cable Co. v. Hulsey* (1896) 115 Ala. 193, 22 So. 854.

An instruction is erroneous by which, in a case where a railway servant was knocked off a car by the spout of a water-tank, the jury are told, without qualification, that their verdict should be for the defendant, if they found that plaintiff could have avoided the collision by stooping or moving to either side of the car, and still have performed his duty, but that he did not so avoid the spout. *Greenleaf v. Dubuque & S. C. R. Co.* (1871) 33 Iowa, 57.

See further as to this class of cases, § 350 *infra*.

An instruction that "it is the duty of every person to use his senses to learn what is going on about him, and that, the more dangerous a position in which he is placed, the more care should he use to protect himself from injury," is properly refused as misleading, since, without explanation, the jury might infer that a higher degree of care than ordinary care would be required. *International & G. N. R. Co. v. Stephenson* (1897) 22 Tex. Civ. App. 220, 54

S. W. 1086. An instruction that if the jury believe that the servant knew of the existence of the dangerous conditions which caused his death in time to have escaped from the place where they existed, and failed to do so, they must find for defendant, is properly refused as exacting too high a degree of diligence. *Bessmer Land & Improv. Co. v. Campbell* (1898) 121 Ala. 50, 25 So. 793. An instruction that, in determining decedent's contributory negligence, the jury should consider whether the servant had exercised due and reasonable care, and that, if they should believe that decedent did not exercise the greatest care and caution that an ordinarily prudent man would exercise under like circumstances, then they should find for defendant, is properly refused. *Missouri P. R. Co. v. For* (1900) 60 Neb. 531, 83 N. W. 744. Error in charging that the care required of an employee in the use of implements and the operation of machinery is such as "a man of his experience and his situation would ordinarily use," instead of such care as an ordinarily prudent man of his experience and in his situation would ordinarily use, is not cured by a subsequent paragraph correctly defining, in general terms, negligence and ordinary care. *Hillshoro Oil Co. v. White* (1897) Tex. Civ. App. 41 S. W. 874. An instruction requiring the servant to use "such ordinary care as a person of ordinary prudence would have used under similar circumstances" is not misleading, as causing the jury to believe that plaintiff was not required to use as high a degree of care as a person of ordinary prudence "would reasonably have been expected to exercise" under similar circumstances. *Galterson, H. & S. A. R. Co. v. Williams* (1901) Tex. Civ. App. 62 S. W. 808.

The use of the word "expected" in an instruction in an action for the death of an employee, that, even though the jury find that defendant was negligent, if they further find that the employee did not exercise that ordinary

There is some authority for the theory that certain classes of employees are to be judged by more lenient standards than others.⁸ But this conception seems to be inconsistent with the central idea which governs cases of this class, *viz.*, that the one constant standard is the hypothetical behavior of a prudent person under the given circumstances.

The acceptance of that standard also renders it necessary to reject the notion that it may be material to inquire whether the injured servant

himself believed that he was acting prudently at the time of the accident.⁹

care and diligence to prevent injury which would be "expected" of an ordinarily prudent person in similar circumstances the jury should find for defendant,—is proper. *Galveston, H. & S. A. R. Co. v. Bonnet* (1896) Tex. Civ. App. 38 S. W. 813.

A requested instruction that the master is not liable if the injured employee thrust his hand into the recesses of a going machine without knowing what he would meet is properly supplemented by the additional statement that, if a prudent person would not have done what the plaintiff did, the verdict must be for the defendant. *Bennett v. Warren* (1901) 70 N. H. 564, 49 Atl. 105.

The jury should not be told to consider what degree of care the servant's "intelligence and understanding" should have enabled him to exercise under the given circumstances. *Georgia Cotton Gin Co. v. Jackson* (1900) 112 Ga. 620, 37 S. E. 873. Nor is it proper to charge that the question to be answered is whether a man of ordinary intelligence would regard the work as hazardous. A man of ordinary intelligence may be very rash. *Ft. Wayne v. Christie* (1901) 156 Ind. 172, 59 N. E. 385.

Where an instruction states that it was the duty of deceased to take reasonable care of his own safety, "even though to do so required his whole time," the last clause is properly stricken out. *Pittsburgh, C. & St. L. R. Co. v. McGrath* (1885) 115 Ill. 172, 3 N. E. 439.

In a case where the theory of the defense was that a brakeman ought to have observed that the bumper on one of two cars which he was about to couple was higher than that on the other, and that the link which he was using was too short, it was held proper to refuse to charge the jury in substance

that, if a particular duty was imposed upon the plaintiff, and he failed to perform that duty, or that, if the plaintiff in attempting to discharge the duty so imposed committed an error of judgment which resulted in injury, he could not recover. Such an instruction is faulty in that it ignores the question whether the plaintiff, in the omission of the duty, or in the forming of his judgment, which turned out to be erroneous, was in any way guilty of negligence. The court remarked that, while it might be difficult to suppose a case in which a man could omit to perform an imposed duty, and yet be entirely free from fault, it was possible, and even probable, that a man in the performance of a duty imposed on him might exercise the greatest care, and still, because of an error of judgment in the performance of the duty, might, without fault on his part, be injured. *Port Royal & W. C. R. Co. v. Davis* (1894) 95 Ga. 292, 22 S. E. 833.

In *Paterson v. Wallace* (1854) 1 Macq. H. L. Cas. 748, 28 Eng. L. & Eq. 48 (a mining accident) Lord Cranworth remarked that rashness is a relative term. That which would reasonably be treated as rashness in the case of some persons may not be, for the purposes of preventing a recovery, rashness in a workman, if the master knew that the rashness was of a kind which workmen of that particular class ordinarily exhibited.

It is error to give an instruction from which the jury may infer that the fact that a brakeman who was killed while uncoupling cars did not believe it was imprudent to uncouple them in the manner that he did, and had good ground, as a reasonably prudent man, for believing that he could uncouple them without injury to himself, will relieve him from the charge of contributory

329. Care proportionate to the danger must be exercised.—The obligatory care which is designated as "ordinary" varies according to circumstances.¹

But this variation does not imply that the standards by which the quality of the servant's conduct is to be tested is different in different employments. Whatever may be the nature of the work, the standard to be considered remains intrinsically the same, and the servant is never required to exercise any greater care and diligence than a prudent person would, under like circumstances, usually exercise for his own safety.²

The instructions should be so worded as to make this principle quite clear to the jury.³

330. Respective provinces of court and jury in determining the serv-

negligence. *Picart v. Chicago, R. I. & P. R. Co.* (1891) 82 Iowa, 148, 47 N. W. 1017.

"What would be ordinary care in handling building sand would be gross negligence in handling gunpowder. So, the care to be exercised in running a locomotive through a crowded city is something very different from that required in driving the same kind of vehicle through the open country. Nevertheless, in both cases the care required is that only which a man of ordinary prudence would exercise under like circumstances." *Philadelphia & R. R. Co. v. Boyer* (1881) 97 Pa. 101.

A servant is bound to exercise for his own protection that degree of care which is commensurate with the character of his occupation, and which a reasonably prudent person would use under like circumstances. *Ashland Coal & I. R. Co. v. Wallace* (1897) 101 Ky. 626, 42 S. W. 744. Rehearing Denied in (1897) 101 Ky. 644, 43 S. W. 207.

It is the duty of a miner to be vigilant and careful in his own behalf, and to use a degree of care proportioned to the degree of danger in the ordinary discharge of his duties. *Trihay v. Brooklyn Lead Min. Co.* (1886) 4 Utah, 468, 11 Pac. 612 (instruction to this effect approved). If the employment is a hazardous one, the servant is required to use very great precaution to avoid danger. *Union P. R. Co. v. Estes* (1887) 37 Kan. 715, 16 Pac. 131.

Thus a railroad engineer required by the rules to run very cautiously during heavy storms is required to exercise only that high degree of care which is reasonable under the circumstances.

Scout v. Chicago, M. & St. P. R. Co. (1901) 83 Iowa, 380, 49 N. W. 990. See also next note, and § 328, note 8.

It is proper to refuse an instruction that a man engaged in such dangerous work as that of a railway switchman is bound to exercise the highest diligence and caution. *Lake Shore & M. St. R. Co. v. O'Connor* (1885) 115 Ill. 254, 3 N. E. 501. An instruction which implies a gradation of the care to be exercised by employees, in different capacities, of railway companies, to absolve them from the charge of contributory negligence, in an action against the company for negligently causing the death of one of its brakemen, is erroneous. *Missouri P. R. Co. v. Gibson* (1896) 56 Kan. 661, 44 Pac. 612.

An instruction to the effect that a brakeman, part of whose duties consisted in helping to remove damaged cars in the yards, is bound to exercise "more than ordinary care and vigilance to protect himself" in moving a car marked as damaged, requires too high a degree of care, and should be refused. *Taylor v. Missouri P. R. Co.* (1891; Mo.) 16 S. W. 206.

It is proper to give an instruction that a night watchman on a railroad track is not required to use a greater degree of care for his own personal safety than is usually exercised by careful and prudent persons under similar circumstances. *Baltimore & O. S. W. R. Co. v. Alsop* (1897) 71 Ill. App. 54. An instruction that a servant is bound to use the care which a person of ordinary prudence would use in the same situation, considering all the risks thereof, is proper. *Texas & N. O. R.*

ant's negligence.—Whether the action of an injured servant is based on the ground that he was negligent is a mixed question of law and fact. What duty is to be implied as incident to the relation which holds to his employer is always a matter for the determination of the court.¹ What constitutes a dereliction of that duty is a matter primarily for the jury.² It was recently laid down in the English court of appeal that a verdict negating fault on the servant's part is usually conclusive;³ and in a theoretic point of view this statement would doubtless be accepted as correct in the United States, also. But it seems safe to say that the principle which it embodies has not always been observed in practice. The American courts, more especially, as is strikingly indicated by many of the decisions cited in the ensuing sections, have gone to such extreme lengths in controlling and setting aside verdicts, that it seems to be often difficult, if not impossible, to acquit them of ignoring altogether the true boundary line between their own functions and those of juries.

In employers' liability cases the judges frequently have occasion to enunciate the applicability of the ordinary doctrines which determine whether, under the given circumstances, the negligence of the plaintiff is a question for the jury or for the court,—viz., that a servant ought not to be declared, as a matter of law, to have been in fault where there is a reasonable doubt, either as to the facts themselves,⁴

Co. v. Bingle (1895) 9 Tex. Civ. App. 322, 29 S. W. 674.

An instruction that negligence is a relative term when applied to different sets of circumstances, and that the caution required in one case may be greater than that required in another; but that in any case the law imposed the duty of observing the care due under such circumstances, which was the amount of care which would be exercised by a man of ordinary intelligence and prudence,—is not erroneous as charging that in some cases a higher degree of care than due care is necessary. *Bodie v. Charleston & W. C. R. Co.* (1901) 61 S. C. 468, 39 S. E. 715.

Mad River & L. E. R. Co. v. Barber (1856) 5 Ohio St. 541, 67 Am. Dec. 312, holding it error to instruct the jury that what constituted "the various duties of a conductor of a train of cars," incident to his position, was a question of fact to be found by the jury from the evidence.

Mad River & L. E. R. Co. v. Barber (1856) 5 Ohio St. 541, 67 Am. Dec. 312. Where a servant signs a contract con-

taining a special clause which binds him to use care, the stipulation applies to everything he may undertake to do, but it is for the jury to decide whether he has violated it. *Jones v. Lake Shore & M. S. R. Co.* (1883) 49 Mich. 574, 14 N. W. 551. A charge in an action for the wrongful killing of a servant that there was no sufficient evidence that the negligence of deceased did not contribute to his injury was properly refused, as assuming that deceased was negligent. *Knight v. Overman Wheel Co.* (1899) 174 Mass. 435, 54 N. E. 890.

Williams v. Birmingham Battered & Metal Co. [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918. The reader may consult 1 Beven, Neg. pp. 148 *et seq.*, for a general discussion of the English decisions regarding the respective provinces of the court and jury in negligence cases.

New Orleans Ice Co. v. O'Malley (1899) 34 C. C. A. 233, 92 Fed. 108; *Olsen v. Saurin* (1899) 43 App. Div. 422, 66 N. Y. Supp. 134 (evidence conflicting); *Southern R. Co. v. Campbell* (1901) 23 Ky. L. Rep. 290, 62 S. W. 858 (evidence conflicting); *Missouri*,

or as to the inferences of fact to be drawn from the testimony;⁵ and that if, upon the whole evidence, there is uncertainty as to the existence of negligence on the servant's part, the case is for the jury, whether the uncertainty arises from a conflict of the evidence, or because, although the facts are undisputed, fair-minded men may honestly draw different conclusions from them.⁶ The latter doctrine obviously involves, as its complement, the corollary that the servant may be declared by the court to have been wanting in due care, if the evidence is not reasonably susceptible of any other construction.⁷

In determining whether the servant was or was not negligent, it is always competent for the jury to take into consideration the hazardous nature of the work in which brakemen are employed, their means of knowledge, what they are reasonably required to know, in the nature of their calling, of machinery; the thought and reflection demanded or expected of such persons, their just expectation that the company will exercise due care and vigilance in protecting them

K. & T. R. Co. v. Young (1896) 4 Kan. App. 219, 45 Pac. 963 (verdict based on conflicting evidence, held conclusive).

An instruction that if a red light by night displayed on a train is a danger signal, and known to be such generally by railroad employees, it was incumbent upon employees engaged in switching cars on a track upon which a car displaying such light was standing to heed such signal and to act with caution in its presence, although they may not have known that a car inspector was under a standing car, is erroneous, where there is evidence tending to show that such a light under the circumstances known to the employees, or which they were bound to know, did not necessarily indicate danger, but merely that the car on which it was displayed was the end of the train. *Abbitt v. Lake Erie & W. R. Co.* (1898) 150 Ind. 498, 50 N. E. 729.

Gates v. Pennsylvania R. Co. (1893) 154 Pa. 566, 26 Atl. 598; *Papine v. R. Co.* (1882) 100 Pa. 301; *Bannon v. R. Co.* (1893) 158 Pa. 165, 27 Atl. 890; *Leas & P. R. Co. v. Gerten* (1895) 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104; *Flaherty v. Norwood Engineering Co.* (1898) 172 Mass. 134, 51 N. E. 463; *Kann v. Miner* (1898) 88 Md. 541, 41 Atl. 1065; *Jones v. Elletts P. M. R. Co.* (1901) 127 Mich. 198, 86 N. W. 838; *Riddin v. East Tennessee, V. & G. R. Co.* (1884) 74 Ga. 385; *Bennett v. Northern P. R. Co.* (1892) 3 N. D. 91, 54 N. W. 314; *Reese v. Morgan*

Silver Mon. Co. (1897) 15 Utah, 453, 19 Pac. 824; *Phillips v. Chicago, M. & St. P. R. Co.* (1885) 64 Wis. 475, 25 N. W. 544; *Honors C. R. Co. v. Corbin* (1898) 174 Ill. 109, 50 N. E. 1011 (instruction to find for defendant properly refused where ordinary care on part of plaintiff was a possible inference). Many other cases to the same effect will be found in the notes to the ensuing sections.

Tennessee Coal, I. & R. Co. v. Carter (1901) 47 C. C. A. 161, 108 Fed. 49; *Central R. Co. v. Freeman* (1880) 66 Ga. 170; *Cook v. Western & A. R. Co.* (1882) 69 Ga. 619.

In an action against a master for injuries received in doing work which it was not necessarily negligent to undertake, the jury are not bound to find that the plaintiff was careless because several witnesses testified that he said the accident was his own fault. *Martindale v. National Bluff Rock Co.* (1896) 166 Miss. 4, 47 N. E. 513.

Elliott v. Chicago, M. & St. P. R. Co. (1893) 150 U. S. 245, 37 L. ed. 1958, 14 Sup. Ct. Rep. 85; *Hath v. Petrol Co.* (1882) 55 Wis. 405, 13 N. W. 219, and cases cited *passim* in the ensuing sections.

"When facts constituting negligence are either admitted or conclusively established by undisputed evidence, it is, of course, the duty of the court to declare the law applicable thereto." *Gates v. Pennsylvania R. Co.* (1893) 154 Pa. 566, 26 Atl. 598.

against injury, and to give due weight to those instincts which naturally lead men to avoid injury and preserve their lives.*

Contributory negligence being, as we have seen (§§ 319, 323, *supra*), predicable only where the servant understood the condition and the resulting dangers, the case is always for the jury if it is not a necessary deduction from the evidence that he did understand those conditions and those dangers.⁹

Considered with relation to the sufficiency of the declaration, the above principles involve the corollary that a court cannot say, as a matter of law, from the allegations in which the servant states the cause of action, that he was guilty of contributory negligence, unless his statement so clearly indicates such negligence that, giving him the benefit of all possible evidence which would be admissible under his allegations, there is no reasonable ground upon which a difference of opinion could be entertained with regard to the quality of his conduct.¹⁰

331. Failure to use appropriate precautions in dangerous situations.

(Compare, generally, the cases cited in §§ 338, 339, and § 348, *supra*, a, *infra*).—A doctrine which may not improperly be regarded as a direct deduction from the principle stated in § 329, *supra*, is that a servant who, as the result either of his own voluntary acts, or of events over which he has no control, finds himself placed in a position in which he will be exposed to some specific hazard, unless he pursues a certain course of action, must, at his peril, pursue that course, if a person possessing the intelligence and knowledge which are imputed to him ought to have seen that by doing this he would be able to minimize the risk of injury. This principle prevents recovery, irrespective of whether the act or predicament, when considered apart from the fact that proper precautions were not exercised, was or was not one which betokened culpability on the servant's part. The cases illustrating this type of negligence may be conveniently tabulated under the headings specified in the subjoined note.¹

**Greenleaf v. Illinois C. R. Co.* (1870) 29 Iowa, 14, 4 Am. Rep. 181.

**Keist v. Chicago, G. W. R. Co.* (1899) 110 Iowa, 32, 81 N. W. 181; *McLaughlin v. Eidlitz* (1900) 50 App. Div. 518, 64 N. Y. Supp. 193. See also, generally, chapter XXI., *post*.

¹⁰*Rolsch v. Smith* (1887) 38 Minn. 14, 35 N. W. 565; *Wilson v. Williams* (1900) 22 Ky. L. Rep. 567, 58 S. W. 444.

¹ (a) *Operation of railway trains and cars*.—A freight engineer who in starting knows of the insufficiency of the

headlight on his engine, the absence of air brakes, and the incompetency of his fireman, and that in approaching a switch it is his duty to look for the danger signal, and that if there is no light it is his duty to stop his train,—is guilty of contributory negligence in running a train on a foggy morning at the rate of 30 miles an hour into an open switch at which no light was displayed. *Illinois C. R. Co. v. Guess* (1897) 74 Miss. 170, 21 So. 50. An engineer who, immediately after a storm which he knew had caused many washouts, and with the

A precaution predicable with regard to dangerous situations of every kind is indicated by the decision that negligence is inferable

knowledge that his train had been preceded by no sectionmen, maintains such a speed that he cannot stop within 130 feet, the distance he can see ahead on going around a curve, and so runs into a washout, is, as a matter of law, negligent. *Surrency v. Minneapolis & St. L. R. Co.* (1885) 33 Minn. 153, 22 N. W. 289. The widow of an engineer killed in a collision cannot recover where he was warned by a signal of danger ahead, and immediately thereafter another signal was given indicating that he might proceed with safety, but both signals were continuously displayed together so as to leave it in doubt which should be regarded, and he went on, disregarding the danger signal, with the result that the collision ensued. *Dorine v. Savannah, F. & W. R. Co.* (1892) 89 Ga. 541, 15 S. E. 781.

Where an operator hands a wrong order respecting the movements of a train to a conductor, and the terms of the order show that it is not directed to him, he is negligent if he takes it without inquiry. *East Tennessee, V. & G. R. Co. v. De Armond* (1887) 86 Tenn. 73, 5 S. W. 600.

Whether a brakeman was guilty of negligence in not taking hold of the brake rod to steady himself in anticipation of a jerk was held to be a question for the jury, in *Shoan v. Central Iowa R. Co.* (1883) 62 Iowa, 728, 16 N. W. 331. But it has been held that a brakeman employed to run a car loaded with stone from a quarry to a railroad is not, as matter of law, negligent in letting the brake off a little from the car at the very beginning, although the car moves gradually before he does so. *Spaulding v. W. N. Flint Granite Co.* (1893) 159 Mass. 587, 34 N. E. 1134.

A motorman of an electric car is guilty of such contributory negligence as will prevent recovery for an injury by collision with a vehicle going in the same direction as his car, where the car was going at such a rate of speed on a foggy morning that he could not stop it in time to prevent the collision after the vehicle became visible. *La Pontney v. Shelden Carriage Co.* (1898) 116 Mich. 514, 74 N. W. 712 (action against stranger).

A motorman who takes an east-bound car on the west-bound track, although by order of the dispatcher, on a morning

so foggy that he cannot see a distance of more than 15 or 20 feet, at such speed that he cannot stop in time to prevent a collision with an approaching car, is guilty of negligence which is the proximate cause of an injury received by him in such collision. *Savage v. Nassau Electric R. Co.* (1899) 42 App. Div. 241, 59 N. Y. Supp. 225.

The fact that a conductor of a street car had been over the road before he was thrown off by a jolt at a place where the track was dangerously out of alignment was held not to be a sufficient ground for taking the question of his contributory negligence from the jury. *Coughlin v. Brooklyn Heights R. Co.* (1901) 59 App. Div. 126, 68 N. Y. Supp. 1165.

The driver of a street car is negligent in allowing the car to acquire such a momentum when near a railway crossing, that he could not stop it in time to prevent a collision with a train. *Huntel v. Chicago, M. & St. P. R. Co.* (1885) 33 Minn. 62, 21 N. W. 853.

A brakeman on a railroad is not, as matter of law, guilty of negligence contributing to his death, in attempting to light a cigarette while sitting on the rear bolster of a skeleton car from which he fell under the train and was killed. *Davis v. Miller* (1896) 109 Ala. 589, 19 So. 699.

(b) *Operation of hand cars.*—An experienced section hand who is thrown from a hand car by a sudden stoppage of the car cannot recover where the employee who put on the brake gave the usual signal, and the injured servant, although he knew the car would stop, made no effort to save himself by holding on to the lever. *Gulf, C. & S. F. R. Co. v. Hubert* (1900; Tex. Civ. App.) 54 S. W. 1074.

A section hand is not, as matter of law, negligent in having hold of the handle of the hand car with only one hand. *Alabama Mineral R. Co. v. Jones* (1897) 114 Ala. 519, 21 So. 507.

A section boss is guilty of gross negligence in running a hand car into a deep cut, without preparations to watch for and warn a train known to be due. *Goodlett v. Louisville & N. R. Co.* (1887) 122 U. S. 391, 30 L. ed. 1230, 7 Sup. Ct. Rep. 1254.

Sectionmen on a hand car who, without excuse and with notice that a wild train may come along at any time, go

down grade around a curve wholly cutting off the view, at a rate faster than that of the train which meets it, are guilty of negligence which will prevent recovery for injuries from collision with a wild train properly sent out and which whistles in accordance with the rules. *Shepard v. Boston & M. R. Co.* (1893) 158 Mass. 174, 33 N. E. 508. "The moment" said Mr. Justice Holmes, "a man has notice that a train may come along a track without warning at any hour, if he is run down by such a train when he is traveling on the track the other way, it is impossible for him to escape the imputation of negligence merely by showing that such trains were few, and the chance of their coming small."

Trackmen running a hand car around a curve on a down grade are guilty of negligence in failing to send a flagman around the curve to flag an approaching train, if such precaution would be taken by a man of ordinary prudence under similar circumstances, although a printed rule requires flagmen to be sent around curves in going "up" grade only. *Southern P. Co. v. Ryan* (1895; Tex. Civ. App.) 29 S. W. 527.

A section foreman on a hand car is not, as matter of law, guilty of contributory negligence in going at a high rate of speed on the track where it is obscured by dense smoke, without stopping to ascertain whether a train is coming from the opposite direction, where he follows so closely behind a train which has passed that he will be through the smoke before such train can reach a side track beyond the smoke and allow another train coming down the main track at the usual rate of speed to enter the smoke; but otherwise if he does not know how far the former train is ahead of his hand car. *Woodward Iron Co. v. Herndon* (1897) 114 Ala. 191, 21 So. 430. On the second appeal of this case (1901) 130 Ala. 364, 30 So. 370, it was held to be proper to instruct that if the jury believed, from the evidence, that the switch engine, at and before the collision, was running at its customary speed, they should find for defendant; and also that, if the plaintiff's intestate was informed that the switch engine was liable to be passing along the track where the smoke was at any time of day, and did not see and could not know how far the incoming train was ahead of the hand car when he entered the smoke, he was negligent in not stopping before entering the smoke, and sending a flagman forward. It was also held to be for the

jury to say whether he was negligent not sending on a flagman before entering the smoke, the evidence being conflicting as to the distance between the incoming train and the hand car at the time the former disappeared in the smoke; and it might therefore have been justifiable to act on the assumption that the switch engine would not secure a right of way after the passage of a train in time to get as far as the smoke.

A road master who enters a cut on a velocipede hand car knowing that a train was nearly due from the opposite direction is guilty of negligence which will prevent his recovering for injuries caused by a collision with the train. *International & G. N. R. Co. v. McCall* (1885) 64 Tex. 632.

A railroad employee in charge of a hand car, who wrongfully and for his own pleasure delays his return with the car until it is too dark to see trains, cars left standing on the track, is held to proceed with such caution as may be necessary to secure his safety, and through running the car too rapidly, if he fails to observe cars standing on the track and a collision results, the mere fact that the cars have been left without signal lights will not render the company liable for injuries caused by the collision. *Slincy v. Duluth & W. R. Co.* (1891) 46 Minn. 384, 49 N. W. 187.

Where a track repairer was killed at night by the collision of a hand car with a train of cars with a hand car in which he, with others, was approaching a station at which the train was stopped, it is error to instruct the jury that, if the deceased knew that the train was at the station, he was not guilty of negligence in approaching it in a hand car, unless he knew the train was in motion. *Chickawissa R. Co. v. Armstrong* (1895) 4 Pa. 186.

An inexperienced section hand on a hand car cannot be held, as matter of law, guilty of contributory negligence in not trying to stop the speed of the car on which he is riding, on seeing another closely following at a high rate of speed—especially where there is nothing to show that the slackening of the speed would have prevented the collision by which he was injured. *Christianson v. Chicago, St. P. M. & O. R. Co.* (1896) 67 Minn. 94, 69 N. W. 640.

See also cases cited in § 343, note 1, *infra*.

(c) *Inspecting and repairing of rolling stock.*—Negligence was held to be a necessary inference where an experienced

car repairer failed to set out a signal flag at both ends of the siding where he was at work, although at the end where the flag was not set engines used to enter only two or three times a week. *Chicago, B. & Q. R. Co. v. McGraw* (1896) 22 Colo. 363, 45 Pac. 383. A railway employee cannot recover for personal injuries caused by a shifting engine bumping the car on which he was engaged in making repairs, where he knew that if he put up a red flag which was at hand, the car would not be struck, and also knew of the danger of failing to put it up, and yet neglected to do so. *Cypher v. Huntington & B. T. H. R. & Coal Co.* (1892) 149 Pa. 359, 24 Atl. 225. A fireman who has occasion to go underneath an engine which has a leaky valve and is therefore liable to begin moving is negligent if he omits to scotch the wheels. *Vicksburg & W. R. Co. v. Willis* (1872) 47 Miss. 404.

(d) *Coupling cars.*—A switchman attempting to couple cars having couplers which he knows are dangerous, without the exercise of great care, is bound to exercise a higher than ordinary degree of care in his attempt to couple the cars. *Southern R. Co. v. Arnold* (1897) 114 Ala. 183, 21 So. 954. No action can be maintained for the death of brakeman killed while coupling a car having an old-fashioned drawbar to a car having a patent one, owing to the fact that he had not a link ready, so as to prevent the platforms passing. *Toledo, W. & W. R. Co. v. Ashbury* (1877) 84 Ill. 429. A brakeman who is chargeable with knowledge that the coupling appliances on foreign cars are dissimilar is bound to exercise, in coupling them, a degree of care proportionate to the increased danger. *Kelly v. Abbot* (1885) 63 Wis. 312, 53 Am. Rep. 292, 23 N. W. 890.

Where a brakeman, whose hand was crushed by being caught between deadwoods, testified that there was nothing to prevent his seeing that both the cars coupled had deadwoods, and that he could have seen the deadwoods perfectly if he had looked, the unavoidable inference is that his injury might have been avoided by the exercise of due care. *Whitcomb v. Standard Oil Co.* (1899) 153 Ind. 513, 55 N. E. 440. A brakeman is guilty of such contributory negligence as will prevent a recovery for the crushing of his hand between the bumpers of cars which he was attempting to couple, notwithstanding the negligence of the conductor in signalling the engineer to back the train when the

brakeman was not ready, where the cars were 6 feet apart at the time and moving very slowly and the brakeman saw the signal given. *Dickson v. Norfolk & W. R. Co.* (1897) 43 W. Va. 80, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258. A servant who has to handle crippled cars is bound to exercise active vigilance to avoid danger, to at least the same degree that is demanded of persons using highway crossings. *Abbott v. New York C. & H. R. R. Co.* (1894) 80 Hun. 152, 29 N. Y. Supp. 1126.

A brakeman who, at the direction of the conductor, attempts to couple a flat car with steel rails projecting from the end of the car, and raised 4 feet 1 inch from the ground, to another car, is not, as matter of law, guilty of contributory negligence in raising his head, after completing the coupling, just before he is out of reach of the rails, so that it is caught between the end of a rail and the other car. *Corbin v. Winona & St. P. R. Co.* (1896) 64 Minn. 185, 66 N. W. 271.

(e) *Dismounting from moving cars.*—A servant who steps off the pilot of a moving engine at an unusual place, with which he is unacquainted and at which he is under no necessity to alight, in the dark, without using his lantern, as he could, when, had he used it, he would have discovered an embankment so close to the track as to render his attempt to alight dangerous, cannot recover for injuries sustained. *Burgin v. Louisville & A. R. Co.* (1893) 97 Ala. 274, 12 So. 395.

A brakeman who hurriedly stepped from a train without looking to see in which direction it was going, which he could have readily discovered by looking, although the night was dark, is guilty of such contributory negligence as will bar a recovery, where he was injured by falling upon the station platform and rolling under the cars. *Wagon v. Chicago & N. W. R. Co.* (1891) 82 Iowa. 219, 48 N. W. 92.

See also § 338, subd. f, *infra*.

(f) *Setting stop signals on railways.*—The delay of a brakeman whose duty it is to put caps on the rails as signals to a following train, to place such caps, for the purpose of fixing his fires, is negligence which will prevent recovery for his death from a collision between the two trains during the time of such delay. *Hoover v. Beech Creek R. Co.* (1893) 151 Pa. 362, 26 Atl. 315.

A train hand who, being sent out to set stop signals, goes to sleep on the

track, cannot recover if he is struck by a train. *East Tennessee V. & G. R. Co. v. Rush* (1885) 15 Lea, 145. Under such circumstances the fact that the engineer failed to keep a sharp lookout upon the track will not enable the plaintiff to recover, since the former owes him no such duty. *Newport News & W. Valley Co. v. Howe* (1892) 3 C. C. A. 121, 6 U. S. App. 172, 52 Fed. 362; *Stewart v. Southern R. Co.* (1901) 128 N. C. 517, 39 S. E. 51 (servant seated himself on the end of a tie while acting as flagman, and fell asleep). See also *Price v. Hannibal & St. J. R. Co.* (1883) 77 Mo. 508 (plaintiff, while asleep, put his foot on a rail, and was run over).

(g) *Operation of elevators.*—A servant who knows of the condition of the doors opening into an elevator well, and the fact that they have no automatic fastenings, is under the duty of guarding against any accident that is liable to occur in consequence of the absence of such fastenings. *Diebold v. United States Baking Co.* (1893) 72 Hun, 403, 25 N. Y. Supp. 205 (servant backed into well without ascertaining whether the cage was there).

An operator of an elevator, familiar with its construction and operation and knowing that the brake must be set according to the weight placed upon it, and that a weight would cause it to descend unless the brake was properly set, is guilty of such negligence as will prevent a recovery for injuries caused by its sudden descent, where he rolled two heavy barrels upon it without trying the brake and seeing that it was properly set to sustain their weight. *Robinson v. Charles Wright & Co.* (1892) 94 Mich. 283, 53 N. W. 938.

See also subd. (i) of this note, and note 16 of next section.

(h) *Manipulation of machinery.*—In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the unexpected starting of a machine which he was attempting to repair, and which was run by a belt from an overhead shaft, there being both a loose and a tight pulley for the belt, evidence tending to show that owing to defects in the belt and in the driving pulley over which it ran on the overhead shaft, the belt had a tendency, when running on the loose pulley, to tick the tight pulley, and to creep from the loose to the tight pulley, to such an extent as to communicate the power of the overhead shaft to the machine, and to put in motion the fly wheel, the mo-

mentum of which kept power on the speed shaft after the belt was on the loose pulley, does not prove, as matter of law, that the plaintiff was careless in attempting to repair the machine without first taking the belt entirely off. *Mitchell v. National Blank Book Co.* (1896) 166 Mass. 4, 43 N. E. 513.

An employee who works near a running shaft, without first removing his coat or protecting it from coming in contact with the shaft, is negligent. *Folk Beet-Sugar Co. v. Preuner* (1895) 55 Neb. 556, 75 N. W. 1097.

A servant who has been at work on an obviously dangerous or defective machine sufficiently long to understand the special perils to which it exposes him cannot recover where he is injured as a result of his want of care in handling it. *Hunby v. Union Paper-Mills Co.* (1881) 110 Ga. 1, 35 S. E. 297; *Standard Swifts Cande Co.* (1900) 53 App. D. 500, 65 N. Y. Supp. 942 (servant's hand drawn between rollers of drying machine, the space between them having been enlarged temporarily, to his injury). Where an employee was using a stamp which, after descending, was cutting pieces of tin in a certain position, and returned to a position of rest above the block, where it was supposed to rest until released once more by the lever, he is not negligent, as matter of law, in using his fingers to remove a piece of tin, although he knew that the machine was not in good order, and he could have used a stick for the purpose. *Anton Bros. v. Szepurak* (1897) 70 N. D. App. 686. See also subd. (i) of this note.

(i) *Dealing with electrical appliances.*—A recovery cannot be had for the death of an experienced lineman in handling uninsulated wires charged with electricity, without using rubber gloves provided for him. *Junior v. Missouri Electric Light & P. Co.* (1895) 1 Mo. 79, 29 S. W. 988. A night inspector's want of care in the use of an insulating board while he was repairing lamps will prevent recovery for death caused by contact with a live wire. *Dixon v. Louisiana Electric Light & Co.* (1895) 47 La. Ann. 1147, 37 S. 696.

A charge in an action for a lineman's death, caused by a live wire, that the deceased had no knowledge or information that the span wires of a street railway company were not properly insulated, and reasonably safe, then he had a right to presume that they were properly a-

safely insulated, unless the want of insulation or defects therein were plainly obvious, is erroneous, in that it relieves the employee of the duty to exercise active precaution in a hazardous occupation. *Jackson & S. Street R. Co. v. Simmons* (1901) 107 Tenn. 392, 64 S. W. 705.

(j) *Dealing with inflammable gases.*—Whether the striking of a match by the plaintiff, a janitor in the employ of defendant, to discover where the smell of gas which he detected came from, was negligence which contributed to the injury resulting from an explosion caused thereby, will depend upon the circumstances of the case, and is a question for the jury. *Ruch v. Gas Electric Co.* (1900) 65 N. J. L. 399, 47 Atl. 504. Contributive negligence is chargeable to an experienced oil miner who is killed by an explosion occasioned by his lighted lantern, in passing near an oil well from which he could smell and hear gas escaping. *McClafferty v. Fisher* (1885; Pa.) 1 Cent. Rep. 571. See also § 335, subd. (14), *infra*.

(k) *Dealing with explosives.*—To leave an open barrel of gunpowder close to the place where a charge is being fired is negligence. *Mulligan v. M'Upine* (1888) 15 Se. Sess. Cas. 4th series, 789. To light a fire for the purpose of repairing tools in a room where powder is lying is negligence. *Downey v. Pence* (1895) 98 Ky. 261, 32 S. W. 737. An employer is not liable for injuries sustained by an employee engaged in clearing and grading the surface of the bottom of a canal after blasting, from the carelessness and negligence of a coemployee in striking an unexploded dynamite cartridge with his pick, where the injured employee knew it was not uncommon for cartridges to remain unexploded after the use of an electric battery in their discharge, and was aware of the necessity of caution in approaching the unexploded holes. *Hutchinson v. Charles F. Parker & Co.* (1899) 39 App. Div. 133, 57 N. Y. Supp. 168.

(l) *Dealing with dangerous fluids.*—A laborer who, while cleaning a wall, is precipitated to the sidewalk by the breaking of a rope of the platform used by him, cannot recover therefor, if his employer instructed him that the acid used for cleaning would eat the ropes, which were of sufficient strength when he began work, and where the rope broke because of acid which he spattered upon it while he was engaged in the work.

Anson v. Evans (1893) 19 Colo. 274, 35 Pac. 47.

(m) *Working where there is danger from flying objects.*—Where an employee engaged in working at an emery wheel was provided by his employer with a pair of goggles to protect his eyes from flying particles of brass from the wheels, and, having occasion to be absent from his wheel a few moments, laid his goggles aside, and on his return and before he had adjusted them to protect himself he was struck in the eye by a piece of brass from an adjacent wheel operated by another employee, he is guilty of negligence. *Munn v. L. Wolf Mfg. Co.* (1900) 94 Ill. App. 122. See also § 335, subd. g.

(n) *Handling heavy objects.* One of two men employed to transfer a box weighing 250 pounds from one railroad car to another, who stands in the doorway of one of the cars while his fellow servant shoves the box part way out of the door of the other, and attempts to hold it by a rope attached by one of them to the handle of such box so carelessly that it gives way and causes the whole weight of the box to fall upon the former and pull him out of the car, is guilty of negligence. *Garcen v. Hubby* (1893) 6 C. C. A. 190, 12 U. S. App. 571, 56 Fed. 973.

An employee engaged in loading heavy lumber on a car standing on a spur or side track is not, as matter of law, guilty of such negligence as will prevent a recovery for his death by the lumber falling upon him when struck by another car, without notice to him, by not keeping the lumber on a level at all times, where it is of different dimensions. *Rochland v. St. Louis, I. M. & S. R. Co.* (1897) 49 La. Ann. 1166, 22 So. 366.

A brakeman on a construction train who, although cautioned of the danger by a fellow servant, attempts while the train is in motion to adjust cross ties on flat cars, which have become misplaced so that their ends jut over the end of the car, and is knocked from the train and killed, is guilty of contributory negligence. *Georgia P. R. Co. v. Bradford* (1892) 10 So. 3.

The carrying of a light rail on the shoulders of sectionmen to be substituted for a defective one in the railroad track, instead of upon a hand car, which is the usual method of transporting rails, does not constitute contributory negligence on the part of one of those

sectionmen. *Atelison, T. & S. F. R. Co. v. Vincent* (1896) 56 Kan. 344, 43 Pac. 251. Where a sawmill employee, having failed to get a log down to the depression nearest the foot of the skids, ready to load on the carriage when the latter was back from the saw and in front of the skids, rolled the log down after the carriage was beyond the skids, and the carriage, when it came back, threw the log against him, an action for the resulting injuries is barred on the ground of his contributory negligence in rolling the log down after the carriage was beyond the skids. *Stadky v. Marinette Lumber Co.* (1900) 107 Wis. 250, 83 N. W. 514.

It is negligence to roll a heavy grindstone over a depression in a floor without any necessity and without taking any precautions,—such as laying a plank over the low place. *Sullivan v. Nichols, an Fife Co.* (1900) 21 R. I. 540, 45 Atl. 549.

An employee is not, as a matter of law, guilty of negligence in holding one end of a plank, while the other end rests on a wagon, for the purpose of unloading a heavy barrel therefrom, where such manner of unloading was not so dangerous as to threaten immediate injury in its use. *Beard v. American Car Co.* (1895) 63 Mo. App. 382.

One of three men injured while attempting to lift heavy steps, when other employees who might have been called to assist, and all necessary tools and instruments for moving such articles, were near, cannot recover against his employer for injury thereby received. *Dundup v. Barney Mfg. Co.* (1888) 148 Mass. 51, 18 N. E. 599. An employee directed to remove the rough places from an iron cylinder weighing 1,250 pounds, who, without calling for assistance, which he might have had, attempts alone to move the cylinder up an incline to enable him to work more conveniently, takes the risk of the breaking of a stick or rung used to hold the cylinder in place, and which, had the casting not been moved, was reasonably sufficient for the purpose although it was cross-grained. *McGoldrick v. Metcalf* (1892) 44 N. Y. S. R. 476, 18 N. Y. Supp. 163. Affirmed in a mem. judgment (1894) 144 N. Y. 630, 39 N. E. 494.

An employee in a dock-yard is guilty of contributory negligence where, under the foreman's orders, he attempted to bear down upon a stern post which was being unevenly raised by a hydraulic crane, although he knew that the ring

attached to the post was too large safely fit down into the hook fast to the arm of the crane,—a fact of which the foreman was not notified,—when the hook gave way and the post fell on the employee's leg, crushing it. *W. v. Newport News Shipbuilding & Dock Co.* (1897) 95 Va. 355, 28 S. E. 577.

An adult laborer is presumed to understand the operation of the law of gravitation sufficiently to be charged with negligence if he puts his weight on one side of a wagon bed on which a thin slab of marble is set almost right, and thus causes the slab to tip over on him. *Motey v. Pickle Mark Granite Co.* (1896) 20 C. C. A. 366, U. S. App. 682, 74 Fed. 155.

An employee is negligent in moving heavy timbers which have not been squared, along a narrow runway with blocking them so that they cannot be moved from the dolly by means of which they are moved. *Agnew v. Supple* (1898) Ill. App. 437.

A servant is not entitled to recover on findings that plaintiff was employed to operate machinery in defendant's mill, and was injured while attempting to readjust a heavy shaft hung about four feet from the floor; that he was acquainted with the danger as defendant was; that the injury was purely accidental, and to have avoided it plaintiff need only have kept in mind the fact that the shaft would fall if not supported, and to give reasonable attention to the work. *Ervin v. Evans* (1900) Ind. App. 335, 50 N. E. 725.

A factory girl whose duty it is to carry boards to be used in her work from the floor above the one on which she works is not guilty of negligence in attempting to descend the stairs holding in her arms four boards about 4 feet long and 6 to 12 inches wide, there being no other way to obtain them. *Farrar v. Hornsheim* (1899) 51 La. Ann. 178, 18 So. 771.

(c) *Work in mines.*—A miner who lights a match without observing his safety lamp to see that there is no gas in the mine is negligent, so as to be unable to hold the employer liable for injuries caused by a resulting explosion. *Sommers v. Carbon Hill Coal Co.* (1898) 91 Fed. 337. No recovery can be had where a miner, knowing that a roof was in an unsafe condition, tapped it with his pick for the purpose of testing it, and brought down a large piece upon his head. *Massie v. Peel Splint Coal Co.*

(1899) 41 W. Va. 620, 24 S. E. 644. Where an employee having charge of a switch at a resting place along a line of the shaft of a coal mine was struck by a descending car, his contributory negligence is deemed to be a bar to his action, where he neglected to have the switch turned by his assistant, although he knew that the noise occasioned by the steam escaping from a pipe which he was engaged in repairing would prevent him from hearing the approach of the car. *Woodward Iron Co. v. Jones* (1885) 80 Ala. 123. See also subd. (j), *supra*.

(p) *Footways*.—A servant who is chargeable with knowledge that a bridge extending from a vessel to a wharf is likely to prove too weak to support the weight to which it is subjected, unless it is supported at intervals by blocks, is negligent if he does not adopt this precaution. *Jones v. Roach* (1876) 9 Jones & S. 248. A servant injured through failing to use some precaution to save him from falling off a sloping shelf, slippery with ice, which ran round a tank, on which he was ordered to do some work, the manner of doing such work being wholly under his control, cannot recover. *English v. Chicago, M. & St. P. R. Co.* (1885) 21 Fed. 909. No recovery can be had where a servant who has got off a beaten path goes on, knowing that there is an unprotected hole close by, and falls into it. *Washburn v. Baxter* (1890) 7 Times L. R. 58.

A woman has been held unable to recover for injuries caused by a fall consequent upon rushing down a ladder with high-heeled shoes on her feet. *Apex v. Bull* (1889) 5 Times L. R. 202.

(q) *Inadequate light*.—A servant who gropes about an unfamiliar part of his master's premises on a dark night is, as a matter of law, guilty of contributory negligence. This rule prevents an employee in a mill from recovering for injuries sustained by falling into a cistern maintained in the mill yard at a distance from the passage leading to and from the mill, in walking through the yard in search of a drink of water on a dark night, while the ground was frozen and slippery. *McCann v. Atlantic Mills* (1898) 20 R. I. 566, 40 Atl. 500.

A workman who, told by his master's foreman to hurry, in the dark, falls into an unguarded elevator well the existence of which he knows and which he might have avoided, is guilty of contributory negligence precluding his maintaining

an action against his master, who negligently permitted the well to be unguarded. *Taylor v. Carey Mfg. Co.* (1885) 140 Mass. 150, 3 N. E. 21. Where the evidence is that the plaintiff ran an elevator to an upper story to secure some merchandise, and, leaving the bar up which closed the shaft, went in search of the goods, and, returning, placed some on the elevator; that he then went for others, still leaving the bar up and the shaft open; and that on returning hastily without the goods, he, without examination, stepped into the shaft and was precipitated to the bottom, the elevator having been removed by another employee,—he cannot recover though the light was bad, since in such event he should have been more careful. *Paindexter v. Benedict Paper Co.* (1900) 84 Mo. App. 352.

In an action by the night foreman of a furnace company to recover for injuries sustained by falling over a precipitous excavation in the dump pile at nighttime, a verdict should be directed for the defendant where the foreman had a right to and might have taken a torch with him. *Troquois Furnace Co. v. McCrea* (1901) 191 Ill. 349, 61 N. E. 79, Affirming 91 Ill. App. 337.

Where an employee, after dark, with an unlighted lantern in his hands, in leaving the building where he is employed takes no notice of where he is going, and, without looking down to see if there is a ladder or other safe means of egress, walks out of a window which he knows is 20 feet or more from the ground, he is guilty of contributory negligence. *Swift v. Melchrey* (1899) 90 Ill. App. 204.

A spinner who, on the electric lights going out for a minute or two, immediately reached in the dark, with his left hand, to shut off the machinery, though it does not appear that there was any emergency or need for haste, and in doing so got his right hand in the gear, is guilty of contributory negligence. *Kelley v. Calumet Woolen Co.* (1900) 177 Mass. 128, 58 N. E. 182.

An employee who, knowing that a room is dangerous because it contains the opening to vats containing hot liquids, enters it when it is dimly lighted, and goes along in it when he cannot see, is guilty of such negligence as will prevent recovery for an injury caused by falling into one of the vats. *Chicago Packing & Provision Co. v. Rohan* (1892) 47 Ill. App. 640. It is negligence to walk in the dark beside an open

from the failure of a servant to extricate himself from such a situation, whenever it is possible to do so by the exercise of ordinary care.

A jury is properly instructed to the effect that an employer is liable for an injury received by an employee in a situation of which is apparent to anyone of ordinary intelligence that the employer failed to exercise the degree of care required, and such fault is contributed to his injury.³

Some of the decisions cited in which the servant failed to recover might evi-ently, so far as the facts were concerned, have been put upon the ground that he had assumed the risk or was negligent having remained at work.

It will also be observed that in many of the cases the facts involved are identical with or similar to those commented upon §§ 334-339, *infra*. Indeed, it is easy to see that circumstances which are suggestive of a violation of the duty to avoid unnecessarily dangerous positions will usually be suggestive also of a violation of the duty to use precautions appropriate to the environment. The practical inference is that a counsel acting for an employer should

vat on a plank which, as the servant ought to know, is frequently rendered slippery by the vapors which rise from the vat and settle upon it. *Shippey v. Grand Rapids Leather Co.* (1900) 124 Mich. 533, 83 N. W. 284.

Whether an employee stepping down from a ladder in the dark without calling on others present to relight his candle, or to hold theirs so that he could see, contributed to his injuries caused by stepping into hot water overflowing from a well, is a question for the jury where he had previously crossed the place three times within a few minutes, picking his way carefully each time by the light of his candle. *Connelly v. Faith* (1899) 190 Pa. 553, 42 Atl. 1024.

The failure of a servant to use a lantern, while walking along in the dark between the decks of a ship which is being loaded, is not negligence, where it appears that he did not know that lanterns had been supplied. *Tully v. New York & T. N. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29. See also subd. (e), *supra*.

(r) *Severe weather*.—A railway servant sent out on a work train in the winter time is not, as matter of law, guilty of contributory negligence because he failed to provide himself with clothing sufficient for severe weather. *Schumaker v. St. Paul & D. R. Co.* (1891) 46 Minn. 39, 12 L. R. A. 257, 48 N. W. 559.

A section hand who allows his feet to freeze, when this might have been prevented by his keeping in motion or going to a fire provided, is guilty of contributory negligence. *Farmer v. Central Iowa R. Co.* (1885) 67 Iowa, 136, 24 N. W. 895.

(s) *Unruly horses*.—An employee who, seeing a moving train, drives a horse known to him to be fractious within 5 feet of the locomotive, is guilty of negligence which will preclude a recovery by him from his employer for injuries sustained by the horse becoming frightened, although he did not see the engine and had been required to drive the horse against his objection. *Mahan v. Clee* (1891) 87 Mich. 161, 49 N. W. 556.

(t) *Work on ships*.—A seaman who is ordered aloft on a dark, windy night to cast off the stop on the foretop gallant balliards, and does this by going up the rigging and out on the crane line, is negligent, if he does this without examining the condition of the crane line, and without holding on to the stays by his arms or legs while casting off the stop. *The Chandos* (1880) 6 Sawy. 544, 4 Fed. 645.

¹ *Parker v. Georgia P. R. Co.* (1889) 83 Ga. 539, 10 S. E. 233.

² *Jones v. Alabama Mineral R. Co.* (1895) 107 Ala. 400, 18 So. 30.

always be careful to see that, whenever, the state of the evidence admits it, both these issues are distinctly raised.

The inference of negligence which is drawn when a servant who is about to put himself in a dangerous position fails to warn other persons of his movements is discussed in § 336, *post*.

332. Failure to give proper attention to surroundings.—(Compare § 348, subd. b, *infra*.)—A doctrine which is indirectly exemplified by several of the cases cited under the last section, and specifically enumerated in a large number of others, is that a servant is not in the exercise of ordinary care, unless, at each stage in the progress of his work, he makes an effective use of his bodily and mental faculties, and observes as attentively as is reasonably possible under the circumstances the condition of the instrumentalities by which his safety may be affected, and the results of their operation by himself or others, in so far as that operation may tend to subject him to danger.¹

In some cases his inability to recover may be viewed as being referable either to the conception that the fact of his having paid no attention to his surroundings shows that he was reckless as to whether there was or was not danger, or to the conception that his incapacity to understand the extent of the danger was culpable.²

For the sake of convenience in classifying the large number of cases in which a breach of the obligation thus indicated has been recognized, they may be divided into the two main categories indicated by the headings of the next two sections.

332a. Duty omitted in respect to stable or persistent conditions.—(Compare § 348, note 12, *infra*.)—The conditions thus designated

¹ An employee must give heed to the notice and instructions given him, and must employ his senses, his reasoning faculties, and his attention, alike for his own safety and the welfare of the road. *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710, 6 So. 277.

A servant "is bound to exercise his own skill and judgment so as to protect himself in the course of his employment, and the master is not regarded as warranting generally his safety. He is bound himself to exercise proper care, and cannot claim indemnity from the master for injuries resulting to him which might have been prevented if he had himself been reasonably vigilant." *International & G. N. R. Co. v. Hester* (1888) 72 Tex. 44, 11 S. W. 1041.

An employee is not entitled to rely on

his ears alone, without using his eyes. *Lynch v. Boston & A. R. Co.* (1893) 150 Mass. 536, 34 N. E. 1072.

In *Buxton v. Old Colony R. Co.* (1887) 143 Mass. 535, 10 N. E. 255, the obligation to use eyes and ears is also adverted to.

In *Claybaugh v. Kansas City, Ft. S. & M. R. Co.* (1894) 56 Mo. App. 630, it was laid down that a servant could not recover if his injury was due to his failure to "make use of his faculties of sight and hearing."

In *Stone v. Oregon City Mfg. Co.* (1870) 4 Or. 52, it was declared to be a servant's duty "to exercise his thinking faculties, and give careful attention to the business" in which he is engaged.

² See *Kennedy v. Lake Superior Terminal & Transfer R. Co.* (1891) 87 Wis. 28, 57 N. W. 976.

are exemplified in cases involving the different predicaments mentioned in the three following paragraphs.

(1) The conditions to be observed were incident to the permanent arrangements of the master's plant, or affected some portion of the plant in such a manner as to threaten the security of the servant, and the servant was chargeable with knowledge of those conditions at some time before the injury was received.¹ It will be observed, that,

¹ A railroad brakeman is guilty of contributory negligence in descending a ladder at the side of a car for his own purposes, without looking for a water plug standing so near the car as to be dangerous, or in not waiting until such plug is passed, where it is open and obvious to all, and he has had numerous opportunities of seeing it. *Pennsylvania Co. v. Finney* (1896) 145 Ind. 531, 42 N. E. 816.

A brakeman is guilty of contributory negligence precluding recovery for his death caused by his striking, while standing on the top of a car, against an overhead bridge negligently maintained by the company, where he had passed under such bridge over one hundred times and at the time of the accident his view was unobscured. *Louisville & N. R. Co. v. Banks* (1894) 104 Ala. 508, 16 So. 547. A railway company is not liable for the death of a brakeman who was struck by the fourth sill of a dangerously low bridge, after he had passed safely under the three first sills by stooping and lowering his head, where he had full knowledge of the dangerous character of the bridge, and the accident was due to his negligently raising his head too soon. *Chesapeake & O. R. Co. v. Hafner* (1894) 90 Va. 621, 19 S. E. 106. A railroad brakeman receiving notice of low highway bridges over the road and of their location must use such care, watchfulness, and caution to avoid them as ordinarily prudent men would usually exercise in reference to their own safety, under like circumstances. *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710, 6 So. 277. Some remarks on cases of this type will be found in §§ 30a, 63, *ante*.

A railroad brakeman who has walked by a cattle guard in close proximity thereto three or four times while engaged in switching on a given day is guilty of contributory negligence where he subsequently walks into it while attempting to uncouple cars on the same day. *Fuller v. Lake Shore & M. S. R. Co.* (1896) 108 Mich. 690, 66 N. W. 593.

A railroad employee who, knowing the existence of pits in a roundhouse, walks into a pit at night while going to the place assigned to him for work, is guilty of such contributory negligence as will prevent a recovery where the place was sufficiently lighted or guarded. *McDonnell v. Illinois C. R. Co.* (1895) 105 Iowa, 459, 75 N. W. 336. In an action by a switchman injured by falling over a ground switch in the railroad yard where he worked, evidence that he had been warned by his foreman to look out for certain ground switches, but for the one over which he fell, is properly admitted, as tending to explain failure to discover the switch that caused his injury. *Galveston, H. & S. R. Co. v. English* (1900) Tex. Civ. App. 59 S. W. 912. Denying rehearing (1900) 59 S. W. 625.

For a brakeman to place his foot on a coupling car, in a track known to be unblocked, when they have been coupled without doing this negligently. *Southern P. Co. v. Seay* (1894) 152 U. S. 145, 38 L. ed. 391, Sup. Ct. Rep. 530. For a brakeman knowing the frogs and switches are unblocked, to move over them while coupling and uncoupling cars, even in moving trains, without taking any thought of the frogs and guard rails, or as to where he may be stepping, is negligence on his part contributing to the catching of his foot in them. *Gilllin v. Patten & S. R. Co.* (1899) 93 Me. 80, 44 Atl. 361.

Where a foreman of a switching crew had complained to the yard master of the defective condition of a footboard on the engine, and a few days afterwards was injured while riding on the footboard, by reason of the defect, contributory negligence is not inferred simply from the fact that in the hurry of business, he did not look out for the defect or observe whether it had been remedied. *Central Trust Co. v. Walsh* (1886) 26 Fed. 897. Compare cases cited under §§ 350, 351, *infra*.

An employee in a foundry company

though the right of recovery was made to turn, in the cases cited, upon the question whether he exercised a proper amount of vigilance at the time the injury was received, the action might have been declared not maintainable for the reason that the servant's knowledge charged him with an assumption of the risk, or with contributory negligence in continuing in the employment.

(2) The conditions were of the same nature as those designated in

cannot recover for injuries received by falling into a molding pit, where he could have seen such pit if he had carefully looked ahead of him as he was walking along, and such pit was one of the usual appurtenances in connection with such a foundry as that in which he worked. *East Chicago Foundry Co. v. Aubrey* (1897) 19 Ind. App. 159, 47 N. E. 936, Rehearing Denied in (1898) 19 Ind. App. 153, 49 N. E. 186. An employer is not liable for an injury to an employee who falls through an opening in the floor of which he knew, where the accident results from his own inattention. *Clark v. Mutton* (1896) 63 Ill. App. 49.

The servant's freedom from contributory negligence is not established, where it appears that he went to clear ice from a flume rack, and fell into an open space between two platforms over the flume; that on the same night he had assisted his brother in clearing away the ice, and had assisted in performing such duty as occasion required for three years; that he was familiar with the flume and its dangerous character, knew the method of clearing away ice, and had full opportunity to know the exact situation; that he was provided with a lantern, and it was a bright moonlight night; and that, while the testimony tended to show that such open space had been habitually covered until within a week or ten days before the accident, there was no proof that it had been covered within such time, or that such servant did not know the exact situation, or that he took any precaution to prevent the accident. *Robbins v. Brownville Paper Co.* (1900) 53 App. Div. 641, 65 N. Y. Supp. 955. A servant cannot recover for personal injuries due to his own negligence in letting his hands slip into cogwheels while not giving attention to his work. *D. M. Sechler Carriage Co. v. O'Neil* (1891) 41 Ill. App. 633. A workman in a biscuit factory who, through his inattention, allows his hand to be caught between the rollers of a machine into

which he was inserting a piece of paste cannot recover damages. *Saucutt v. Van* (1881) 11 Rev. Leg. (Montreal Super. Ct.) 217. A servant who walks backward towards a revolving shaft, while helping other employees to move a box, is negligent. *Beck v. Firmench Upp. Co.* (1891) 82 Iowa, 296, 48 N. W. 81. A servant who fails to hold a coil of rope which he is carrying high enough to clear a revolving shaft the position of which he knows, and, as a result of his inattention, is injured by the ropes catching in the shaft, cannot recover. *Stone v. Oregon City M'n. Co.* (1870) 4 Or. 52. A servant operating a rip-saw set in a framework was declared, upon the evidence, to be chargeable with knowledge that, as the table through which the saw projected was not stationary, it was necessary to fasten it by some means or other as occasion required, and by consequence to be negligent in failing to give any attention to the subject, or to observe that the screws by which it had formerly been secured in place had been removed. *Eichler v. Haqqi* (1889) 40 Minn. 263, 11 N. W. 975. Compare also the decision that an independent contractor working upon a scaffolding within a few inches of a revolving shaft and set screws, with full knowledge of the situation, is guilty of contributory negligence precluding recovery for injuries from being caught by the set screw and whirled around the shaft. *Horton v. Vulcan Iron Work Co.* (1897) 13 App. Div. 508, 43 N. Y. Supp. 699.

In a case where the servant's hand was caught by a projecting key and thrown into the wheel which was fastened by it to a shaft, it was held that the jury were properly instructed that, if he knew the position, condition, and character of the machinery, and could have reasonably avoided danger by approaching the same from one particular side, and did not do so because he did not think or look, he was guilty of contributory negligence. *Hurst v. Barnside* (1885) 12 Or. 520, 8 Pac. 888.

the last paragraph, but the servant's knowledge thereof prior to the accident was not a specific element in the case, either because it was or could not be, proved at the trial.² Under such circumstances since the defenses of the assumption of the risk and of contributory negligence in continuing in the employment are excluded by the character of the evidence submitted for review, the sole question

It is held, however, that a finding that a servant who had his hands drawn between a belt and a pulley could have avoided the danger by giving attention to where he was putting his hands is not sufficient to overcome a general verdict in his favor. To have that effect it must also be stated that the failure to give such attention was negligent. *Romona Oilfield Stone Co. v. Phillips* (1894) 11 Ind. App. 118, 30 N. E. 96.

²In an action for damages for the death of a brakeman on a railroad freight train, the facts that he was killed by being knocked from a car by a bridge over the railroad, which was near other bridges, and was approached in the daytime; that the deceased and another brakeman were seated on top of one of the cars facing the bridges; that they passed one of the bridges in safety; that his companion passed all the bridges in safety, and the one by which he was struck was the last; that the men were not engaged in the performance of any duty, but were sitting idly together, in full view of the danger, and with nothing to distract their attention, and nothing to do but to avoid the danger,—constitute such evidence of contributory negligence as will defeat a recovery. *Stonback v. Thomas Iron Co.* (1886; Pa.) 2 Cent. Rep. 604, 4 Atl. 721.

Failure of a railway company to maintain a "telltale" over one of two parallel tracks passing under a low bridge does not render it liable for injury to a brakeman while riding on the top of a freight train, where he was learning the road, and had been told to look out for low bridges, and he knew of the existence of the bridge and its dangerous character a short time before the accident, and climbed onto the top of the car at a place which would have been between the bridge and the telltale if there had been a telltale. *Allen v. Boston & M. R. Co.* (1897) 60 N. H. 271, 39 Atl. 978.

An electric street railway company is not liable to a conductor who was

caught in a narrow space 3½ inches between the side of a trail car and a doorway of its power-house through which he assisted in pushing the car, the danger of attempting to pass between the car and pier being obvious and everything about the construction being open and transparent, and the injury occurring because he failed to go of the car when he came to the doorway. *Jennings v. Tacoma R. & M. Co.* (1893) 7 Wash. 275, 34 Pac. 222. Plaintiff testified that "he saw the situation, that he was directed by a superior in the execution of the duty, and he simply did not notice what was doing."

A servant who, while walking between a car, pushing it by the hand on the front platform, strikes his shoulder against a coal shed near the track, cannot recover where it appeared that he could see objects as large as a man at a distance of 10 feet and that others assisting him saw men on the track in front of them, and saw the shed. *Potter v. Detroit, G. H. & W. R. Co.* (1899) 12 Mich. 232, 81 N. W. 103.

Whether the servant was negligent in allowing his foot to get into an unblocked frog was held to be for the jury upon the facts in *Jones v. Flint & P. M. R. Co.* (1901) 127 Mich. 198, 86 N. W. 838.

A conductor who knows that some of the cars that he has to use are without end ladders is negligent if, before attempting to pass from the side to the end of a car, for the purpose of uncoupling it, he fails to ascertain whether it has steps or not. *Chicago, B. & Q. R. Co. v. Warner* (1884) 108 Ill. 538.

The danger caused by the difference in the height of the drawbars of two cars which are to be coupled is against which an experienced brakeman is presumed to be able to protect himself by the ordinary use of his eyesight. *Brewer v. Flint & P. M. R. Co.* (1885) 56 Mich. 620, 23 N. W. 440.

Negligence is inferable, as a matter of law, where a brakeman who was about to couple two cars failed to no-

which can be material is whether the servant's failure to observe the danger was due to a want of proper vigilance at, or just prior to, the time of the accident.

(3) The conditions were produced by or incident to the use of the master's plant by the employees, and, although not permanent in the sense in which that term has been used in the two preceding paragraphs, were such as to affect the safety of the servant's environment for a definite period of more or less considerable length.³ In most of the cases illustrating this predicament the servant had no opportunity

that they were equipped with projecting sills which came within 14 inches of each other when the cars met. *Boudin v. Central Vermont R. Co.* (1891) 38 N. Y. S. R. 473, 14 N. Y. Supp. 700.

A section hand is guilty of such contributory negligence as will prevent a recovery for an injury caused by falling, while helping to carry a heavily laden hand car over rough ground, in failing to give any attention to where he is going. *Terry v. Louisville, N. A. & O. R. Co.* (1896) 15 Ind. App. 353, 43 N. E. 273. Rehearing Denied in (1896) 15 Ind. App. 350, 44 N. E. 59.

It is for the jury to say whether negligence is imputable to a servant who, while carrying an armful of wood into a dark cellar, was injured by stepping into a hole, of which he had no previous knowledge. *Eastland v. Clarke* (1901) 165 N. Y. 420, 59 N. E. 202. Reversing (1898) 28 App. Div. 621, 51 N. Y. Supp. 1140.

An engineer who could have seen an obstruction on the track if he had kept a vigilant outlook, as his duty required him to do, in time to stop the train before injury, cannot recover for injuries on account of such obstruction. *Norfolk & W. R. Co. v. Williams* (1892) 89 Va. 165, 15 S. E. 522.

A brakeman who jumps off a moving train in a yard without looking to see whether he will alight on any of the obstructions which may be expected to be encountered near the track in railway yards is negligent, as a matter of law. *Thompson v. Boston & M. R. Co.* (1891) 153 Mass. 391, 26 N. E. 1070 (struck a pile of rails).

Whether trainmen should have observed an obstruction on a spur track was held to be a question for the jury, where it was hidden by a growth of overhanging brush which became much more dense as the point of danger was

approached. *Oregon Short Line & U. V. R. Co. v. Tracy* (1895) 14 C. C. A. 199, 29 U. S. App. 529, 66 Fed. 931.

A brakeman is not guilty of contributory negligence, as a matter of law, precluding recovery for his death caused by his head being wedged between a projecting pole on a flat car and box car while coupling the cars during a rainy and very dark night, although he had a lantern with him, and a few minutes before had uncoupled the same cars from the other side. *Uchison, T. & S. F. R. Co. v. Wells* (1895) 56 Kan. 222, 42 Pac. 699. The question of the contributory negligence of a switchman of slight experience, killed by poles which projected from the end of a car he was attempting to couple to another in the nighttime, is for the jury. *Lucas v. Clark*, (1898) 29 C. C. A. 371, 56 U. S. App. 595, 83 Fed. 608.

A brakeman who has an opportunity of inspecting the coupling apparatus of a car, but makes no examination thereof until the engine to which it is to be united is being backed down upon him in response to his signal, and then finds that a coupling pin is stuck fast in the drawhead, and having unsuccessfully tried to remove the pin steps back to get out and is caught between the car and the engine, must be held, as a matter of law, to have voluntarily placed himself in a place of danger without having used the caution which a person of ordinary prudence would have used. *Remington v. New York C. & H. R. Co.* (1900) 162 N. Y. 595, 57 N. E. 1123. Affirming (1899) 11 App. Div. 565, 42 N. Y. Supp. 813.

A brakeman employed in making and breaking up trains and coupling cars, who knows that there are both crippled and sound cars in the yard, cannot recover for injuries received while handling a crippled car, where the accident occurred in daylight, and the condition

to ascertain the existence of the conditions until the actual emergency with which he had to deal presented itself; and the degree of attention which he was paying to his surroundings at or just before the accident is the only material issue to be determined.

332b. Omission of duty in respect to transitory and sporadic conditions.—(See also § 348, note 12, and § 358, *infra*.)—Another type of case in which the servant's failure to give proper attention to his surroundings is the determinative factor is that in which the condition

of the car was apparent, although it was not marked as crippled. *Albert v. New York C. & H. R. R. Co.* (1894) 80 Hun. 152, 29 N. Y. Supp. 1126. A railway company is not liable for the death of an employee who was caught between two cars, one of which was without a drawhead and had been condemned to the repair shops and had reached the yard of the company, when deceased, dealing with it as a disabled car, called for the engine to be backed, and went between the cars without examination and regardless of the defective condition of such car. *Illinois C. R. Co. v. Bowles* (1894) 71 Miss. 1003, 15 So. 138.

A brakeman was guilty of contributory negligence preventing recovery for his death from collision of two parts of a train which had become separated while the train was running, during the nighttime, where he was riding on the top of the car next to the first car of the rear portion, and failed to discover that the train had broken, or, if aware of that fact, failed to take measures for his own safety, although the cars ran 5 miles before the collision occurred. *Richmond & D. R. Co. v. Tribble* (1896) 97 Va. 495, 24 S. E. 278.

A carpenter employed by a railroad company in the repair of cars cannot recover against the company for injuries resulting from the fall of a board the ends of which rested upon two cars, while, under orders from the foreman, he was engaged in moving one of the cars, which caused the fall of the board, where the foreman was unaware that the board had not been removed, and the carpenter could have easily seen it if he had looked. *Day v. Cleveland, C. C. & St. L. R. Co.* (1894) 137 Ind. 206, 36 N. E. 854.

An employee working at night on a trestle cannot recover for injuries due to his stepping on a tie which had been sawed in two, where it appears that he knew that at intervals there were ties in that condition, that the trestle was

illuminated by several electric lights and that, according to the testimony of several witnesses, he had been warned of the danger of the work. *Robare v. Seattle Traction Co.* (1901) 24 Wash. 57, 64 Pac. 781.

A workman engaged in constructing a bridge is negligent if he fails to observe whether a wedge used in the construction of a track on which heavy timbers are conveyed is out of place, so as to render the track unsafe, before attempting to convey such timber over it where he knows that the wedge is liable to slip out of place. *Bedford Belt Co. v. Brown* (1895) 142 Ind. 659, 4 N. E. 359.

A verdict cannot be directed for the defendant where the evidence is that while plaintiff was on a dimly lighted upper floor in a warehouse on a dark winter's afternoon, doing some work which required him to walk backward towards the elevator shaft, by which he and the other workmen had just ascended, he fell down it, owing to the fact that, without his knowledge, the spring hinge which closed one of the doors had been broken and the door itself left open permanently, and that, without his knowledge, the foreman had sent the cage down to a lower floor. *H. Cleveland Co. v. Hahn* (1901) 189 Ill. 28, 59 N. E. 522. Affirming (1900) 90 Ill. App. 256. The contributory negligence of an employee who walks backward with a truck down an incline towards an elevator, not knowing of the removal of the cage, and falls down the shaft, is a question for the jury. *Perryas v. Booth* (1901) 82 Minn. 191, 84 N. W. 739, 85 N. W. 179.

A workman who, several times during the day, has passed up and down a ladder through an open hatchway, is guilty of such negligence as will prevent his recovery, where, at midnight, without looking to see whether the hatchway is covered, and while a candle was burning within 6 feet of the hatch, he steps

tions involved were of an essentially transitory nature, and created a conjuncture which merely affected the safety of the servant's environment for a few moments.

By far the largest part of the cases under this head relate to injuries caused by moving railway cars.

It has been expressly held that the rule of law which excuses passengers from the obligation to observe a strict lookout for trains and locomotives when alighting from or getting upon trains over the tracks of a railway company does not apply to employees whose duties may require them to cross the tracks in the yards or at the

into it without looking, while reaching for a ladder 5 feet away. *The Jersey City* (1891) 46 Fed. 134. Where a night-watchman on a steamer undertook to sit down on a bunker hatch upon the main deck, without looking to see whether the cover was on or not, and fell backward into the hold because the cover was off, his own negligence will prevent a recovery. *The Sir Garnet Wolseley* (1890) 41 Fed. 896.

A stevedore's employee is guilty of contributory negligence where he steps upon a steam winch to reach a ladder, in order to descend into the hold, without waiting to ascertain whether the winch was temporarily stopped because it had discharged its load, or was stopped in pursuance of a practice well known to the employee, of holding the load suspended until the men in the hold were ready to receive it. *Anderson v. The Ashbrooke* (1890) 44 Fed. 124.

Where a workman employed in a colliery deliberately walked into a cloud of steam which he saw issuing from the surface of a footpath where he was accustomed to walk, the steam in fact proceeding from a defective blow pipe, which his employer should have kept in repair, his contributory negligence is for the jury. *Payne v. Reese* (1882) 100 Pa. 301.

The negligence of a railroad employee who fell into a hole filled with hot water, produced by a break in the sewer leading from a roundhouse, is for the jury upon evidence that he did not know and was not chargeable with knowledge of the hole, that it was dark and he had no light, and that there was nothing to indicate the hole except a lantern which was placed in the vicinity of the hole; and that he took the usual course in going from the roundhouse to the turntable where the employees whom he was directed to assist

were working. *Grimmelman v. Union P. R. Co.* (1897) 101 Iowa, 74, 70 N. W. 90. An employee in a blast furnace, who leaves the building at night for his own pleasure, and in returning walks, for his own convenience, in front of a furnace which he knows is undergoing repairs, cannot recover for an injury caused by falling into a hole in the floor in front of such furnace, where he knows that in making repairs it is necessary to remove part of the floor, and that the floor is not replaced until all the repairs have been finished, although he does not know the actual condition of the work on the furnace,—especially where he could have seen the hole if he had been paying attention. *Harley v. Lukens Iron & Steel Co.* (1898) 186 Pa. 187, 40 Atl. 321. Where a person employed as mate by one placed in charge of a vessel laid up during the winter season was familiar with vessels of this class, knew that they had hatchways, and knew they were liable to be open when the vessel was in port, and in passing along the deck for the purpose of inspection, before the vessel was placed in commission, fell into an open hatchway, he cannot recover. *Caniff v. Blanchard Nav. Co.* (1887) 66 Mich. 638, 33 N. W. 744.

In one Illinois case it was held that where a night watchman fell, on a Monday morning, through a trap door in the engine room, which he made his headquarters, and the floor of which he had swept on the preceding Saturday and Sunday mornings, while the door had been continuously open, negligence was inferable, though he testified that he did not know the door was there. *Mutual Wheel Co. v. Mosher* (1899) 85 Ill. App. 240. This decision, viewed as a conclusion of law, seems to rest largely upon the fact of the servant's having had previous opportunities of observing

station houses.¹ The obligations of an employee under these circumstances have sometimes been considered to be virtually the same as those incumbent upon travelers who are about to use a highway crossing, *viz.*, to look and listen before going on the track.²

the danger, as well as those which were offered at the time when he was injured. In another case, decided by the same court, it was declared that the question whether an employee, injured by falling through an open hatchway in a shop, was chargeable with negligence in failing to look where he walked, is a question for the jury in view of all the circumstances of the case. *Pullman Palace Car Co. v. Connell* (1897) 74 Ill. App. 447.

As it is obvious that a dead tree which is on fire may fall at any moment, a servant who passes close to it is bound to be on the watch for such a contingency. *Maltbie v. Bolden* (1901) 167 N. Y. 307, 54 L. R. A. 52, 60 N. E. 645. Reversing (1899) 45 App. Div. 384, 60 N. Y. Supp. 824.

A seaman engaged in unloading lumber from a vessel cannot recover for personal injuries from the fall of a pile of planks caused by the mate's removal of a cleat holding them in position, where such removal was necessary to their unloading, and the mate gave ample and repeated warning heard and obeyed by the other workmen, but disregarded by such seaman because he believed himself in a safe position. *The Aspogogan* (1892) 49 Fed. 163.

A servant assisting the operator of a drill, who proceeds to work the drill without taking steps to find out whether there was a "missed shot" or not, when he and the operator had full knowledge that shots had been fired; that a "missed shot" might be reasonably anticipated, and that, if found by the use of the drill, danger and injury would result to both, —cannot recover. *Browne v. King* (1900) 40 C. C. A. 545, 100 Fed. 561.

See also *Kennedy v. Lake Superior Terminal & Transfer R. Co.* (1896) 93 Wis. 32, 66 N. W. 1137, § 334, note 15, *infra*.

¹*Wabash R. Co. v. Skiles* (1901) 64 Ohio St. 458, 60 N. E. 576.

²*Wabash R. Co. v. Skiles* (1901) 64 Ohio St. 458, 60 N. E. 576. There it was held that where an employee whose duty required him to cross the tracks in the yards stepped on a track from a place of safety on a platform without looking or listening, immediately after

the passing of a train, and in full view and close to a backing switch, so that he was struck and injured by the engine, he was guilty of contributory negligence.

In an action by a foreman of trackway companies using a yard against another of the companies, evidence that he stepped upon a track for the purpose of crossing it, without looking to see if an engine was upon it, shows that he was guilty of negligence barring his recovery for injuries caused by a collision with an engine, if engines were constantly in operation and he had seen an engine go along another track a short time before, which, according to a common knowledge, must return to the track upon which he stepped, though subsequently he had examined the switch leading to the track, and found it closed, and had heard no alarm of the return of the engine. *Trunk R. Co. v. Baird* (1899) 36 C. C. A. 574, 94 Fed. 946. An employee of a contractor to handle freight for a road company is, as a matter of course, guilty of contributory negligence in attempting to cross a track upon which he knew trains and engines were constantly passing, without looking for engines or trains, in the absence of any sudden emergency, fright, or bewilderment to confuse him. *Stackhouse v. Paul & D. R. Co.* (1898) 73 Minn. 75 N. W. 734. The doctrine that a crossing man who is about to cross a track must look and listen was laid down in broad terms in *Lorin v. Kansas City, Ft. S. & M. R. Co.* (1895) 128 Mo. 31 S. W. 6.

Where the view of a railroad track was unobstructed, a servant or foreman who, in attempting to cross the main track diagonally while the rear section of a train which was moving slowly was in full view, and more than 25 or 30 feet from him, was struck and injured by the engine, was guilty of negligence. *Ellis v. Chicago, M. & St. P. R. Co.* (1889) 51 Ill. 523, 3 L. R. A. 363, 41 N. W. 758. affirmed in (1893) 150 U. S. 215, 33 ed. 1068, 14 Sup. Ct. Rep. 85. A conductor of a freight train, who steps

But decisions are not wanting which are inconsistent with this doctrine.³

In some cases it is laid down that the rule as to travelers is not applicable to servants who are engaged in work which requires them to be on the track.⁴ But the reports also contain a considerable

of a telegraph office where he has gone for orders, and starts across a passenger track on which a train is approaching which he knows to be late and to be likely to run at a higher speed than usual, is guilty of contributory negligence, preventing recovery for his death by being struck by the train, where he sees the train or could see it if he looked. *Chicago & N. W. R. Co. v. Holcomb* (1896) 66 Ill. App. 201.

In one case it was held that an engineer who started to cross a track without looking in both directions, and was consequently injured by an engine which he had seen, shortly before, taking coal at a chute, could not recover. *McGadden v. Abbot* (1896) 92 Wis. 551, 66 N. W. 694.

A servant operating a street car is, as regards a railway which he has to cross, in the same position as a stranger. Hence, a complaint is demurrable which alleges that a motorman injured in a collision with a railway train was assured by the company that the railway track was seldom used; that he was accordingly ordered to go across without stopping his car. *Shout* opportunity for looking for and that, relying on the representation, he did as directed, and received injury. *Goodrich v. Chippewa Valley Electric R. Co.* (1900) 108 Wis. 329, 84 N. W. 419.

It has been held that the rule requiring one about to cross a railroad track to stop, look, and listen is not applicable to employees of an iron mill which uses locomotives at slow rates of speed to shift iron from place to place in the yard and buildings, whose duties require them to cross and recross the tracks. *Weiss v. Bethlehem Iron Co.* (1891) 31 C. C. A. 363, 59 U. S. App. 627, 10 Fed. 23. So, also, where a laborer engaged in mixing and carrying mortar for a new station under construction was killed by a rapidly running train, the case was held to be for the jury upon evidence showing that a considerable noise was being made at the time by the escaping steam of a locomotive near the mortar box; that the main track leading to the station was curved; and that a siding

which ran out upon the curve was filled with cars standing in such a position that they obstructed the view of the approaching train until it reached a point at which not more than five seconds would be required to bring it to the place of the accident. *Nelson v. New Orleans & N. E. R. Co.* (1900) 40 C. C. A. 673, 100 Fed. 731. In another case it was distinctly laid down that the rule requiring persons who go on to a railway track to look and listen is not applicable, where a conductor of a train belonging to one company using a station jointly with another company steps on the adjacent track of the latter company for the purpose of signaling his engineer, and is run down by a train operated by the employees of such company. *McMarshall v. Chicago, R. I. & P. R. Co.* (1890) 80 Iowa, 757, 45 N. W. 1065.

Baltimore & O. S. W. R. Co. v. Peterson (1901) 156 Ind. 364, 59 N. E. 1044, holding that the question whether the omission of a trackman to look and listen for approaching trains constitutes negligence is for the jury.

To same effect, see also *Ominger v. New York C. & H. R. R. Co.* (1875) 4 Hun. 159; followed in *Crowley v. Burlington, C. R. & N. R. Co.* (1885) 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918; *Noonan v. New York C. & H. R. R. Co.* (1891) 42 N. Y. S. R. 41, 16 N. Y. Supp. 678. It is proper to refuse a charge that the same degree of care is required from an employee engaged in his duty upon the track as from a person crossing the track. *Roll v. Northern C. R. Co.* (1878) 15 Hun. 496.

A teamster hired under a special agreement that he should be notified of the approach of passing trains is not under any duty to look and listen for trains. *Bradley v. New York C. R. Co.* (1875) 62 N. Y. 99.

What the precise effect of the New York decisions just cited may be is rendered somewhat obscure by the fact that the supreme court has also declared that it is negligence, as matter of law, for a railroad employee or other person to be inattentive to his dangerous position when on a railroad track, whether

number of decisions which are apparently based upon the theory that such servants are bound to keep a constant lookout for moving engines and cars, and that a breach of this duty is usually a sufficient reason for denying recovery, as a matter of law.⁵ A similar doctrine

lawfully there or not. *Redmond v. Rona, W. & O. R. Co.* (1890) 31 N. Y. S. R. 366, 10 N. Y. Supp. 330. And that an employee of a railroad, who stands upon a track upon which, to his knowledge, trains are frequently passing, without paying any attention to his surroundings, while engaged in the discharge of his duties, is guilty of contributory negligence. *Clark v. New York, L. E. & W. R. Co.* (1894) 80 Hun, 320, 30 N. Y. Supp. 126.

Where a servant engaged in loading timbers on a flat car next to several box cars was killed by a train backing rapidly against the box cars without any warning, it was held that the deceased was under no obligation to look and listen for the approach of the train entering the switch. *Freeman v. Illinois C. R. Co.* (1901) 107 Tenn. 340, 64 S. W. 1.

⁵No recovery can be had for the death of a railroad employee whose duties required him to be upon the track in such a place and manner as to make it necessary to look out very carefully for approaching trains, in the absence of evidence that he took the precautions required by due care and diligence. *Shea v. Boston & M. R. Co.* (1891) 154 Mass. 31, 27 N. E. 672. A railroad employee at work where engines and cars are constantly passing must be diligent to observe and keep out of the way of moving engines and cars, and cannot rely wholly upon persons in charge to prevent accidents. *Kofo v. Chicago & N. W. R. Co.* (1894) 92 Iowa, 182, 60 N. W. 503.

A watchman employed to examine cars and take and report initials and numbering thereon must exercise the ordinary diligence due from every intruder on a railroad track to care for his own safety in walking and standing upon unoccupied tracks, including the main lines, in performing such duties, in the absence of any custom or acquiescence on the part of the superintending officers permitting the watchman to stand upon such tracks. *Richmond & D. R. Co. v. Watts* (1893) 92 Ga. 88, 17 S. E. 983 (Former Appeal [1892] 89 Ga. 282, 15 S. E. 365).

A railroad employee engaged in cleaning under a switch bar in the yard is

not entitled to expect with certainty warning from every car that may be shunted or kicked upon the track, while he is working, or, if so, can expect only a shout as the car draws near, and is not entitled to rely upon his ears alone without using his eyes, or to rely upon the car being stopped in time after it is discovered that he is not going to get out of the way. *Lynch v. Boston & M. R. Co.* (1893) 159 Mass. 536, 34 N. E. 1072. Contributory negligence is imputable where the evidence is that, in accordance with the usual custom of the yard, a car was started in charge of a brakeman towards others to which it was to be coupled; that, as it approached a switch where a laborer was at work, the brakeman shouted to him to get out of the way; that the brakeman, seeing that his warning was not heeded, applied the brake, but could not stop the car before it struck the laborer; and that there was nothing to obstruct the laborer's view of the approaching car, or to distract his attention. *Moccia v. New York C. & H. R. R. Co.* (1899) 46 A. Div. 58, 61 N. Y. Supp. 338. An employee of a railroad company engaged in placing switch lights in position, and that purpose required to go upon the track, is guilty of such negligence as will preclude a recovery for injuries sustained by being struck by a car, in coming upon the track at a time when he knew switching was being done, and when it was not necessary to be there without looking to see what track the car when he saw approaching him was on, and turning his back to see what a team was on the other track, although it was usual to switch such car upon the other track. *Collins v. Burlington C. R. & N. R. Co.* (1891) 83 Iowa, 349, 49 N. W. 848.

A railroad employee engaged in cleaning the tracks at a highway crossing was guilty of contributory negligence, where, with knowledge that an engine might come his way, he failed to observe its movements, and was killed when it backed down the track, at which he was at work. *Carlson v. Cincinnati, S. & M. R. Co.* (1899) 120 N. W. 481, 79 N. W. 688.

A repairer of tracks employed in a railroad yard, which were used for t

making up of trains, and who was familiar with the manner in which the work was done, and who, knowing that the switch engine was busy moving cars and making up trains, placed himself with his face away from the direction from which cars were to be expected, and continued his work without ever looking back, although there was no obstruction to his vision and by ordinary attention he could have observed the approaching cars, and while so employed was struck by the switch engine moving slowly, and was injured,—was guilty of contributory negligence. *Decker v. Union Pacific* (1892) 145 U. S. 118, 36 L. ed. 758, 12 Sup. Ct. Rep. 835. Compare *Murphy v. New York C. & H. R. R. Co.* (1882) 11 Daly, 122; *Chicago & N. W. R. Co. v. Kane* (1892) 50 Ill. App. 100.

An employee in a railroad yard, acquainted with a custom of kicking trains backward without a brakeman or lookout, is guilty of such contributory negligence in turning his back to moving cars and not keeping an outlook as will prevent recovery for injuries occasioned by a train backing upon him while he was engaged in his work and not looking out for it. *Schaible v. Lake Shore & M. S. R. Co.* (1893) 97 Mich. 318, 21 L. R. A. 660, 56 N. W. 565. A track hand is guilty of contributory negligence precluding recovery for personal injuries, in remaining on the track while a train was approaching in plain sight for a quarter of a mile, where its whistle was audible, and he was called to by his fellow workmen, although the engineer failed to give the signal required by the rules to persons on the track. *St. Jean v. Boston & M. R. Co.* (1898) 170 Mass. 213, 48 N. E. 1088. A track hand working in a locality with which he was familiar is chargeable with such contributory negligence as will bar a recovery for his death, where, upon the approach of a train, he stepped upon an adjoining track upon which he was struck by a train coming from a direction towards which he was not looking, when nothing occurred to distract his attention, and he might have stood between the tracks in safety. *Roskonek v. St. Paul & D. R. Co.* (1899) 76 Minn. 28, 78 N. W. 872. Recovery cannot be had under these circumstances merely because the servant was working on an earth embankment just wide enough for two tracks upon it. *Fisk v. Chicago M. & St. P. R. Co.* (1900) 111 Iowa, 392, 82 N. W. 931. A section hand who, with knowledge that a gravel train was fre-

quently followed by a switch engine, stepped back upon the track after the gravel train passed, without looking, and was struck by the switch engine, is guilty of negligence proximately causing his injury, and cannot recover therefor. *Chicago, B. & O. R. Co. v. Yost* (1898) 56 Neb. 139, 76 N. W. 901. A section hand who, while standing on the track without necessity, therefore, stooped down to tie his shoe, and, while in that position with his back to the tender of a locomotive the engineer of which could not see him, was run over, is chargeable with negligence. *Trietta & S. R. Co. v. Mitchell* (1889) 72 Tex. 609, 10 S. W. 698. A section hand who, after getting off the railroad track to let a train pass, obeys orders in going upon the track to take some dirt from one of the rails, and, while looking back at the train, fails to get off the track in time to avoid injury, must be held guilty of such negligence as to prevent liability of the railroad company. *Harrison v. Texas & P. R. Co.* (1895) Tex. Civ. App. 31 S. W. 242. A railroad company is not liable for the death of a section hand while a flying switch was being made, where he stood on the track with his back towards the engine, when he knew that the cars were about to be put on the track on which he was standing. *Union P. R. Co. v. Clark* (1897) 51 Neb. 229, 70 N. W. 923. Compare *Carroll v. Minnesota Valley R. Co.* (1868) 13 Minn. 30, Gil. 18, 97 Am. Dec. 221, where a servant of a steamboat company, who stood with his back to a train, while engaged in trying to move a staging off of the track, was denied recovery. A section foreman who knows that a train is sometimes cut in two at a certain point, and that the train always carries a caboose and passenger car, is guilty of contributory negligence in stepping upon the track immediately after the passage of the first part of the train, having no caboose or passenger car, without looking for the second portion of the train. *Haden v. Sioux City & P. R. Co.* (1891) 99 Iowa, 735, 48 N. W. 733.

It is negligence to uncouple a car from a train to which an engine is attached, and proceed to push it along the track from a place directly behind the hunker, without observing the engine. *Burns v. Boston & L. R. Co.* (1863) 101 Mass. 50 (action by the servant of a company using a siding). A brakeman was, as a matter of law, guilty of contributory negligence precluding recovery

is also frequently applied to the disadvantage of servants working in the immediate vicinity of railway tracks.⁶

ery for his death from being struck by the rear end of the tender, where he was running with his back to the engine, and, knowing that it was following him closely, stopped for an instant, and then without looking behind him, stepped upon the track immediately in front of the tender. *Guthrie v. Great Northern R. Co.* (1899) 76 Minn. 277, 79 N. W. 107.

Contributory negligence is inferable, as matter of law, where a brakeman, sent back at night to stop an approaching train by placing a red lantern on the track, was struck by that train a few feet behind the lantern, which the train overran slightly. *Buckmaster v. Chicago & N. W. R. Co.* (1900) 108 Wis. 353, 84 N. W. 845.

But an employee engaged in picking up links and pins on a railroad track, who looks for a train before going on the track, and sees that it is clear is not, as matter of law, guilty of such contributory negligence in failing to look for a car for a short time while engaged at his work, as will prevent recovery for an injury caused by switching a car on the track without any person upon it to give warning. *Chicago & N. W. R. Co. v. Kane* (1897) 70 Ill. App. 676.

Where a switchman signaled a tower man, who had manual control of the switches in a railroad yard, to throw a certain switch, and the tower man threw a wrong switch, causing the train to run against the switchman, it was competent to show, as bearing upon his exercise of due care, that the train was running faster than was usual for trains at that place. *Welch v. New York, N. H. & H. R. Co.* (1900) 176 Mass. 393, 57 N. E. 668.

*A railroad employee directed to shovel snow from a platform between two tracks, and expressly charged to look out for himself, is guilty of such contributory negligence as will prevent a recovery for his death, where he works with his back toward the track and so near the same as to be struck by an approaching engine, where he knows that trains are passing such platform every few minutes. *Brady v. New York, N. H. & H. R. Co.* (1898) 20 R. I. 338, 39 Atl. 186. An experienced switchman proceeding with his usual and customary duties between two tracks is chargeable with contributory negligence, where, in

the absence of any emergency calculation to divert his attention or create confusion in his mind, he was injured by a train backing in full view of the switchman, and which, by the observance of duty, he might have avoided. *Chicago & N. W. R. Co. v. Long* (1887) 112 Ind. 166, 13 N. E. 659.

There can be no recovery where an employee, familiar with the method of operating a railway yard, and knowing that a certain track is frequently used for shunting unattached cars, stops near it while waiting to deliver a car to a passing train, and is struck by one of those cars owing to his failure to keep a proper lookout. *Stearns v. Great Northern R. Co.* (1901) 84 Minn. 230, 87 N. W. 766. More especially is he debarred from recovery, where he only failed to keep a proper lookout. He was warned of the approach of the train by a whistle from the engine and a shout from his fellow servants. *Shoup v. Missouri P. R. Co.* (1901) 161 Mo. 214, 61 S. W. 829.

A section hand who is doing work near the track while his foreman is absent, and no one else is watching for approaching trains, is guilty of negligence if he fails to keep a lookout. *Rutherford v. Chicago, M. & St. P. R. Co.* (1894) 57 Minn. 237, 59 N. W. 32.

A railroad fireman fully occupied with a switching yard through which he is walking, and knowing that switching is actively in progress upon the tracks behind him, is, as a matter of law, guilty of contributory negligence in walking on or immediately at the side of the main track where a passing car can strike him, for a distance of 15 feet, without looking around, and with his cap pulled down over his ears so as wholly or partially to cut off his hearing. *Wilber v. Wisconsin Central R. Co.* (1893) 86 Wis. 535, 57 N. W. 356.

In *Atchison, T. & S. F. R. Co. v. Croll* (1896) 3 Kan. App. 242, 45 Pw. 112, it was in evidence that a lump of coal which fell from an engine tender struck the rock ballast or ground, and then bounded and struck a section hand; that he was not looking at the train, but was stooping over, shoveling, and that, if he had been looking at the train, it was more than likely that he would have seen the lump of coal, and could have dodged it. The court held

working

There is apparently no difference of opinion as to the doctrine that a servant who walks or stands upon a track for his own convenience must, at his peril, protect himself from passing trains.⁷

The failure to observe approaching trains is, of course, more especially culpable in the case of a flagman whose distinctive function is to look out for them, and warn others when they are coming.⁸

Other illustrations of the duty to watch the movements of trains are furnished by the cases in which a neglect of that duty was held to be a bar to an action for an injury received by a servant who was himself operating or riding on a train,⁹ or upon a hand car,¹⁰ or who was engaged in coupling cars.¹¹

that he was very careless in not watching the train. This doctrine, it is submitted, is simply preposterous. Such an accident is so rare that it may be fairly doubted whether, even if the servant had been found by a jury to be negligent in not regulating his conduct with reference to the possibility of its occurring, the verdict should not have been set aside. But whether this be so or not, there seems to be absolutely no justification for the position that the plaintiff was negligent, as matter of law, in continuing to work, without considering the possibility of a contingency which was, to the last degree, improbable. See, however, *Illinois C. R. Co. v. Stassen* (1893) 56 Ill. App. 221, cited in § 334, note 2, *infra*.

Contributory negligence is not inferable, as matter of law, where a section foreman, on the approach of a train, stepped away from the track a distance of 5 feet, which was the distance usually taken in such instances by workmen similarly employed, was struck by a door of a freight car, which was hanging from one corner at the top, and swinging outward with the motion of the train, and which he failed to observe as he was standing with his back to it. *Chicago & A. R. Co. v. Cullen* (1900) 187 Ill. 523, 58 N. E. 455, affirming (1899) 67 Ill. App. 374.

⁷ *Barkston v. Old Colony R. Co.* (1887) 143 Mass. 535, 10 N. E. 255 (servant was using track as a footpath).

A section hand killed by a train is guilty of such contributory negligence as will prevent a recovery for his death in walking to his home on a railway track, where he could have heard the train 400 feet away, and have seen the headlight 1,300 feet away, and knew the train was likely to pass at any time.

Baker v. Chicago, R. I. & P. R. Co.

(1895) 95 Iowa, 163, 63 N. W. 667. To same effect, see *Chicago, R. & Q. R. Co. v. Mancy* (1894) 55 Ill. App. 588.

A railway employee engaged in carrying the mail to and from a station, who chooses to stand on the track for his own convenience, must guard himself against the danger of passing trains; and a failure to keep a lookout will be imputed as negligence. The mere fact that it was a side track that he was standing upon is immaterial, the danger of taking such a position being the same in kind as that incurred by a person standing on the main track, and only different in degree. *Dell v. Phillips Glass Co.* (1895) 169 Pa. 549, 36 W. N. C. 467, 32 Atl. 601.

⁸ *Clark v. Boston & A. R. Co.* (1879) 128 Mass. 1; *Louisville & N. R. Co. v. Crawford* (1889) 89 Ala. 240, 8 So. 243; *Raupe v. Lake Shore & M. S. R. Co.* (1896) 64 Ill. App. 359 (action held not maintainable, although bell was not ringing on the engine, as was required by a statute).

⁹ Where the foreman and the train master on a railroad had warned the men employed thereon not to ride on the flat cars, and had provided a caboose in which plaintiff, a laborer on a gravel train, was told it was safer to ride, and he selected a place he knew to be dangerous, when cars were being coupled, sat with his legs hanging over the side of a flat car in a position in which he could be easily jostled off, and paid so little attention to what he knew was going on that he not only did not watch or see the other cars coming down, but failed to hear a warning shout heard by others in the vicinity, at least one of whom was more remote than he,—he cannot recover of the company, for being thrown off and injured by the backing down of the train at too great a speed. *St. Louis & S. F.*

The obligation to keep a proper lookout is also incumbent on servants who are exposed to danger from the movements of other heavy machinery.¹²

R. Co. v. Schumacher (1894) 152 U. S. 77, 38 L. ed. 361, 14 Sup. Ct. Rep. 479. In an action for an injury received by a switchman who was thrown from a car by a sudden jerk caused by the engineer's responding to a signal of the foreman of the switching crew, where the evidence shows that the control of the acts of the switchman and of the movements of the train was by means of signals given by the foreman of the switching crew in charge of the train to the engineer and switchman, and that it was the duty of the latter to keep a lookout for all signals given by the foreman, the defendant is entitled to have the jury instructed that, if they believe the evidence, "it was the duty of the plaintiff, in riding on the car, to have kept a lookout for any and all signals that might have been given by the employee of the defendant." *Louisville & N. R. Co. v. Smith* (1901) 129 Ala. 553, 30 So. 571. There can be no recovery for a brakeman's death caused by a collision between two parts of a train, which had become separated while the train was running during the nighttime, where he was riding on the top of the car next to the first car of the rear portion, and failed to discover that the train had broken, or, if aware of that fact, failed to take measures for his own safety, although the cars ran 5 miles before the collision occurred. *Richmond & D. R. Co. v. Tribble* (1896) 97 Va. 495, 24 S. E. 278. An experienced motorman who, while running his car back to meet another car on the same track, did not run slowly and watch constantly, cannot recover for injuries caused by a collision between the two cars. *Hudson v. People's Street R. Co.* (1899) 175 Mass. 23, 55 N. E. 464.

Where an engineer on one train was killed by its collision with another at the intersection of two roads, it is for the jury to say whether the decedent did or could have seen the red flag when displayed, and whether he was not deceived by the subsequent waving of a white flag as a signal to another train. *Wood v. New York C. & H. R. R. Co.* (1877) 70 N. Y. 195.

¹²A section hand is, as a matter of law, guilty of such contributory negligence as will prevent a recovery for an injury caused by collision of the hand

car on which he was riding, with a train approaching at the rate of only 10 miles per hour, in plain view 1 1/2 miles. *Conner v. Great Northern R. Co.* (1894) 9 Wash. 292, 37 Pac. 438. A section foreman who, while traveling in a hand car, fails to keep a lookout for extra trains, though he is familiar with the company's rule that no notice is to be given of the passage of such trains, is negligent. *Jolly v. Detroit, L. & N. W. Co.* (1892) 93 Mich. 370, 53 N. W. 529. Compare § 331, note 1, subd. (a), supra.

¹³Whether a brakeman was guilty of negligence in placing his hand between the drawheads of two cars, and failing to notice the slow backward movement of one of them was held to be a question for the jury, in *Baldwin v. C. & N. W. R. Co.* (1899) 109 Iowa, 752, 81 N. W. 160.

¹⁴*Anniston Pipe Works v. Dicks* (1891) 93 Ala. 418, 9 So. 720 (servant struck by moving crane); *Stabbs v. Atlanta Cotton Seed Oil Mills* (1890) Ga. 495, 17 S. E. 746 (servant cleaning machinery, carelessly exposing himself to an unseen danger which he had had opportunities of observing, but he kept his faculties on the alert, and manipulating it).

A coal miner who steps directly into the bottom of a shaft, knowing that the cages with which coal is carried are above him, and being familiar with the operation, without looking up to see whether one of them is descending, or taking the slightest precaution for his safety, is guilty of negligence, as a matter of law, which will prevent any recovery for resulting injury when standing in a descending cage. *McDonald v. Richmond Iron & Coal Co.* (1890) 135 Pa. 19 Atl. 797. An employee who, while working on the upper floors of an unfinished building, walked along a narrow ledge close to the elevator shaft for the purpose of reaching some plank, and was struck by the elevator, so that he fell to the ground below, was not free from contributory negligence, where he was familiar with structures of the kind, and knew that there were elevators in the building. *Clancy v. Guaranty Concrete Co.* (1898) 25 App. Div. 355, 59 N. Y. Supp. 800. A truckman familiar with the surroundings was, as matter of law, guilty of contributory negligence in

There is, of course, an especially strong obligation on the servant's part to look out for a certain danger, where circumstances which have previously occurred have shown the possibility of his being subjected to it.¹³ Compare § 413a, *post*.

The extent to which the duty to keep a lookout is qualified by the servant's right to rely on the exercise of proper care by his co-employees is discussed in §§ 355, 356, *infra*.

333. Selection of the more dangerous of two available courses of action; generally.—The following passage contains a succinct statement of the principle which prevents recovery in a very numerous class of cases:

"The general rule of law is that, when the danger is obvious, and is of such a nature that it can be appreciated and understood by the servant as well as by the master or by anyone else, and when the servant has as good an opportunity as the master or as anyone else of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of reasonable

cluding recovery for injuries sustained by falling down an elevator well just after the elevator had ascended, in backing through the door which the elevator man, contrary to his usual custom, had not closed, without paying any attention to his surroundings, where he should, under the circumstances, have known that the elevator had ascended, although he was not in fact aware of it. *Marcell v. Thomas* (1898) 31 App. Div. 546, 52 N. Y. Supp. 30. Where the plaintiff had been working for several months in an establishment in which the employees, instead of ringing for the elevator, were accustomed to pull it up and down themselves, and this custom was well known to him, he cannot recover for injuries due to the fact that, after another employee had called out that he wanted the elevator and was told by the plaintiff that he could not have it, the plaintiff proceeded, without looking behind him, to back towards the elevator, pulling the truck, and fell down the shaft, the elevator having been removed by the other employee in spite of his prohibition. *Danuser v. H. Sells & Co.* (1901) 24 Wash. 565, 64 Pac. 783.

An employee of several months' standing in an establishment in which access to different floors of one portion thereof is across the floor of an elevator from the corresponding floor of the other part, who, in attempting to go from one part to the other while the elevator is at an-

other floor, which fact he could have seen had he stopped long enough to look carefully, walks into the elevator well and is injured, is so clearly guilty of contributory negligence as to preclude a recovery therefor. *Meister v. Alber* (1897) 85 Md. 72, 36 Atl. 360.

An employee in a quarry, who knew that a box was descending or about to descend, and that he was entitled to no notice of its descent, is guilty of contributory negligence if he goes on about his work without looking out for the box, and is killed by it in its descent. *Rickert v. Stephens* (1890) 133 Pa. 538, 19 Atl. 410.

Contributory negligence is inferable where the evidence is that in order for plaintiff to reach that portion of defendant's factory where he had been ordered to go to work, it was necessary that he should pass under or over an iron lever by which a punch was operated; that he saw the boy operating the lever about to put it down, and called to him to stop; and that the boy did not stop, and plaintiff, endeavoring to pass under, was struck by the lever. *Goodman v. Crystal* (1900) 56 App. Div. 64, 67 N. Y. Supp. 260.

A saw-mill operative, who knew that the saw for cutting slabs, which was raised through a slot in a plank when required for use, and allowed to drop back under the action of a counterweight when the work was finished,

care, the servant cannot recover against the master for injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care. . . . This rule is especially applicable when the danger does not arise from the defective condition of the permanent works, or machinery of the master, but from the manner in which these are used, and when the existence of the danger could not be anticipated, but must be ascertained by observation at the time.

This principle is deemed to involve the corollary that, in the absence of one or other of the differentiating factors to be discussed in the following subtitle, a servant will ordinarily be pronounced negligent, as a matter of law, whenever it is clear from the evidence that there was a safe, and a dangerous, method available for the performance of the work in hand, and that he selected the latter method, with knowledge, actual or constructive, of the fact that it was dangerous.²

sometimes failed to sink below the surface of the plank, was held to be negligent in omitting to look and see if it was in a safe position, when he was about to walk a slab across the slot with his feet on the lower side. *Johnson v. Hooper* (1894) 98 Mich. 343, 57 N. W. 172.

¹ *Lothrop v. Fitchburg R. Co.* (1890) 150 Mass. 423, 424, 23 N. E. 227.

² *Dandie v. Southern P. R. Co.* (1890) 42 La. Ann. 686, 7 So. 792; *Highland Ave. & Belt R. Co. v. Walters* (1890) 91 Ala. 436, 8 So. 357; *Mobile & B. P. R. Co. v. Holborn* (1887) 84 Ala. 137, 4 So. 116; *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 548, 8 So. 300; and the cases cited *passim* in this and the ensuing sections.

A servant who carelessly pursues a method obviously more dangerous, where there is a natural and safe method of performing his service, is guilty of contributory negligence which will prevent recovery for injuries sustained. *Gowen v. Harley* (1893) 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 973.

Where there is a comparatively safe, and a more dangerous, way known to a servant, by means of which he may discharge his duty, it is negligence for him to select the more dangerous method. *Morris v. Duluth, S. S. & A. R. Co.* (1901) 47 C. C. A. 661, 108 Fed. 747.

A servant who voluntarily and under no emergency selects a dangerous way to perform a duty when there is a safe way, knowing the way thus selected to

be dangerous, or if the danger is apparent or obvious, is guilty of contributory negligence. *Walker v. Atlanta & W. P. R. Co.* (1898) 103 Ga. 820, 30 S. E. 503.

An employee who has the choice of two ways of doing a given piece of work, the one safe and the other dangerous, is under a duty to his employer to select the former. *Central R. Co. v. Mosch* (1900) 112 Ga. 914, 38 S. E. 350.

"Where a servant has equal means of knowing the danger, so that the master and servant stand equal in that respect, and the servant is not specifically commanded as to the time and manner in which the work may be done, but is told to do a particular thing, and has such discretion that he can have some control over the means, time, and manner of doing the work, then, unless he does it in a way and with the means which will be safest, he is guilty of contributory negligence." *Brewer, J., in English v. Chicago, M. & St. P. R. Co.* (1885) 24 Fed. 908.

If the servant "was directed to perform certain work, without directions as to the manner of performing the service, and he, of his own will and inclination, selected that mode that was dangerous, and was thereby injured, when there was a way and a better way in which to do the work without danger of injury, that would not be ordinary care or prudence, and he ought not to recover." *St. Louis, Balt. & Iron Co. v. Burke* (1883) 12 Ill. App. 372.

In any case where the evidence ren-

The mere fact that the safer method is one which involves considerably more trouble than the more dangerous one is no excuse for adopting the latter.³

The rule thus laid down is evidently intended to be applied only when the method adopted was essentially unsafe, and the other was apparently safe. It will be observed that this conception emerges more or less distinctly in the statements of the rule already given. That it determines, whether expressly adverted to or not, the actual extent and scope of the rule is apparent from the consideration that a doctrine which should predicate negligence, as a matter of law, in cases where the servant is merely chargeable with having adopted the less safe of two courses which were both reasonably safe, would contravene the fundamental principle by which the standard of due care is declared to be the hypothetical conduct of a prudent person under the given circumstances.⁴ To let in the defense of contribu-

ders it appropriate, an instruction should be given to the effect that, in the absence of alarm sufficient to confuse the mind, an employee who finds himself in a dangerous position should select the least dangerous means of escape, where two or more are open to him. *Austin & N. W. R. Co. v. Beatty* (1894) 6 Tex. Civ. App. 650, 24 S. W. 934, where it was held that the jury should have been instructed that, if a person is in a perilous situation, and selects that avenue of escape which he should have seen, under the circumstances, to be the more dangerous, he is guilty of negligence.

In *Gibson v. Burlington, C. R. & N. R. Co.* (1899) 107 Iowa, 596, 78 N. W. 190, it was held erroneous to instruct a jury that a servant is negligent in adopting a dangerous way of accomplishing a task, when a safe way is open to him. The court took the position that the question is one of fact, to be determined according to the circumstances of the case, the reasons for doing what was done, and the care used to avoid danger. But it is submitted that this theory errs as much on the side of leniency to the servant as the one embodied in the instruction disapproved errs in severity. Unless the court intended to stand sponsor for a doctrine different from that applied in other jurisdictions, the proviso stated in the text seems to represent the full extent of the allowable mitigation of the naked principle that negligence is inferable whenever a servant chooses an unsafe method of work. In *Florida C. & P. R. Co. v. Mooney*

(1898) 40 Fla. 17, 24 So. 118, it was held proper to refuse an instruction couched in the same phraseology as that condemned in the case just cited; but this ruling, as applied to the facts, does not betoken any departure from views generally accepted, as there was evidence that the method in question was one universally adopted by railways. See note 4, *infra*.

³ *Pennell v. Harvey* (1898) 78 Ill. App. 278.

In one case we find it expressly laid down that an employee is not necessarily guilty of contributory negligence in selecting a certain mode of doing his work, where there was a safer mode. *Houston & T. C. R. Co. v. Smith* (1897; Tex. Civ. App.) 30 S. W. 582. Nor where there was another method which a very timid or cautious person might have adopted as safer. *Taylor v. Felsing* (1896) 164 Ill. 331, 45 N. E. 161, affirming (1895) 63 Ill. App. 624.

Where neither of the only two ways by which a servant injured in crossing an uncovered gearing could have crossed it was absolutely safe, a finding of the jury that the choice of one of those ways was not negligent will not be set aside. *Rodgers v. Hamilton Cotton Co.* (1893) 23 Ont. Rep. 425, where it was also held that, in view of the fact that the evidence clearly showed that there was no other way of crossing the gearing, the jury could not be asked to find whether the plaintiff could not have availed himself of some other way of crossing which would have rendered the accident impossible.

tory negligence, however, it is not necessary to show that his error in selecting the dangerous way amounted to actual rashness.

It obviously results from the broad principle referred to in *supra*, that the inability of a servant to recover on the ground that he adopted the less safe method of doing work can be predicated only in cases where he not only had actual or constructive knowledge of the material conditions with which he had to deal, but also comprehended or ought to have comprehended the comparative value of the various courses open to him.⁸ The cases illustrating the principle that the selection of an unsafe course of action by a servant, when a safe one was open will usually be imputed to him as contributory negligence may be said, on the whole, to be divisible into two main categories. In one of these the essential conception is that the servant put himself into a dangerous position; in the other the essential conception is that he did the work in a dangerous manner. In arranging the immense mass of authorities which bear upon the description of contributory negligence, it will be convenient to recognize, as far as possible, the existence of these two categories. The line of demarcation between the two classes of cases controlled by each of the two conceptions just mentioned is often difficult, but not impossible, to lay down with precision may be conceded. But so far as the rights of the parties are concerned, this circumstance is of no material importance, the servant's delinquency being logically one of the same character, to whichever of those conceptions the quality of his conduct is referred.

⁸ *Central R. Co. v. Mosely* (1900) 112 Ga. 914, 38 S. E. 350. *Co. v. Richie* (1892) 99 Ala. 346, 12 S. E. 612.

⁹ The fact that an employee was injured because of the manner selected of doing his work, when if he had selected another way the injury would have been avoided, does not of itself fix upon him contributory negligence, since the result is not the true test; but the test is whether he knew the way selected to be dangerous, or the danger was apparent and obvious. *Tennessee Coal, I. & R. Co. v. Herndon* (1893) 100 Ala. 451, 14 So. 287. The fact that a brakeman who had his arm caught and crushed while uncoupling cars, by the alleged negligence of the engineer in moving the cars with too much force, could have raised himself higher by placing his foot on the cross tie on the outside of the rail, instead of putting his foot on the ground on the roadbed, will not preclude a recovery, if he did not have time to see and comprehend that the other way would be the safer. *Alabama G. S. R.*

In a case where a brakeman was injured by the breaking of a hand, when he was mounting a moving car, it was held that the mere fact that it would have been safer for him to have ascended at the rear of the car instead of at the front did not necessarily lead to the conclusion that he was negligent in having selected the more dangerous of the two courses open to him. *Louis. & N. O. R. Co. v. Pearson* (1893) 97 Ala. 211, 12 So. 176. The court remarks that, if the servant "selected a dangerous way to perform the duty, knowing that it was dangerous, when there was a safer way apparent to him, and the injury was the result of having selected the dangerous way, he would be guilty of contributory negligence."

An instruction to the effect that the employer has a right to expect that the servant will adopt the less hazardous course is misleading and erroneous.

334. Taking or remaining in an unnecessarily dangerous position: cases relating to work on railways.—(Compare § 318, subd. c, *infra*.)

The general effect of the authorities upon this subject is that, where the evidence shows that the injury complained of was due to the fact that, at the time of the accident, the servant was occupying a position which was obviously more dangerous than another which was available, a *prima facie* presumption of contributory negligence arises, which will warrant a court in declaring, as a matter of law, that the action cannot be maintained; but that this presumption is subject to rebuttal by testimony which introduces into the case one or more of the qualifying elements discussed in the next subtitle.

The application of this doctrine to railway employees is observable in the various predicaments stated in the following paragraphs:

(1) Taking a position where there is a risk of being struck by moving trains or cars.¹

where the evidence is that the servant did not know there was any hazard in the course he actually took. *Huckins v. Johnson* (1886) 105 Ind. 29, 55 Am. Rep. 609, 4 N. E. 172 (revolving shift had been repaired without the plaintiff's knowledge so that he could not drive under it without injury).

An employee directed to perform an act in regard to machinery by a foreman knowing that he has no experience as to the ordinary mode of doing so is instituted in using any reasonable mode, and acts within his instructions in using the only efficient means that he can. *Hon. Briden Co. v. O'Connor* (1895) 24 Conn. St. C. 598.

Compare also the phraseology used in the cases cited in note 2, *supra*.

A servant having the choice of two positions for doing his work, each apparently safe, is not guilty of contributory negligence in selecting that which proves to be unsafe. *McEllinatt v. Railroad Co.* (1891) 61 Conn. 157, 22 Atl. 1094.

A track laborer who, to avoid a passing train, steps from one track to another, receiving an injury from the train on the latter, when he might have got off from all the tracks, cannot recover. *Shaw v. Pennsylvania R. Co.* (1888; 19 Cent. Rep. 769, 13 Atl. 193. Recovery cannot be had by such an employee under these circumstances, although he had no knowledge of a crossing existing at that part of the road to the trains in the same direction on both tracks. *Tonko v. Central R. Co.* (1896) 1 App. Div. 289, 37 N. Y. Supp. 144.

Contributory negligence is inferable, as matter of law, where an experienced sectionman, who is working a hand car on a descending grade, lets go of the handle, which he knows to be necessary to enable him to keep his foot on steps down on the track and stands still until he is struck by a heavily loaded dump-car which is running by its own momentum some little distance behind the hand car. *Chicago & N. W. R. Co. v. Davis* (1892) 3 C. C. A. 429, 10 U. S. App. 422, 53 Fed. Cl.

In one case stepping on a rail on a track just after the passage of an engine engaged in making a flying switch has been held to be contributory negligence in one who is struck by the engine on its return, though done for the purpose of throwing something, as directed by the brakeman, under the car being switched, to prevent it from running into another car standing in front of a shed owned by him, and though the engineer did not, as is customary, ring the bell on returning, where the injured person is familiar with this mode of switching. *St. Louis, I. M. & S. R. Co. v. Ross* (1892) 56 Ark. 271, 19 S. W. 837. In another, it has been held (one judge dissenting) that an employee whose duty required him to go along and across a track, who stepped upon the track behind a train which had passed, and, walking toward it, was run over by detached cars following the train, was not guilty of contributory negligence. *Farben v. Chicago, R. I. & P. R. Co.* (1881) 56 Iowa, 337, 9 N. W. 230. Compare the similar decision by

which a track repairer who stepped behind a "dead car" in attempting to avoid a train coming along the main track was allowed to recover for injuries received by a switch engine driving a train against the dead car and injuring him. *Chicago & E. I. R. Co. v. Shannon* (1891) 43 Ill. App. 540. Nor is a car inspector who, for the purpose of discharging his duties more efficiently, went upon the track adjoining that on which the car was standing, instead of standing between the two tracks, deemed to have been negligent, as matter of law, though he knew that an engine might pass upon the track on which he stepped. *Taylor v. Louisville & N. R. Co.* (1893) 93 Tenn. 305, 27 S. W. 663 (stumbled and fell as he was getting out of the way).

Several cases embody the theory that a railroad employee who walks on the track, unnecessarily and not in the line of his duty, is in no better position than a stranger who did the same thing would be, and is guilty of contributory negligence, as a matter of law. *Mulherrin v. Delaware, L. & W. R. Co.* (1876) 81 Pa. 366; *Dyer v. Fitchburg R. Co.* (1898) 170 Mass. 148, 48 N. E. 1087; *Keena v. Central P. R. Co.* (1894) 101 Cal. 26, 35 Pac. 332; *Tumulty v. New York, N. H. & H. R. Co.* (1898) 170 Mass. 164, 49 N. E. 85; *Pennsylvania Co. v. O'Shaughnessy* (1889) 122 Ind. 588, 23 N. E. 675 (employee engaged in starting loaded cars from a turntable and accompanying them to a point where they could be unloaded into barges, unnecessarily walking in front of a car after starting it, instead of taking a safe path by the side); *Curley v. Winifrede R. Co.* (1888) 31 W. Va. 116, 5 S. E. 318; *Illinois C. R. Co. v. Curran* (1901) 94 Ill. App. 182.

On the other hand it has been held that a switch tender who, while walking upon the ends of the ties towards the place where he had to turn a switch, was struck by an engine that came up behind him and knocked him down while it was negligently run at unlawful speed, without ringing any bell, was not, as matter of law, guilty of contributory negligence. *Canada Southern R. Co. v. Jackson* (1890) 17 Can. S. C. 316. The trial judge had told the jury that the only ground on which a charge of contributory negligence could be based was that the plaintiff had not looked behind him when starting to walk down the track. On this point there was a conflict of evidence, making the question one for the jury. The majority of the su-

preme court seem to have assumed that a switch tender may, without negligence, walk on the track in going to the place where his duties are to be performed. Two judges dissented, holding that to walk on the track unnecessarily is just as culpable for a railway servant as for a stranger.

The Illinois court of appeals also has held that an instruction which tells the jury that if there were several ways over which the plaintiff, a section hand, could have traveled in safety, and he chose to travel upon the track, the plaintiff should find the defendant not guilty is erroneous. The question as to whether the plaintiff was guilty of negligence in walking upon the track was for the jury. *Kingma v. Chicago & N. W. R. Co.* (1899) 85 Ill. App. 138.

In one case the court refused to say that negligence was predicable, as a matter of law, where a yard foreman who, when walking between two tracks, stepped on to one of them in order to pass a switchstand more conveniently, and, having continued to walk between the rails for about 40 or 50 feet, was struck by an extra train. The differentiating elements relied upon were that, when he had looked round a few minutes before no train was in sight, and that in the ordinary course of events no train was due for some hours. *Hayes v. Northern P. R. Co.* (1896) 20 C. C. A. 52, 46 U. S. App. 41, 74 Fed. 279.

Where a section hand who was obliged to pass over a high trestle on defendant's track to reach his work, and knew before going on the trestle that a hand car was about to start for the place of work when he left, looked back before going on the trestle, but could not see the car, which, however, overtook him, and knocked him off the trestle, the question of his contributory negligence in attempting to pass over the trestle is for the jury. *Central R. Co. v. Lamb* (1899) 124 Ala. 172, 26 So. 969.

A yard master who in attempting to cross a track in front of a rapidly approaching train catches his foot under wires forming part of an interlocking signal system with the existence of which he is familiar, and falls and is injured, when there is no necessity for his crossing in front of the train, is guilty of negligence. *Horne v. Old Colony R. Co.* (1894) 161 Mass. 180, 36 N. E. 792. An assistant agent at a flag station who attempts to cross the track for the purpose of flagging the train, when the engine is so near that it strikes him before he

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covery, although the engineer failed to
give the customary signal of the ap-
proach of the train. *Helm v. Louisville & N. R. Co.* (1895) 17 Ky. L. Rep. 1004,
33 S. W. 396. One whose duty is to take
the number of each car coming into a
railroad station, who is experienced in
the railroad operations in the yard and
its dangers, and who knows that a shif-
ting engine is plying back and forth at
its work, is chargeable with negligence
in going upon the track in front of the
engine or in attempting to jump upon the
tender. *Beuhring v. Chesapeake & O. R. Co.* (1892) 37 W. Va. 502, 16 S.
E. 437.

A recovery cannot be had for the death
of a railroad employee who was injured
while using a narrow passageway be-
tween the railroad track and a platform,
not designed for such use, instead of a
safer though longer way provided, un-
less there was such need of haste that
there was no time to go by the longer
way, or the passage is of such a shape
as to be a trap for those entering it.
Galvin v. Old Colony R. Co. (1895) 162
Mass. 533, 39 N. E. 186. One employed
at a mine to assist in pushing and put-
ting in the desired position cars for the
receipt of coal cannot recover for inju-
ries from his foot being caught between
a platform and a standard on the side
of a car in front of which he undertook
to run to climb upon the platform to
start an engine operating the apparatus
for hoisting the coal, where he had more
practical knowledge of the situation
than the foreman who ordered him to
"run ahead and start the engine," and
knew the customary method of reach-
ing the engine was to pass to the rear
of the moving car, or get upon the end
of the moving car and step therefrom
to the platform, even though he might
have believed that the brakeman on the
car would be able to protect him against
mishap,—especially where the car was
30 feet away when he went to cross in
front of it, and the foreman and brake-
man had the right to assume that he had
ample time to effect a crossing, and he
would have done so in safety had he
not slipped upon a projecting plank in
the act of springing upon the platform.
Kansas & T. Coal Co. v. Reid (1898) 29
C. C. A. 475, 57 U. S. App. 464, 85 Fed.
914.

Where work was being carried on at
night only when trains were not running
in a tunnel, and an employee who, know-
ing the dangers to be encountered when

trains are running, and that they have
not stopped running for the night, goes
into the tunnel to work and is struck
by a passing train, the engineer of which
did not and could not, by the exercise
of reasonable care, see him,—the com-
pany is not liable, even if the bell on
the engine was not rung, where the ac-
tion is not based on the violation of any
ordinance. *Loeffler v. Missouri P. R.*
(1888) 96 Mo. 267, 9 S. W. 580.

The mere fact that it was the duty of
the hostler in charge of an engine to
stop it and wait for a signal before tak-
ing it on to a turntable will not prevent
the inference of negligence as to an em-
ployee who goes on the track in front
of it when it is near the turntable and
still moving with substantially un-
checked speed. *Cowles v. Chicago, R. I.
& P. R. Co.* (1897) 102 Iowa, 507, 71 N.
W. 580.

An employee engaged in turning up
a ladle used for carrying molten iron
upon a railroad truck is guilty of con-
tributory negligence which will defeat
his recovery for injuries sustained, in
placing his foot upon the track near
the wheels of such truck, when he knows
that at any moment it may be moved by
an engine in an attempt to couple to
other trucks upon the same track, where
there is a safe place in which he can
stand while performing his work.
Werk v. Illinois Steel Co. (1895) 154 Ill.
427, 40 N. E. 442, Affirming (1894) 54
Ill. App. 302 (without comment).

A fireman who goes to sleep between
two stalls in a badly lighted roundhouse,
and is injured by a train running over
his foot, cannot recover. *Price v. Han-
nibal & St. J. R. Co.* (1883) 77 Mo. 508.

An employee, fully informed of the
danger, who places himself between two
tracks, where his duty did not call him
and where a train moving upon either
or both tracks might injure him, is
chargeable with gross negligence which
is the proximate cause of his injury
when struck by a train which approached
while he was looking another way. *Ru-
all v. Central P. R. Co.* (1888) 76 Cal.
474, 18 Pac. 430.

The mere fact that a trackman knew
that the track at a place where he
stepped off it to let a train pass was
defective is a circumstance tending to
show that he was negligent in standing
close to the rails, but it does not estab-
lish such negligence, as matter of law,
nor preclude recovery for injuries caused
by the derailment of the train. *Swadley
v. Missouri P. R. Co.* (1893) 118 Mo.
268, 24 S. W. 140.

(2) Taking a position where there is a risk of being struck by heavy objects falling from moving or stationary cars.²

An employee engaged in cleaning out a ditch several feet from the railway track, and required to remove stones lying in close proximity to the edge of the ditch, is negligent if he goes so near the track as to be hit by a passing train, where he knows the rate at which the trains run, and is not required by his work to go upon the track. *Rutherford v. Chicago, M. & St. P. R. Co.* (1894) 57 Minn. 237, 59 N. W. 302.

An employee of a railroad company, engaged in unloading cars, is guilty of contributory negligence in attempting to pass an engine on a narrow trestle, where it was going so slowly that he could have walked back ahead of it, or by going back a short distance could have stepped aside on a cap sill and let it pass. *St. Louis & S. F. R. Co. v. Boyd* (1895) 60 Ark. 637, 31 S. W. 457 (employee was struck by the engine steps and thrown off the trestle).

It cannot be said, as a matter of law, that a brakeman who was running along the platform made by the top of a box car which covered the rods operating the switches was negligent in stepping on the edge of the platform, although only a few inches intervened between him and the moving cars. *Sweet v. Boston & A. R. Co.* (1892) 156 Mass. 284, 31 N. E. 296.

A car inspector who stepped onto a pile of cinders between two tracks to allow an engine to pass, and was injured by the cinders giving way under his weight and thus throwing him under the wheels, was held not to have been necessarily negligent in taking such a position. *Beaver v. Atchison, T. & S. F. R. Co.* (1896) 56 Kan. 514, 43 Pac. 113.

The question of contributory negligence of a workman who remained in an excavation between two street-car tracks while the car from which the horses had been detached was passing over the excavation precluding recovery for injuries sustained by coming in contact with the car as he jumped back to avoid one of the horses which was drawn too near the end of the excavation and slipped in, is for the jury upon evidence that there was ample room to draw the horses around and avoid the excavation. *Burns v. Second Ave. R. Co.* (1897) 21 App. Div. 521, 48 N. Y. Supp. 523.

A workman employed on a temporary street-car track was guilty of contribu-

tory negligence in stepping between a track and a girder between the pillars of an elevated railroad structure, precluding recovery for his death from being crushed between a passing car and the girder, where there was nothing to prevent his stepping to the other side of the track upon the approach of the car. *Sullivan v. Third Ave. R. Co.* (1897) 19 App. Div. 195, 45 N. Y. Supp. 1083. A street-car employee who, knowing that the track is so close to a wall that it is unsafe for a man to stand next the wall while a car is passing, allows himself to be caught in that position by a car, is negligent. *Jennings v. Tacoma R. & Motor Co.* (1893) 7 Wash. 275, 34 Pac. 937.

The conductor of an electric car is not guilty of contributory negligence in standing in the space between a switch track and the main line while turning the switch point, where the position is the usual one, and not in itself a place of peril, although he is not to be held to have stood in another place and turned the switch. *Gier v. Los Angeles Coast Electric R. Co.* (1903) 3 Cal. 129, 43 Pac. 22.

See also § 331, note 1, subd. (a), 332b, notes 1-3, *supra*; subd. (i) of the present section; and § 364, *infra*.

It has been held that, where a section hand, who was standing a reasonable distance from the track while a train passed, was injured by being struck by a piece of coal, he could not be said to have been guilty of contributory negligence. *Gulf, C. & S. F. R. Co. v. Wood* (1901; Tex. Civ. App.) 63 S. W. 16. This case seems to embody a more reasonable doctrine than another decision to the effect that a section hand who voluntarily stands in a ditch at the side of the track, in close proximity to a train passing at the rate of 30 to 40 miles an hour, is, as matter of law, guilty of negligence which will prevent recovery for his death from being struck by coal falling from the engine, where he could with ordinary care have reached a place of safety. *Illinois C. R. Co. v. St. Louis* (1893) 56 Ill. App. 221. Compare the criticism in note 6 to § 332b, *supra*, and the similar decision in *Croll v. Atchison, T. & S. F. R. Co.* (1896) 57 Kan. 548, 46 Pac. 972.

The fact that a section foreman stood about 4 feet from a track while a train

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(3) Going under or between stationary railway cars which may be set in motion at any moment.³ Compare cases cited in § 335, notes 2, 6, § 336, note 2, *infra*.

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is passing, and watches a fireman thereon as he prepares to throw a message to him, does not establish his contributory negligence, as a matter of law, so as to prevent his recovering for an injury caused by a blow by a lump of coal to which the message was attached. *Card v. Ledy* (1893) 24 S. W. 746.

A railroad employee who, instead of approaching a car from either end or the opposite side, where he could have done so safely, approached from the side where a stone was suspended by a chain in the unsafe condition of which he understood, and passed under it, when a link in the chain broke and the stone fell and injured him, is guilty of contributory negligence. *Kinney v. Corbin* (1890) 132 Pa. 341, 19 Atl. 141.

A car cleaner who knows that the trainmen are in the habit of recklessly bumping moving cars against stationary stock cars on side tracks without any warning is negligent in attempting to cross the track by crawling under those cars. *Beal v. Atchison, T. & S. F. R. Co.* (1900) 62 Kan. 250, 62 Pac. 321.

A night clerk in a railroad yard, familiar with the conditions and dangers, is guilty of negligence in attempting to cross a track upon which a train was standing, by going under the cars. *Chicago, B. & Q. R. Co. v. Eggman* (1895) 59 Ill. App. 680.

There can be no recovery for the death of an employee who went under an engine to clean out the ash pan, with knowledge that a train standing upon another track would soon enter upon his track for the purpose of removing therefrom cars standing about 120 feet from his engine on an up grade, and was killed by the cars being put in motion by the train in an attempt to couple them, and running down against his engine. *Seldomridge v. Chesapeake & O. R. Co.* (1899) 46 W. Va. 569, 33 S. E. 293. A servant who, when directed to remove coal which had fallen on the track while it was being loaded on cars, goes under or between the cars when he might have done the work by pulling down the coal through a chute under the track, is negligent. *St. Louis Bolt & Iron Co. v. Burke* (1883) 12 Ill. App. 372.

A workman who, in order to remove ore from a car track, gets under a car standing upon a slight incline, where

rakes were provided and he had been instructed to use them for removing the ore, voluntarily subjects himself to an unnecessary risk; and he cannot recover from his employer for injuries received, where a loaded car in charge of fellow workmen, from which the blocks holding it had in some unknown way been removed, struck the car he was under and moved it upon him. *Morgan v. Hudson River Ore & Iron Co.* (1892) 133 N. Y. 666, 31 N. E. 234.

A servant, familiar with the premises, who, knowing that other employees are switching cars, and that there is no definite or certain passageway left open, attempts to cross between cars only 20 inches apart, loaded with tools, and out of sight of the engineer, is, as a matter of law, guilty of contributory negligence which will prevent any recovery for his death by being caught between the cars. *Lord v. Pueblo S. Ting & Ref. Co.* (1888) 12 Colo. 290, 21 Pac. 148. Where a servant, having the right to cross the tracks at a designated place in order to reach a closet provided by his employer for its servants, goes between the cars at another place for his own convenience, and is injured, he is guilty of contributory negligence. *Louisville & N. R. Co. v. Hocker* (1901) 23 Ky. L. Rep. 982, 64 S. W. 638, 65 S. W. 119. A railroad employee going in between standing cars when he sees an engine and train stalled at an upgrade, only about 20 feet from the cars, is guilty of contributory negligence barring a recovery for injuries received by a collision. The fact that the engineer gave no warning by bell or whistle is immaterial, if the noise of the engine's exhaust was audible a long way off. *Clapcake & O. R. Co. v. Lee* (1888) 84 Va. 642, 5 S. E. 579.

It may be remarked that it has been laid down, as regards persons not in the employ of railway companies, that the risk of passing between cars in a train which is likely to get under way at any moment is such as no one can incur without being held, as a matter of law, guilty of negligence. *Lake Shore & M. S. R. Co. v. Pinchin* (1887) 112 Ind. 592, 13 N. E. 677.

A car inspector who, on a snowy and freezing morning, knowing that trains are made up at the place where he is in-

(4) Doing work on railway cars at an improper time or place.⁴

(5) Taking a position on a railway car which is dangerous with relation to objects above the track.⁵ Some of the cases under the

specting, by kicking cars against others which are standing, voluntarily goes between a car and an engine only 3 feet apart, while the train is being made up, is guilty of contributory negligence, or assumes the risk of the cars being driven against the engine by failure of the brake on the moving cars to work because of snow and ice. *Hanrahan v. Brooklyn Elcr. R. Co.* (1897) 17 App. Div. 588, 45 N. Y. Supp. 474. An employee is not guilty of contributory negligence in undertaking repairs on a car, with cars on the track on each side of it, but at such a distance that if switching were done in the ordinary manner he would be able to get out of the way. *Texas & N. O. R. Co. v. Wynne* (1893; Tex. Civ. App.) 22 S. W. 1064 (switch engine, which was defective and unmanageable, struck a car violently and forced it against the car under which the plaintiff was working).

See also § 331, note 1, subd. (c), *supra*.

⁴A conductor who undertakes to bleed the air reservoir of an air brake on a train which is stationary on a bridge so narrow that the sides of the cars are only 2 feet from the ends of the ties is negligent, and cannot recover if he falls off. *Norfolk & W. R. Co. v. Mann* (1901) 99 Va. 180, 37 S. E. 849. An engineer who alights on a trestle to oil his engine is negligent. *Chicago, B. & Q. R. Co. v. Abend* (1880) 7 Ill. App. 130. A locomotive fireman, who for his own convenience attempts to discharge his duties of cleaning the engine at the end of his trip without waiting for it to be inspected and repaired, though knowing that he will have plenty of time to do his work after such inspection, cannot hold the company responsible for a defect on account of which he is injured, which would undoubtedly have been disclosed by the inspection and then repaired. *Patton v. Texas & P. R. Co.* (1900) 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275. Affirming (1899) 37 C. C. A. 56, 95 Fed. 244.

But the question whether a railway employee who was injured by falling from a high trestle in attempting to open the door of a car standing thereon, which door was defective, was guilty of negligence contributing to the accident,

was held to be for the jury, in *Chase v. Oakes* (1897) 69 Minn. 67, 71 N. W. 915. See also § 330, note 1, *infra*.

⁵There can be no recovery for injuries received by a brakeman who unnecessarily walking on the top of a car when he was struck by a low overhead bridge. *Pittsburgh & C. R. Co. v. Seutweger* (1879) 92 Pa. 276, 27 Am. Rep. 684. Nor for injuries received by a brakeman by reason of the fact that he stood upright, with his face towards the rear of the train, on a car which to his knowledge did not leave room for him to pass a trestle safely while in that posture. *Rock v. Retse-Hin. Co.* (1891) 40 N. Y. S. R. 556, 13 N. Y. Supp. 872; *Goff v. Norfolk & W. R. Co.* (1888) 36 Fed. 299. A railroad brakeman familiar with a bridge so low at its sides that it is dangerous for a person standing or sitting on the edge of a car as it passes under the bridge is guilty of negligence which will prevent recovery for his death, in sitting at the edge of the car with his feet hanging over the side for his own comfort and convenience, and not in the discharge of any duty, while his proper position is at the center near the brakes. *Schlaff v. Louisville & N. R. Co.* (1893) 100 Ma. 377, 14 So. 105. An employer is not liable for the death of an employee caused by his head coming in contact with a low place in a tunnel through which he was driving a car while riding on the top of the load instead of on a seat provided for him where he could have ridden safely. *Foster v. Onderdonk* (1894) 54 Ill. App. 254. See also § 331, note 1, subd. (c).

The above decisions presuppose that the servant understood or ought to have understood the conditions. Accordingly where the attention of a brakeman had not been called to the danger of standing on a car higher than the rest of the train, it was a question for the jury whether he was guilty of contributory negligence in being on the top of such a car when it passed under a bridge as he had just been on the top of some of the cars to adjust brakes, and had a right to pass over the car in question in going to the cab or engine. *Southwestern R. Co. v. Durall* (1899) 21 Ky. L. Rep. 1153, 54 S. W. 741; (1900) 22 Ky. L.

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head, it will be noticed, are decided with reference to the consideration that there either was or was not a necessity for the employee to be in the place where he was at the time of the accident; and others with reference to the consideration that he did or did not understand the danger to which the position taken exposed him, and was, therefore, capable or not capable of protecting himself.

(6) Taking a position on a railway car which is dangerous with relation to objects beside the track.⁵ See also § 358, *infra*. It will

Rep. 56, 56 S. W. 988. Former opinion in (1899) 20 Ky. L. Rep. 1915, 50 S. W. 535, was withdrawn.

⁴Where a train hand, thinking that something had gone wrong during the nighttime, put his head outside a car window and was struck by a water tank, his action cannot be barred on the theory that the rule applicable to passengers—that it is negligence, as a matter of law, to allow any part of the body to protrude beyond the side of a car—is applicable to employees also. *Walsh v. Oregon R. & Nav. Co.* (1881) 10 Or. 250. Nor does that rule apply to a brakeman on a freight train, who is frequently under the necessity of extending his person beyond the surface of moving cars in order to give and receive signals, and for other purposes, *Kansas City, M. & B. R. Co. v. Burton* (1892) 97 Ala. 240, 12 So. 88.

On the other hand it is negligence for a brakeman to place himself, without necessity, on the side of a train which is about to pass some stationary cars on the adjacent rails, or other objects dangerous to a person in that position. *Callender v. Carlton Iron Co.* (1893) 9

U. S. R. 646 (action against another company).

An employee who attempts to board a moving freight car by a side ladder when he has an opportunity to board it by an end ladder, while it is standing, is guilty of contributory negligence preventing a recovery for injuries caused by his body coming in contact with a car on another track. *McDugan v. New York C. & H. R. R. Co.* (1894) 10 Misc. 336, 31 N. Y. Supp. 135. A car cleaner who, without any call of duty, takes his stand upon the oil box over the wheel of a freight car while it is being run along a siding, cannot recover for injuries caused by his striking against a running board projecting from a platform. *Martensen v. Chicago, R. I. & P. R. Co.* (1883) 60 Iowa, 705, 15 N. W. 569. A brakeman who descends over the side of

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a car for the purpose of eating his lunch, and not in the line of his duty, is deemed to be negligent where he knows that there is a dangerous obstruction at that point, but not otherwise. *Wilson v. Louisville & N. R. Co.* (1887) 85 Ala. 269, 4 So. 701 (effect of decision so stated in *Kansas City, M. & B. R. Co. v. Burton* [1892] 97 Ala. 240, 12 So. 88).

A car accountant who is killed while riding at the bottom of a ladder on the side of a box freight car, by striking the switch stand, when his duties do not require him to so ride, is guilty of such contributory negligence as will prevent a recovery. *Haggerty v. Chicago, St. P. & K. C. R. Co.* (1894) 90 Iowa, 405, 57 N. W. 896.

An employee of a street railway company who is killed by coming in contact with a post close to the track, while standing on the step of the front platform of a car and leaning outward and looking backward underneath the car, is guilty of contributory negligence, where he is under no necessity or duty to be in that position. *Sandy v. Savannah Street R. Co.* (1895) 96 Ga. 819, 23 S. E. 841. No action can be maintained for injuries received by a servant who was struck by a skidway 29 inches from the side of the car, while needlessly hanging down to observe whether the wheels were sliding after the brakes had been set. *Walker v. Redington Lumber Co.* (1893) 86 Me. 191, 29 Atl. 979.

A locomotive fireman is chargeable with contributory negligence, precluding recovery for injuries sustained by falling from the engine as cars attached to it came in contact with standing cars, in attempting to pass from the steam chest down the front of the engine to the ground, instead of passing along the running footboard to the cab, as he might have done in safety, after he knew that the engine had started to back for the purpose of coupling standing cars. *Kelsey v. Chicago & N. W. R. Co.*

be observed that the same remark that was made in regard to the cases cited under the last paragraph is also applicable to the case cited under the present one.

(7) Taking a position on a railway car or engine, which is danger-

(1898) 106 Iowa, 253, 76 N. W. 670. An experienced engineer who, while engaged in instructing another engineer as to all the physical peculiarities of the road, allows himself to be struck by the side of a bridge to which the engine happens to have been brought nearer than usual by the swaying movement caused by the passage of the train round a curve by which the bridge was approached, cannot recover. Such an accident implies that he failed to use the care which it was his duty to warn his pupil to use in entering the bridge. *Bellows v. Pennsylvania & N. Y. Canal & R. Co.* (1893) 157 Pa. 51, 27 Atl. 685. No action can be maintained where an engineer, knowing that the side of a bridge was close to the track, put his head so far out as to be struck. *McGhie v. Northwestern R. Co.* (1886) 24 Scot. L. Rep. 370, 14 Sc. Sess. Cas. 4th Series, 499.

An employee in a mine who gets upon the extreme outer edge of a brake beam in front of an engine with no cars attached, to ride through a narrow and dark tunnel on his way to the office for his pay, on a day when he is not at work, cannot recover for an injury to his knee from a projecting rock. *Richardson v. Carbon Hill Coal Co.* (1893) 6 Wash. 52, 20 L. R. A. 338, 32 Pac. 1012.

A railway company is not liable for the death of an engineer caused by his coming in contact with a danger signal post which was too near the track, where he knew of its proximity, and unnecessarily left his place on the locomotive and exposed himself to danger for the purpose of looking at a hot journal under the tender, which he could have sufficiently seen without leaving his place. *East Tennessee, V. & G. R. Co. v. Head* (1893) 92 Ga. 523, 18 S. E. 976. A trainman who goes outside the engine cab, and, while leaning his body out for the purpose of looking under the engine, was struck by a snowbank and thrown under the wheels, cannot recover. *Brown v. Chicago, R. I. & P. R. Co.* (1886) 69 Iowa, 161, 28 N. W. 487. A brakeman who is chargeable with knowledge that all the wing fences at the cattle guards along the line are too near

the track to admit of a person's passing out with safety from the bottom of a passing car is negligent if he puts himself in that position. *McKee v. Chicago, R. I. & P. R. Co.* (1891) 83 Ill. 616, 13 L. R. A. 817, 50 N. W. 209. A brakeman who, in attempting to get on top of a car, is caught between the car and a stone wall 2 feet from the track of which he had previously been warned, but which he mistook for a snowbank, the distance between the ladder and this obstruction being from 2 to 4 inches—is guilty of contributory negligence. *Hitchcock v. Railway Transfer Co.* (1900) 81 Minn. 352, 84 N. W. 42.

A switchman engaged in switching cars, familiar with the surroundings who chooses to descend from a moving car knowing that he must strike a post near the track if the train does not stop and knowing the engine to be defect in permitting the escape of clouds of steam which he must see in giving a signal to the engineer to stop, cannot recover for injuries caused by the engineer's being unable to see the signals, cause of the steam, and failing to stop the train. *Pennington v. Detroit, G. & M. R. Co.* (1892) 90 Mich. 505, 51 W. 634. A conductor of a street car is guilty of contributory negligence in attempting to mount the front platform of his car as it was going out of the station within such a short distance from a post at the side of the track that he was caught between it and the body of the car, where he was familiar with the surroundings, and knew that he was likely to be squeezed if he got between the car and the post, although he did not know how close it was to the track. *Reid v. New York & H. R. Co.* (1897) 100 App. Div. 23, 98 N. Y. Supp. 868.

Whether an employee, injured while striking a structure while on the side of a car in the discharge of his duty, knew of the danger incident to the structure, or, if he did know of it, what under the circumstances, he had the danger in mind, and ought to have avoided it, is primarily a question for the jury under proper instructions. *Kestel v. Chicago G. W. R. Co.* (1899) 110 Ill. 32, 81 N. W. 181.

A brakeman engaged in moving a

ous with relation to the movements or condition of such engine or car.⁷ For cases of this type in which the negligence of the servant was held to be for the jury, see more especially §§ 353, 354, 357, *infra*.

a running freight train is not required to make a nice calculation of inches, so that the protrusion of his body shall not strike a cattle chute near the track to which his attention was not specifically called. *Wood v. Louisville & N. R. Co.* (1898) 88 Fed. 44. It is not contributory negligence for a street-car conductor to attempt to collect fares from the side of a car rendered dangerous by an overhead wire pole being placed several inches closer to the track than the other poles, of which fact he was ignorant, where he was a new man, without instructions as to which side he should collect fares from, and could not by reasonable diligence have protected himself from the danger. *Pikesville, R. & L. G. R. Co. v. State* (1898) 88 Md. 563, 42 Atl. 214. A brakeman is not, as matter of law, guilty of contributory negligence in attempting to climb the side ladder of a car while the train is in motion, without looking to see whether he is in danger from a pole which is too close to the track, where the danger is not so obvious as to be discoverable by observation, and he has no actual knowledge of the danger. *Whipple v. New York N. H. & H. R. Co.* (1896) 19 R. I. 587, 35 Atl. 305.

Whether a conductor injured by being caught between a telegraph pole near a side track and a car as he was attempting to board his train after it had started was negligent in not looking for obstacles that might strike him, or in not boarding the train before giving the signal to start,—is a question for the jury upon evidence that he had never before been on the side track, and did not know of the location of the pole, and that his attention had been directed to seeing that none of his passengers should get in front of a train approaching on the main track. *Crandall v. New York N. H. & H. R. Co.* (1896) 19 R. I. 594, 35 Atl. 307.

But the action may be declared not maintainable, as a matter of law, where there cannot be any reasonable doubt that the servant was aware of the location of the structure. *Blackstone v. Central R. Co.* (1901) 112 Ga. 762, 38 S. E. 79, and cases cited above.

A brakeman sitting on a brake wheel on the platform of a car upon a switch, who is injured by a collision in which

parties inside the car were unhurt, is not entitled to recover. *Martin v. Baltimore & O. R. Co.* (1889) 41 Fed. 125.

It is negligence to take a position on the front platform of the last freight car in a train. *Coyle v. Pittsburgh, C. C. & St. L. R. Co.* (1900) 155 Ind. 429, 58 N. E. 545 (complaint showing such a position held demurrable in a case where the servant was thrown off by reason of a defective piece of track). An employee traveling in the caboose of a freight train is negligent if he goes out and stands on the platform at a station while switching is being done. *Posey v. Texas & P. R. Co.* (1900) 42 C. C. A. 293, 102 Fed. 236. A section hand is not, as matter of law, guilty of contributory negligence precluding recovery for injuries from being thrown from the platform of a caboose of a work train by the sudden stopping of the train, in remaining upon the platform, to which he had just stepped from a flat car after hearing the direction of the foreman to the engineer to move the train a car's length, where the train moved slowly. He is not bound to take precautions in view of such an unexpected contingency. *Union P. R. Co. v. Doyle* (1897) 50 Neb. 555, 70 N. W. 43.

A city employee who sits on the edge of a gravel car used by the city, with his feet inside, and holding on with both hands while the car is in motion, cannot be said to occupy a position so manifestly dangerous that he cannot recover if thrown off by a sudden jerk. *Coughlin v. Cambridge* (1896) 166 Mass. 268, 44 N. E. 218.

A brakeman directing the movements of a car to be attached to a train is, as matter of law, not guilty of contributory negligence precluding recovery for injuries from being thrown from the car by the negligence of the engineer, in standing upon the top of the car, rather than on the narrow platform at the front end thereof, where he assumes that position the better to observe the cars and the signals of the engineer when occasion requires it. *Kansas City, Ft. S. & M. R. Co. v. Murray* (1895) 55 Kan. 336, 40 Pac. 646.

A railroad employee engaged in shifting and handling cars was held guilty of such contributory negligence as would bar a recovery for injuries sustained,

where, to save the labor of walking a few feet, he attempted to climb upon the pilot of a passing engine from which he fell and was run over. *Young v. Boston & M. R. Co.* (1898) 69 N. H. 356, 41 Atl. 268. Special elements emphasized were that there was no sudden exigency, nor any opportunity to see whether the pilot afforded a safe footing; and that the employee made no attempt to discover whether there was anything which he might grasp in case of a mis-step.

A servant who rides on the pilot of an engine without any necessity is negligent. *Atchison, T. & S. F. R. Co. v. Tindall* (1897) 57 Kan. 719, 48 Pac. 12. The fact that a shopman who is carried to and from his work as a matter of accommodation cannot get a seat in the cars will not justify him in sitting on the pilot of the engine; and if he does improperly do so, it is his duty to leave the pilot and go into the cars at his first opportunity. *Downey v. Chesapeake & O. R. Co.* (1886) 28 W. Va. 732. To ride on a pilot is deemed to be culpable, irrespective of anything that might have been said by those in charge of the train to encourage the servant to do so. *Baltimore & P. R. Co. v. Jones* (1877) 95 U. S. 439, 24 L. ed. 506.

For a brakeman to sit on the cross-beam in front of the engine with his legs hanging over in front of the pilot, while the train is running between stations on the main line and it is in no sense necessary for him to be there, is negligence which will prevent a recovery for injuries sustained as the result of a collision with the rail of a bisecting road. *Warden v. Louisville & N. R. Co.* (1891) 94 Ala. 277, 14 L. R. A. 552, 10 So. 276. A similar decision has been rendered with regard to an employee who was being transported to his place of work. *Kusanowski v. Northern P. R. Co.* (1883) 5 McCrary, 528, 18 Fed. 229.

In an action against the owner of a wagon with which an engine came into collision at a crossing, it has been held that the fact that switchmen upon switch engines ride standing upon the platform provided for them has no tendency to prove that a switchman is justified in sitting on the beam of the pilot with his legs hanging down. *Glover v. Scotten* (1890) 82 Mich. 369, 16 N. W. 936. On the other hand it has been held that for a brakeman to stand upon the platform in front of the

boiler head of a locomotive which is pushing a box car towards others, which it is to be coupled is not negligence, as matter of law, where the engine used was an ordinary freight engine, and not a switch engine with the usual appurtenances of footboards and hand rails, and the position thus occupied corresponded as nearly as the structure of the freight engine would permit, that which would have been the position on a switch engine for an employee having duties to perform which required him to be on the engine, which did not entitle him to be in the cab. *Missouri P. R. Co. v. McCoy* (1889) 41 Kan. 639, 21 Pac. 571. A car was driven so violently against the other cars that the force of the impact bent the pilot, and the brakeman was crushed between the box car and the engine).

A yard master is not bound to abandon a dangerous position, like the footboard of an engine, if it is the understanding that, while engaged in supervising the switching of trains, he is to use the footboard, and it appears that he cannot perform his duties with efficiency and promptness if he occupies any other position. *Highland & R. R. Co. v. Walters* (1890) 91 Ill. 435, 8 So. 357. A switchman, while riding on the front footboard of a switching engine en route to his work, was killed by a collision with load cars placed on the track at an unusual hour and without danger signals. Another company which interchanged cars at that point, is not charged in an action against such company, with contributory negligence because he did not ride on the rear footboard. *Tobert v. Little Rock & M. R. Co.* (1888) 10 Fed. 631.

Nor can negligence be predicated from the fact that a brakeman injured by derailment was riding on the rear instead of the front footboard of a switch engine. There is no more reason to anticipate danger on one footboard than on the other. *James v. Northern P. R. Co.* (1891) 46 Minn. 168, 48 N. W. 7.

It is negligence for a brakeman to ride on the brake beam of an engine instead of in the cab, at a place where he cannot alight except on an open trestle. *Beauregard v. Lake Shore & M. S. R. Co.* (1894) 102 Mich. 72, 60 N. W. 28, 62 N. W. 1029.

A brakeman who, in uncoupling a combination car with a railing, got up on a flat car next to it instead of remain-

(8) Taking a position on a railway car which is dangerous with relation to the nature of the load upon it.*

ing within the railing, and was jerked off and run over, is not entitled to recover. *Chicago & A. R. Co. v. Rush* (1877) 84 Ill. 570.

A brakeman is guilty of contributory negligence in standing with one foot on the bumper of each car, with his lantern in his left hand, and leaning forward and reaching with his right hand to withdraw a coupling pin which without his knowledge had been withdrawn by a fellow brakeman, precluding recovery for injuries resulting from the separation of the cars. *Young v. West Virginia C. & P. R. Co.* (1896) 42 W. Va. 112, 24 S. E. 615. A switchman who was injured by being caught between a flat car and engine while standing on the footboard of the engine on the inside of a curve in the track as he was assisting in making a coupling was not guilty of contributory negligence, as matter of law, because he remained on the footboard, instead of going ahead and setting the pin and then stepping outside of the track before the engine and the car came together. *Bennett v. Northern P. R. Co.* (1892) 3 N. D. 91, 54 N. W. 314. A brakeman who uncouples the caboose from a moving freight train while there is no one on the caboose to control its movements is guilty of such contributory negligence as will prevent a recovery for his death from being run over by the caboose, after being thrown from the train by a sudden jerk, where he remained on his knees in a dangerous position at the rear end of the train after uncoupling the caboose. *Louisville & N. R. Co. v. Fox* (1897) 20 Ky. L. Rep. 81, 42 S. W. 922.

Negligence is an inference, in point of law, where an engineer, for the purpose of making some necessary repairs, went out on the running board of an engine which was apt to rock a great deal. *Southern P. Co. v. Johnson* (1894) 12 C. C. A. 479, 29 U. S. App. 201, 64 Fed. 951.

A railroad company is not liable for an injury to an employee, where he voluntarily leaves the coach in which he is riding as a passenger, and takes a more dangerous place upon the engine to subserve his own purposes, with a view of gaining information to secure his promotion. *Texas & P. R. Co. v. Boyd* (1894) 6 Tex. Civ. App. 205, 24 S. W. 1086.

Whether the conductor of a "lunging" electric car, who was injured by the sudden starting of the car, was negligent in leaning backward over the dashboard with both hands upraised, attempting to keep the trolley on the wire, is a question for the jury. *Murdock v. Oakland S. L. & H. Electric R. Co.* (1900) 128 Cal. 22, 60 Pac. 469.

A charge that if an employee, knowing that there was a safer way to ride on an engine, placed himself, without necessity, in a more dangerous position, and thereby contributed to the injury, he was not entitled to recover, is proper. *Powers v. Boston & M. R. Co.* (1900) 175 Mass. 466, 56 N. E. 710.

No action can be maintained by a brakeman who, when getting off a car on which there was a tank of oil known by him not to have been secured against sliding, places his hand on a timber near the end of the tank, and has it crushed when the tank is thrown against the timber by the shock resulting from the collision of the car with another. *Larkin v. New York C. & H. R. Co.* (1896) 166 Mass. 110, 44 N. E. 122.

A railroad brakeman is guilty of negligence which will prevent his recovery for injuries sustained by his foot being caught against the end of an open car by the sliding of iron rails therein, in putting his foot inside the car in front of the rails, when he knows the car is about to be struck by the train for the purpose of moving it, and sees that the train is moving fast enough to strike hard, where there is a platform outside the car upon which he can stand. *Richmond & D. R. Co. v. De Butts* (1894) 90 Va. 405, 18 S. E. 837.

A brakeman who unnecessarily attempts to climb upon or pass over a lumber car in a train, which is a dangerous car to pass over, is guilty of such negligence as will prevent a recovery for his death caused by the breaking of improvised steps leading to the top of such car. *Harris v. Chesapeake & O. R. Co.* (1895; Va.) 23 S. E. 219.

A railroad employee who is sent from the engine to the tender on a dark night to fill the tender with coal, without any other light than a torch, is negligent in attempting to get back to the engine after his torch goes out, by walking on a tank which he knows to be a very dangerous one, when a safer way is, to

(9) Taking a position on a railway car which is dangerous by reason of some specific defect therein.⁹

(10) Dangerous positions taken by employees engaged in coupling or uncoupling cars. Abstracted from the element introduced by the fact that both the cars to be connected were in motion, the question whether the servant's position imported negligence may be considered with reference to dangers arising from the movements of other cars, or from the location of the track,¹¹ or from the construction of the coupling apparatus,¹² or as to the manner in which the cars were loaded,¹³ or from the attitude which he assumes.¹⁴ In all these predicaments, as is shown by the cases cited, the servant is bound at his

his knowledge, available to him. *Chicago, R. I. & P. R. Co. v. Cowles* (1898) 54 Neb. 269, 74 N. W. 579.

Whether a brakeman was guilty of contributory negligence in riding on a flat car between two tiers of logs, to the place where he was to make a coupling, whereby he was injured by being crushed between the logs on the cars leaving the track, is a question for the jury on conflicting evidence as to the prudence of such course. *Bathoff v. Michigan C. R. Co.* (1895) 106 Mich. 606, 65 N. W. 592.

⁹ A head brakeman a part of whose duty consisted in filling the water tank of the locomotive through the manhole, and who had filled it several times during the trip, cannot recover for personal injuries received by stepping on the manhole cover, which, being out of repair, slipped and injured him, if he knew that the cover was defective. *McQuigan v. Delaware, L. & W. R. Co.* (1890) 122 N. Y. 618, 26 N. E. 13.

¹¹ A railroad employee who entered a gap between two attached cars and a single car to make a coupling, where he could not see the conductor's signals nor the movement of the engine and cars approaching him, and remained upon the track while five uncontrolled cars traveled down a grade for 50 feet before striking the two attached cars, and the whole 7 traveled between, 10 and 50 feet before reaching him, gathering momentum "4 they went down grade, is guilty of contributory negligence. *McDonald v. Alabama Midland R. Co.* (1899) 123 Ala. 227, 26 So. 165.

¹² An employee is guilty of negligence in standing to couple cars on the inside of a sharp curve, so that he is crushed by the contact of the cars, in consequence of the slipping and passing of the draw-bars, when the cars are sufficiently sep-

arated on the outside of the curve, so that he would not have been injured if he had stood on that side. *Tuttle v. Detroit, G. H. & M. R. Co.* (1887) 122 S. 189, 30 L. ed. 1114, 7 Sup. Ct. R. 1166; *Texas N. V. & A. W. R. Co. v. G.* (1893) Tex. Civ. App. 23 S. W. 631.

¹³ A servant who, in coupling or uncoupling cars with deadwoods, unnecessarily goes inside those deadwoods, is negligent as a matter of law. *Donner v. Knorr & L. R. Co.* (1877) 68 Mo. 28 Am. Rep. 16.

¹⁴ A brakeman who, in broad daylight, has to couple cars loaded with lumber which projects over their ends on one side of the track, is chargeable with knowledge of the risk he has to run, and is not in the exercise of due care if he attempts to make the coupling on that side of the track on which the lumber projects, without stopping. *Lathrop v. Fitchburg R. Co.* (1890) 13 Mass. 423, 23 S. W. 227. It is negligence to attempt to make a dangerous kind of coupling after learning that the cars are loaded in a dangerous manner. *Houston & T. C. R. Co. v. Kelley* (1896) 13 Tex. Civ. App. 1, 34 S. W. 809, rehearing denied in (1896) 13 Tex. Civ. App. 25, 46 S. W. 863. No action can be maintained where a brakeman, with knowledge of the danger created by a projecting load, and without being ordered to do so by the conductor, goes between the two cars to make a coupling, and, being compelled to stop in order to avoid the lumber, fell and was killed. *Brice v. Louisville & N. R. Co.* (1888) 10 Ky. L. Rep. 526, 9 S. W. 288.

¹⁵ Negligence is a necessary inference where a brakeman stood with his left arm against a stationary car waiting for a moving car to come, and while feeling for a coupling pin has his arm

peril to select a position which will protect him from unnecessary risks, in so far as they are known or ought to be known to him. Nor is he free from negligence where he goes on the track in front of a stationary car, when he sees that the engineer is not responding to his signals to slow up the cars which are being backed.¹⁵

As regards the proper inference to be drawn where the essence of the defendant's plea is that the servant attempted to couple cars in motion, the doctrine which is sustained both by reason and by the weight of authority is that the question of his contributory negligence is for the jury to determine with reference to all the circumstances in evidence, and that a court is not justified in declaring, as a matter of law, that the action is not maintainable, unless something more is shown than that the cars were in motion.¹⁶ Recovery is allowed

caught between the deadwoods. *Muller v. Lake Shore & M. N. R. Co.* (1885) 105 Mich. 487, 63 N. W. 410.

¹⁵ *Norfolk & W. R. Co. v. Cottrell* (1887) 83 Va. 512, 3 S. E. 123; this case was followed by *Kenney v. Lake Superior Terminal & Transfer Co.* (1894) 87 Wis. 28, 57 N. W. 976, where it was held that negligence was inferable where a brakeman tried to couple cars running from 3 to 5 miles an hour, though he saw that the engineer had not responded to his signal to slacken the speed. On the second appeal (1896) 93 Wis. 32, 66 N. W. 1137, the evidence must have been presented under a somewhat different aspect, as the effect of the judgment was that the injured servant—a fireman of a switching crew—was not negligent, as matter of law, where, on a dark, wet winter's morning, in accordance with his duty, no one being present to couple the cars, he stepped between moving cars and a standing one, when they were 2 or 3 feet apart, to couple them, and was injured by falling over piles of ashes 4 to 8 inches high and covered with snow. The main stress was laid on the fact that his failing to observe those piles was not culpable.

¹⁶ That stepping between cars in motion to uncouple them is not negligence, as a matter of law, was declared in *Eastman v. Lake Shore & M. N. R. Co.* (1894) 101 Mich. 597, 60 N. W. 309; *Asbunn v. Flint & P. M. R. Co.* (1892) 90 Mich. 567, 51 N. W. 645; *Gardner v. Michigan C. R. Co.* (1886) 58 Mich. 592, 26 N. W. 301; *Rebb v. East Tennessee, V. & G. R. Co.* (1891) 87 Ga. 631, 13 S. E. 566.

A brakeman is not, as matter of law, guilty of contributory negligence in go-

ing in front of a moving car on a dark night to change the coupling link, preparatory to making a coupling, where this was a part of his duty and the proper way to perform it. *Knapp v. Chicago & W. H. R. Co.* (1897) 114 Mich. 199, 72 N. W. 200.

In one case it has been ruled that a complaint showing that the cars which the plaintiff was trying to couple when he was injured were in motion, does not compel the legal conclusion that he was negligent. *Cleveland, C. C. & St. L. R. Co. v. Baker* (1899) 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224.

Where a brakeman, while endeavoring to uncouple moving cars, caught his foot between a rail and a crossing plank and was run over, a demurrer to the evidence should not be sustained, if, according to the testimony, there is no unvarying practice to indicate the propriety or impropriety of what he was doing. *St. Louis & S. F. R. Co. v. Keller* (1900) 16 Kan. App. 480, 62 Pac. 905. Compare *Spaulding v. Chicago, St. P. & K. C. R. Co.* (1896) 98 Iowa, 205, 67 N. W. 227, where a verdict for the plaintiff was upheld for the reason that the evidence was conflicting as to whether the act was negligent or not.

A court ought not to infer negligence in undertaking to couple cars in motion, where there is no evidence going to show that the speed was so great as to have deterred an ordinarily courageous brakeman from making the coupling. *Ohio & M. R. Co. v. Wanglin* (1892) 43 Ill. App. 324.

It is error to hold, as a matter of law, that a brakeman who, in the course of his employment, goes between cars moving at the rate of 4 or 5 miles an hour,

even in the cases in which the servant finds considerable difficulty in extracting a coupling pin and is thus subjected to danger, for unusually long time, and under unusually hazardous conditions. The doctrine thus applied appears to be the only fair one, in view of the fact that this method of coupling cars, if not adopted,

is guilty of negligence. *O'Neill v. Chicago, R. I. & P. R. Co.* (1901) 62 Neb. 358, 80 N. W. 100.

A brakeman is not, as matter of law, guilty of negligence in stepping from a platform between the railroad track and walking between the rails in front of a slowly backing train, if it is about to couple to a passenger car. *Long Island R. Co. v. Smith*, 10 App. Div. 134, 42.

A railroad brakeman is not, as matter of law, guilty of negligence in going on the track in front of cars moving about 3 miles an hour for the purpose of putting a link in the drawhead of a car. *Carrier v. Union P. R. Co.* (1897) 58 Kan. 816, Appx. 50 Pac. 873 (for the result of the second appeal in this case, see note 20, *infra*).

A special finding that plaintiff was killed while uncoupling cars which were going at the rate of 4 miles per hour, he all the time knowing that the train was soon to stop, when he could have performed the task safely, which, however, was not unusually hazardous, as performed, is not inconsistent with a general verdict for plaintiff. *Hammer v. Chicago, R. I. & P. R. Co.* (1883) 61 Iowa, 56, 15 N. W. 597.

A special finding to the effect that a brakeman, while walking in front of a slowly backing train, discovered that the car to which it was to be coupled was moving towards him; that, upon ascertaining this fact, he did not step out at once from between the rails, but remained in front of the train until it was on the point of meeting the car; and that, upon his then attempting to get out of the way, he stepped into a ditch, and, stumbling, threw his hand on the drawbar, where it was crushed by the other car,—does not necessarily show that he was negligent, where there is nothing to show the rates at which the train and the car were moving, and, so far as appears, he did not know of the additional danger created by the ditch. *Baird v. Chicago, R. I. & P. R. Co.* (1883) 61 Iowa, 359, 13 N. W. 731, 16 N. W. 207, First Appeal (1880) 55 Iowa, 121, 7 N. W. 460.

Whether or not a switchman is guilty

of negligence in attempting to uncouple cars moving at the rate of 2 or 3 miles an hour, in violation of a rule of the company, which, however, has been in effect abrogated by habit, is a question with the company's acquiescence, and is a question for the jury. *W. & Southern P. Co.* (1896) 14 Utah, 38, 46 Pac. 374.

In *Lake Erie & W. R. Co. v. C.* (1896) 10 C. C. A. 631, 37 U. S. App. 654, 73 Fed. 642, it was held that one who goes between cars running about 3 miles an hour to uncouple them, on a dark night when the ground is frozen with snow upon it, at a point where the tracks interlace and the ties project above the ground, which is usually moist and likely to be slippery, especially when he has just given his signal to the engineer for a hard kick of the cars, is not, as matter of law, guilty of negligence; and that the question whether he was entitled to recover should have been submitted to the jury.

Where a company has a rule permitting employees to go in between cars when they are moving at a safe rate of speed, which is shown not to have been exceeded at the time of the accident, a brakeman injured by stepping into a ditch cannot be held negligent, as a matter of law, because he walked between the cars, if it appears that he had no knowledge of the ditch. *Hollenhorst v. Missouri P. R. Co.* (1897) 141 Mo. 38, 38 S. W. 723, Affirmed in Banc in (1897) 141 Mo. 113, 41 S. W. 887. The cars in this case were moving at a rate of 3 or 4 miles an hour, which, according to the testimony of experienced railroad men, was a reasonably safe rate of speed.

"As, where a switchman went between cars to uncouple them while in slow motion, and used a stone as he walked along to loosen the pin. *Curtis v. Chicago & N. W. R. Co.* (1897) 95 Wis. 460, 70 N. W. 665. Or where a switchman attempted to make the coupling as directed, but, owing to the fact that he could not pull out the car pin, or for some other cause, did not succeed, and followed the cars as they moved on, trying to remove the pin, until his foot

absolute necessity,¹⁸ is at all events naturally suggested and induced by the conditions under which such work is done. It is, of course, qualified to the servant's disadvantage, where the inference is undeniable, that the speed at which the cars were moving was so great that no prudent man would have attempted to couple or uncouple them;¹⁹ or where the testimony introduces some other special element which points to the same conclusion;²⁰ or where the servant failed

to do so, and he was run over. *Hanna v. R. Co.* (1898) 174 Ill. 109, 60 N. E. 1011. *Milwaukee* (1896) 69 Ill. App. 550. Or where a switchman walked between slowly moving cars while attempting to withdraw a coupling pin, and caught his foot in a defective frog of a switch. *International & G. N. R. Co. v. Turner* (1897; Tex. Civ. App.) 43 S. W. 560. Or where a switchman walked along ahead of a slowly moving car to adjust the coupling pin, for the purpose of making a coupling with a starting car. *Ripley v. Minneapolis & St. L. R. Co.* (1898) 72 Minn. 460, 75 N. W. 704 (slipped on ridge of ice).

In one case it was said that the act of coupling cars while in motion is not negligence, as it can scarcely be done otherwise. *Plank v. New York C. & H. R. Co.* (1875) 60 N. Y. 607. See, however, § 357, note 2, *infra*.

Recovery was denied on this ground in *Marsh v. South Carolina R. Co.* (1876) 56 Ga. 274; *Kroy v. Chicago, R. I. & P. R. Co.* (1871) 32 Iowa, 357. A brakeman attempted to pull out a coupling pin while standing on the deadwood of a car on a train moving about 14 miles an hour.

A switchman is, as a matter of law, guilty of contributory negligence precluding recovery for injuries to his hand from being caught between the deadwoods of two cars, in attempting to move the coupling with a short stick without observing the speed of the moving car, which he had reason to believe had been kicked on to the switch, and that its speed therefore could not be regulated, where he knew that it was particularly dangerous to make a coupling in that manner, and there was no emergency to render it necessary. *Southern R. Co. v. Arnold* (1897) 114 Ala. 183, 21 So. 954.

A brakeman who remains between the deadwoods after uncoupling some empty cars from the end of a train which was coming down a grade in front of an engine is negligent, as he ought to comprehend that the loaded cars remaining

with the engine would descend the grade more rapidly than the one detached by him. *Valencia v. S. R. Co. v. Rioche* (1896) 111 Mo. 297, 20 49.

A brakeman in charge of the movements of his train, who, without signaling to slow up after one attempting to uncouple cars while moving at about five miles an hour, makes the second attempt and is killed, is guilty of negligence which will prevent recovery for his death, even if the railroad company was negligent in leaving a guard rail unblocked. *Towne v. Missouri P. R. Co.* (1893) 52 Mo. App. 618.

An employee who knew of the location and condition of an unsafe cattle guard was, as a matter of law, guilty of contributory negligence where, while attempting to pull a coupling pin, he walked between two moving cars, and fell into the cattle guard and was run over. *Ford v. Chicago, R. I. & P. R. Co.* (1898) 106 Iowa, 85, 75 N. W. 650. Reversing on Rehearing (1897) 71 N. W. 332. First Appeal (1894) 91 Iowa, 179, 24 L. R. A. 657, 59 N. W. 5.

A switchman is, as a matter of law, guilty of contributory negligence precluding recovery for injuries resulting from one of his feet being caught between the rails at a switch and his being run over by the cars, where, with knowledge that the cars were approaching the switch and that there was no one present to signal the engine to stop in case of danger to him, he continued to walk between two cars while attempting to draw the coupling pin, which resisted his efforts. (Speed of train not a factor here.) *Cumard v. Houston & T. C. R. Co.* (1895) 89 Tex. 89, 33 S. W. 534.

A brakeman who attempts to change the link on an engine while it is in motion on a side track known to him to be unballasted is negligent. *Pennsylvania Co. v. Hanken* (1879) 93 Ill. 580.

A brakeman who, knowing that a switch or storage track is not ballasted, and having full control of the movements of an engine, instead of stopping

to use an apparatus provided by the company for the special purpose of enabling him to couple or uncouple moving cars without going between them.²¹

Whether an employee who, while endeavoring to adjust the link of a moving car, runs backwards in front of it, should ever be allowed to recover, is very questionable. His negligence would, at all events, seem to be indisputable when the car was moving rapidly.²²

Some courts seem to favor the doctrine that it is for the jury to say whether the dangers of uncoupling cars while they are in motion are greater than those of uncoupling them while they are stationary, and that the inference of negligence is peremptory if it is thus found as a matter of fact, that the former method is the more hazardous. But if this is really the effect of the cases cited, they are inconsistent with the general principle which declares that the essence of the culpability which is inferred from the selection of the more unsafe of two courses is that the course selected was positively unsafe, and not merely that the other course was the safer. See § 333, *supra*.

it or having it moved so slowly that no accident could befall him, jumps from the brake beam at the rear of the tender while the engine is backing, to make a coupling, and attempts to remove the link from the drawhead while walking slowly backward, and is injured by having his foot caught between the ties,—is guilty of contributory negligence. *Finnell v. Delaware, L. & W. R. Co.* (1892) 129 N. Y. 669, 29 N. E. 825. A brakeman who, while engaged in coupling freight cars, goes on a track covered with snow, a few feet in front of an approaching train, for the purpose of inserting a link in the drawhead of the nearest moving car when it should reach him, is negligent. *Carrier v. Union P. R. Co.* (1900) 61 Kan. 447, 59 Pac. 1075 (for the ruling on the first appeal, see note 16, *supra*).

See, however, *Lake Erie & W. R. Co. v. Craig* (1896) 19 C. C. A. 631, 57 U. S. App. 654, 73 Fed. 642, note 16, *supra*.

A switchman is, as matter of law, guilty of contributory negligence precluding recovery for injuries resulting from one of his feet being caught between the rails at a switch and his being run over by the cars, where, with knowledge that the cars were approaching the switch and that there was no one present to signal the engineer to stop in case of danger to him, he continued to walk between two cars while

attempting to draw the coupling pin which resisted his efforts. *Cranford Houston & T. C. R. Co.* (1895) 89 Tex. 89, 33 S. W. 534. Affirming (1895) Tex. Civ. App.) 32 S. W. 155.

A brakeman's negligence in attempting to uncouple cars while in motion, knowing the absence of a hand hold on the car, prevents his recovery from the company for an injury caused by a defective roadhead and the lack of a hand hold. *Ohio & M. R. Co. v. Beal* (1890) 36 Ill. App. 126.

²¹ Where a brakeman, finding that the lever provided for extracting a pin from the drawhead without going between the cars was defective, stepped between the cars while they were in motion, instead of using the lever on the opposite side, he is guilty of negligence which prevents his recovering for injuries caused by his stumbling while walking between the cars. *Morris v. Duluth, S. & A. R. Co.* (1901) 47 C. C. A. 661, 108 Fed. 747. Compare § 353, subd. (3), *infra*.

²² *Houston & T. C. R. Co. v. Smit* (1896) Tex. Civ. App.) 38 S. W. 51. Writ of Error Denied in (1896) 90 Tex. 123, 38 S. W. 985. Compare *Finnell v. Delaware, L. & W. R. Co.* (1892) 129 N. Y. 669, 29 N. E. 825, note 20, *supra*.

²³ *Peoria, D. & E. R. Co. v. Peoria* (1891) 42 Ill. App. 642. Second Appeal (1893) 52 Ill. App. 223 (brakeman fell into cattle guard); *Henderson v. Coon*

In one case a Federal judge seems to have assumed in his charge that, whatever may be the circumstances involved, the act of attempting to couple or uncouple cars in motion is negligent, as matter of law.²⁴ There is also authority for the view that this act may be pronounced culpable by a court, wherever it was done merely for the purpose of saving a little time.²⁵

For other cases as to injuries received in coupling cars, see §§ 333, subd. (3), 353, 357, 412, *infra*.

(10a) Traveling on railway cars operated in a dangerous manner.²⁶

(11) Taking a dangerous position on a hand car.²⁷

(12) Riding on a push car down a steep grade.²⁸

(1888) 31 Ill. App. 75 (similar accident).

²⁴ *Hudson v. Charleston, C. & C. R. Co.* (1893) 55 Fed. 248.

²⁵ *Peoria, D. & E. R. Co. v. Ross* (1894) 55 Ill. App. 638 (movement was only at the rate of 2 miles an hour). But there the specially dangerous situation was that a car was to be uncoupled from the drawbar of an engine. Unless this circumstance is assumed to be a controlling and differentiating factor the case is opposed to *Hammer v. Chicago, R. I. & P. R. Co.* (1883) 61 Iowa, 56, 15 N. W. 597. See note 16, *supra*.

Compare the ruling that an employee who goes between the pilot of a moving engine and a car to which it is attached for the purpose of uncoupling them is negligent, if it is apparent that he can perform the work without putting himself in that position. *Mobile & O. R. Co. v. George* (1891) 94 Ala. 199, 10 So. 145, Second Appeal (1895) 109 Ala. 245, 19 So. 784.

²⁶ A brakeman is not guilty of contributory negligence so as to prevent a recovery for his death in the wreck of a train while he was on one of several flat cars which were being pushed ahead of the engine in accordance with custom, if when he entered the employment he was ignorant of such custom, but in the course of his service ascertained that the cars had to be so pushed, and it seemed reasonably necessary for him to get on them to discharge his duty; and the danger was such that an ordinarily prudent person situated as he was would have deemed it prudent to do so. *Fordyce v. Louman* (1893) 57 Ark. 160, 20 S. W. 1294. An employee is not, as matter of law, guilty of contributory negligence in riding on a flat car which was being

pushed by a passenger car a short distance, in order to shunt it upon a switch, where he was required to accompany the car, and was not furnished a ticket to ride in a passenger car to the switch. *Butler v. New York & Q. C. R. Co.* (1899) 42 App. Div. 280, 58 N. Y. Supp. 1061. See also § 349, note 1, *infra*.

²⁷ It is negligence for a servant to stand on a hand car with his heels projecting over the front edge of the car, and with his face towards the rear of the car. *Stewart v. Ohio River R. Co.* (1895) 40 W. Va. 188, 20 S. E. 922.

A railroad employee cannot recover for an injury caused by his falling from a hand car suddenly stopped by the employees in charge thereof, where he was sitting on the front part of the same in a careless manner, and his negligence in so doing contributed to the injury. *Galveston, H. & S. A. R. Co. v. Parrish* (1897) Tex. Civ. App. 40 S. W. 191.

A railway company is not liable for personal injuries to an employee who, while working the front lever of a hand car under the orders of the section boss, was struck by the lever and knocked off while stooping to move some loose tools placed on the floor of the car by the section boss, although he has worked for the company but a few days. *Jones v. Louisville & N. R. Co.* (1894) 95 Ky. 576, 26 S. W. 590.

²⁸ A servant who travels down a steep grade on a push car unprovided with any apparatus by which its speed can be controlled by persons riding upon it cannot recover. *Miller v. Union P. R. Co.* (1880) 2 McCrary, 87, 4 Fed. 768.

A section hand who jumps on a "push car" without brakes, designed only to carry material, while going down a steep grade with the wind unfavorable, after

(13) Remaining on a derailed engine which is being dragged to the track.²⁹

(14) Mounting or remaining on a car the speed of which can be controlled.³⁰

(15) Taking a position dangerous with reference to a coal chute.

335. — cases not relating to work on railways.—The doctrine stated at the beginning of the last section has also been applied, as shown in the following paragraphs, to actions for injuries received under circumstances mentioned.

(1) Taking a dangerous position on vehicles drawn by horses,

being warned that it is dangerous, is guilty of such contributory negligence as will defeat an action to recover for his death caused by jumping from the car to avoid a collision with freight cars on a track for which the target showed the switch was set, but which fact he did not observe. *York v. Kansas City, C. & N. R. Co.* (1893) 117 Mo. 405, 22 S. W. 1081.

²⁹ Where an engine has been derailed and the servants of another company are endeavoring to pull it on to the track by means of a rope hauled upon by another engine, the question whether the engineer of the derailed engine was guilty of contributory negligence in returning to and remaining on it while the power was being applied is for the jury. *Robertson v. Boston & A. R. Co.* (1893) 160 Mass. 191, 35 N. E. 775 (rope broke and hook flew back and struck engineer).

³⁰ When the defense relied on in an action for injuries received by a switchman owing to a collision between a car which he had mounted and tried to stop and a stationary one was that he had mounted the car when it was moving at a dangerous speed (10 to 12 miles an hour), it was held that the proper charge to give was that, if the jury believed that the car, when it reached the plaintiff, had attained such a dangerous rate of speed that a prudent man in his position would not have boarded it, they should find for the defendant. *Texas & P. R. Co. v. Reed* (1895) 88 Tex. 439, 31 S. W. 1058.

The mere fact that a brakeman ordered to run a car loaded with stone down a descending grade did not abandon his post and jump from the car at the first instant that he saw the brake was not acting properly does not show that he was negligent. *Spaulding v. W. N. Flynt Granite Co.* (1893) 159 Mass. 587, 34 N. E. 1134.

³¹ An employee who knows the danger of coal falling down a coal chute cannot recover for an injury caused by a lump of coal striking him while standing under such chute several minutes before the time he is required to commence work under the same in repairing the track, unless the employer or its agents were guilty of gross negligence in causing the injury. *Louisville & N. R. v. Walker* (1897) 19 Ky. L. Rep. 369, S. W. 461. As to Kentucky doctrine referred to in the last clause, see § 3 subd. c, *supra*.

³² An employee cannot recover for injuries occasioned by the failure of an employer to provide sufficient accommodations for conveying her to her place of work, where the lack of such accommodations is obvious and she rides in an unsafe position. *McGuirk v. Shattuck* (1893) 160 Mass. 45, 35 N. E. 140.

Where plaintiff, after a year's service in driving a coal truck, which was barely low enough to pass under a beam of the coal bin when the driver was on the seat, was injured by attempting to remain on the seat while driving out under it with a new truck, which was about 2 feet higher than the old one, he cannot recover for the injury, since the danger was an obvious one. *Mih v. Grieme* (1900) 53 App. Div. 276, N. Y. Sup. p. 813.

Whether a teamster engaged in hauling bark over his employer's private roadway is guilty of contributory negligence for injuries sustained from a defect in such roadway, in driving down a hill while sitting on a load, with the soles of his boots even with the front end of the load, and with nothing for his feet to brace against, is a question for the jury. *Nelson v. Shaw* (1899) 102 Wis. 274, 78 N. W. 417.

An employee in a building who, although he notices that a teamster dri-

(2) Taking a position in which there is danger from the movement of an elevator cage.²

(3) Going on to an insecure structure.³ Compare cases cited in § 341, *infra*.

ing up in front of it with a load of bricks throws his reins loosely over the seat, and does not hitch the horses, which are spirited and restless, or put anything under the wheel, goes with the teamster on a plank leading from the wagon to the building to pass bricks from the teamster to other employees in the building, and is injured by the horses suddenly starting and throwing down the plank, is guilty of negligence. *Godard v. McIntosh* (1894) 161 Mass. 253, 37 N. E. 169. Judge Knowlton dissented in a well-reasoned opinion, on the ground that it was for the jury to say whether the plaintiff appreciated the real character of the team, in view of the fact that he had been doing the same work daily for about two months without accident, and might have been justified in inferring that the horses were not in any material respect less trustworthy than those ordinarily used for the same kind of work.

² An employee who has been for some time engaged in the use of an elevator which runs only from the first to the second floor is guilty of contributory negligence where, on pushing up the rod by which the car was lowered, and repeating this act, without starting the car, he put his head into the well to see what was the matter, knowing the bottom of the car was only 6 feet above, and was struck by the car and injured, when he could have examined into the matter safely by simply going upstairs. *Murphy v. Webster* (1890) 151 Mass. 121, 23 N. E. 842 (1892) 156 Mass. 48, 30 N. E. 88.

An employee in a mine who knows that a coemployee has repeatedly started the cage without a signal is guilty of such contributory negligence as will prevent a recovery for his death by placing himself on the cage in a position which would be rendered dangerous by the starting of the cage, when there is no necessity thereof. *Acme Coal Min. Co. v. McIver* (1894) 5 Colo. App. 267, 38 Pac. 596. Compare cases cited in § 334, note 3, *supra*, § 336, note 2, *infra*, and note 7, of the present section.

In an action by a convict who was assigned by the warden to operate an elevator in a building belonging to the per-

son who has hired his labor, and who was injured while on the inside of the shaft, it is proper to instruct that plaintiff was not negligent in going underneath the elevator, if necessary in operating it, and he was assigned to that duty and was compelled to obey the assignment, there being also a further instruction that he was negligent if the elevator might have been operated from the outside without going under it. *Baltimore Boot & Shoe Mfg. Co. v. Jamar* (1901) 93 Md. 404, 49 Atl. 847. See also note 5, *infra*, and § 336, note 2, *infra*.

³ There can be no recovery for injuries received by a laborer while he was working voluntarily on a temporary trestle, known to him to be in a dangerous condition, when the remedies to prevent injury were entirely in the hands of him and his fellow workmen, and had constantly been applied by them in pursuance of general orders from their foreman. *Carroll v. Pennsylvania Coal Co.* (1888) 1 Monaghan, 234, 15 Atl. 688. A conductor who, without compulsion or necessity, attempts to take his train across a bridge after an extraordinary flood, which, to his knowledge, was likely to render it insecure, is negligent. *Columbus & W. R. Co. v. Bridges* (1888) 86 Ala. 448, 5 So. 864.

Where the insufficiency of a scaffold to support the workmen and the material placed on it is obvious, an employee who is injured by its fall cannot recover. *Daniel v. Forsyth* (1899) 106 Ga. 565, 32 S. E. 621. An employee cannot be said, as a matter of law, to have done an unnecessarily dangerous act in constructing a platform from which to oil a journal 4½ feet above the floor, and in using a stepladder to get on the platform, by the separation of the parts of which he is injured, where there is evidence that the floor about the journal was greasy and unsafe. *Standard Oil Co. v. Becker* (1895) 141 Ind. 12, 40 N. E. 128.

A miner cannot recover for injuries received by the breaking of a rotten plank forming part of a walk laid across timbers in a slope of the mine, where he knew of the decayed condition of the planks, and there was no sudden emergency requiring him to expose himself

(4) Taking a position rendered dangerous by moving machinery.

to the danger of walking over them. *Cook v. Bullion-Beck & C. Min. Co.* (1895) 12 Utah, 51, 41 Pac. 557.

A servant who, when pushing a car across a trestle, is injured by a fall which is due to his walking on a manifestly unsound guard rail, when he might have walked on the ties, cannot recover damages. *Southern R. Co. v. Harbin* (1900) 110 Ga. 808, 36 S. E. 218.

An employee who, while assisting to replace a derailed car on a track running along a trestle, stands at the ends of the cross planks, which he knows to be constructed of poor lumber, instead of remaining between the rails where there is a double layer of planks, which furnishes a perfectly safe footing, is guilty of negligence. *Darcy v. Hall & M. Co.* (1899) 122 Mich. 206, 80 N. W. 1082.

Where a servant, at work on a flat roof replacing a pane of glass in a window, in removing the old putty, exerted sufficient pressure to break the mullion, when he had unnecessarily put himself in a position which prevented him from supporting himself on the roof, his consequent fall through the window was the result of his negligence. *Saunders v. Eastern Hydraulic Pressed Brick Co.* (1899) 63 N. J. L. 554, 44 Atl. 630.

An employee engaged in putting terra cotta ornaments upon a building is guilty of contributory negligence preventing a recovery for an injury caused by the fall of such terra cotta upon his stepping thereon, when it was, to his knowledge, in an unfinished condition. *Campbell v. Mullen* (1895) 60 Ill. App. 497.

If it appears that a servant, injured by the collapse of a defective scaffolding, had some opportunity to inspect it before going on it, the question whether or not he was guilty of contributory negligence in going on it is for the jury. *McLaughlin v. Eidlitz* (1900) 50 App. Div. 518, 64 N. Y. Supp. 193.

*An employer or his representative, when he orders a servant of average intelligence to do work in the neighborhood of machinery in motion, has a right to assume that the latter will take the precaution of selecting the position which, while permitting him to do the work, offers the best chances of safety. *Russell v. Tillotson* (1885) 140 Mass. 201, 4 N. E. 231 (servant injured by being caught in a revolving shaft, where

he might have kept the box between and it).

"If the servant puts himself in a way of dangerous machinery, with knowledge of its character, or places himself in the way of bodies moving in accustomed orbit with irresistible force, and is thereby injured, it will generally be regarded as the result of his carelessness." *McGovern v. Vermont R. Co.* (1899) 123 N. Y. 25 N. E. 373.

An employee in a sawmill is negligent if he takes a position in the vicinity of a rapidly revolving shaft with projecting set screw, where he had been employed for a long time about the mill, and, in performing his duties, on at one occasion should have discovered the set screw, and not more than two or three days before the accident was formed of the danger, and his attention specifically called to the set screw. *Daugh v. Mitchell* (1899) 120 Mich. 79 N. W. 806. An employee whose duty requires him to oil a revolving shaft at a point within 3 or 4 inches of a set screw is guilty of such contributory negligence as will prevent recovery for injury from being caught by the set screw, in leaning over the shaft, when it is in motion, without a light, while wearing loose clothing. *Scott v. Rickel* (1897) 113 Mich. 476, 71 N. W. 833. Where an employee who is directed to oil a shafting finds some caspiled upon the floor on the side of the shafting where the oil box is, and instead of requesting their removal, goes up his ladder on the opposite side where he is obliged to lean over the shaft to reach the oil box, he cannot recover for injuries caused by his sleeve catching in a set screw. *Demers v. Hubbard* (1901) 178 Mass. 9, 59 N. E. 451.

Placing a ladder where an effort is required to reach from it machinery, when it could have been conveniently placed, constitutes contributory negligence which will defeat recovery by an employee falling from a ladder against a set screw unobserved projecting from a shaft. *Groff v. South Imperial Mill Co.* (1894) 58 N. W. 333, 59 N. W. 1049. An employee in a sawmill acquainted with the machinery and its location, and competent to take the danger, is guilty of negligence contributing to his injuries occasioned by a set screw on a shaft catching his clothing while he was stepping on

(5) Taking a dangerous route in passing from one point to another.⁵

which was not necessary to accomplish his purpose. *Lewis v. Simpson* (1892) 3 Wash. 641, 29 Pac. 207. A workman in a room where there is a revolving shaft, who knows that the shaft is dangerous to one coming in too close proximity therewith, and who, on moving a box, walks backward until his body comes in contact with the shaft and catches his clothing, is guilty of contributory negligence. *Beck v. Firmenich Mfg. Co.* (1891) 82 Iowa, 286, 48 N. W. 81. One employed to do whitewashing in a factory in which there are shafting and set screws suspended near the ceiling, who for his own convenience refuses an offer of the employer's foreman to stop the machinery, and stands upon a platform, instead of standing on the floor and using a brush with a long handle, is guilty of such contributory negligence as will prevent a recovery for his death by being caught in the machinery. *Glassheim v. New York Economical Printing Co.* (1895) 13 Misc. 174, 34 N. Y. Supp. 69.

Evidence that a mature and experienced employee in a sawmill, in removing the sawdust which was clogging the sawdust carrier below a saw which was running at a high speed, and which extended in an unguarded condition several inches below a table on which it was placed, and the dangerous condition of which was easily discernible on slight inspection, placed his hand so that it came in contact with such saw and was so injured, conclusively shows contributory negligence on his part and bars a recovery for the injury. *Anderson v. C. N. Nelson Lumber Co.* (1896) 67 Minn. 79, 69 N. W. 630. A servant familiar with the operation and construction of the planing machine at which he works cannot recover for injuries caused by unnecessarily stooping over an arm and reaching under the table to remove shavings. *George v. St. Louis Mfg. Co.* (1900) 159 Mo. 333, 59 S. W. 1097. Compare § 339, subd. 2, *infra*. An employee in a sawmill who puts his arm through an opening under a sleeve covering the upper portion of a saw is guilty of such contributory negligence as will prevent a recovery for an injury caused by the falling of the sleeve, where other openings had been provided to his knowledge through which one's arm might be safely put for the purpose for

which he put his arm through the opening under the sleeve. *Rysdorp v. George Pankratz Lumber Co.* (1897) 95 Wis. 622, 70 N. W. 677. An employee in a sawmill, of ten or twelve years' experience, who voluntarily puts his hand into a hole in the boxing around a machine, and attempts to pick up the end of a broken chain lying within 2 or 3 inches of a revolving saw, and is injured thereby, is guilty of contributory negligence. *Schultz v. C. C. Thompson Lumber Co.* (1895) 91 Wis. 626, 65 N. W. 498.

A girl who dresses her hair near moving machinery is, as matter of law, negligent. *Tooke v. Bergeron* (1897) 27 Can. S. C. 567.

An employee cannot recover for injuries received in passing over uncovered cogs, unless there was a reasonable and practical necessity for him to pass over them. *British Columbia Mills Co. v. Scott* (1895) 24 Can. S. C. 702.

See also cases cited under note 5, *infra*.

⁵ In an action for the death of an employee who was killed by an iron bar which fell upon him as he was passing through an elevator shaft which formed one of three passageways from one side of a cellar to the other, it is for the jury to say whether he was negligent in using the shaft as a passageway, where the evidence is that, before he entered the shaft, he looked up and saw that the cage was stationary, and that the bar which fell on him was dropped by an employee of a company which was supplying machinery to his own master. *Hoos v. Edison General Electric Co.* (1899) 161 N. Y. 35, 55 N. E. 285. *Reversing* (1897) 23 App. Div. 433, 48 N. Y. Supp. 323.

An employee in a sawmill is not, as a matter of law, guilty of contributory negligence precluding recovery for the loss of his fingers from coming in contact with a circular saw, in attempting to pass from one part of the mill to another through a space 2 feet wide between the saw and another object, where that was the only accessible way of passing from one part of the mill to the other. *Dolphin v. Plumley* (1896) 167 Mass. 167, 45 N. E. 87.

An employee who, being directed to go to a distant part of a mill, selects a dangerous route which takes him through and amongst machinery and

over and under running wheels and belts, when there were other routes open to him, is negligent. *Sauer v. Union Oil Co.* (1891) 43 La. Ann. 699, 9 So. 566.

A workman who chooses to take a certain route in leaving a dock, when another one which was safer and usually taken by the employees was open to him, cannot recover if he falls into an unprotected opening. *Pritchard v. Lang* (1889) 5 Times L. R. 639. The report does not show that any evidence was given that the plaintiff knew, or ought to have known, of the alternative route. But presumably this was proved or conceded.

A workman cannot recover, where, in going to his work through a factory, he turned aside unnecessarily, from mere curiosity, and, with an abundance of light to show him the condition of the premises, fell into an open hoist-way, the bars of which were temporarily down for the purpose of making repairs. *Headford v. McBurny Mfg. Co.* (1893) 23 Ont. Rep. 335 (1894) 21 Ont. App. Rep. 164 (1894) 24 Can. S. C. 291.

The absence of contributory negligence is not shown where a female employee in a hotel, after being directed to make inquiry of a certain person as to the proper way to reach the place of her employment, omitted to do so, and, having entered upon the roof without the knowledge of anyone, fell through the skylight. *Kane v. Whitaker* (1898) 33 App. Div. 416, 54 N. Y. Supp. 85.

Negligence is inferable where an employee in a mine follows a hoisting bucket up an incline, and is injured by the breaking of the rope. *Patnode v. Harter* (1889) 20 Nev. 303, 21 Pac. 679.

A servant who unnecessarily goes through a narrow opening left between a live dynamo and an iron clutch extending from another one which is temporarily standing near it is guilty of negligence which will prevent recovery for his death resulting from the simultaneous contact of his body with the live dynamo and the clutch. *Fritz v. Salt Lake & O. Gas & E. L. Co.* (1899) 18 Utah, 493, 56 Pac. 90.

A ship is not liable for injuries to a seaman who, when ordered to go between decks, does not avail himself of safe and easy means provided therefor, but swings himself through the main hatch, and is injured by the half cover of the hatch of the between decks, which rested against the stanchions, turning and catching him when he stepped upon it, although such cover is usually fastened,

and was left unfastened by the negligence of some of the ship's company. *The Tammertlane* (1891) 47 Fed. 822.

The fact that a mill-hand reaches a mill a few minutes early, and goes for another part of the premises to his place of work by a different route from that which he ordinarily takes, in the absence of any rule to the contrary, does not make him guilty of contributory negligence when injured by timbers negligently thrown from the mill. *Steward v. Carlson* (1890) 1 Wash. 29, 2 Pac. 830. A complaint by an employee against an employer for personal injuries sustained by falling into an unguarded well of which he was not aware in the latter's field, while proceeding in the darkness, at the employer's direction, and in the course of his employment, from a tent in the field to a nearby town, is not insufficient because it does not expressly aver that the employer directed him to take the route he did where it avers that there was no road path, or traveled way from the tent to the town, and that he took the direct route. *Indiana Pipe Line & Ref. Co. v. Neusham* (1899) 21 Ind. App. 361, 52 N. E. 471.

A servant is, of course, not chargeable with negligence precluding recovery for injuries due to the unsafe condition of the premises, in departing from the shorter route to a point to which he was obliged to go in the discharge of his duties, where there was no apparent risk in taking the route which he did. *Lauter v. Duckworth* (1897) 19 Ind. App. 535, 48 N. E. 864.

An employee in a mine is not, as matter of law, guilty of negligence in ascending the mining slope in the course of his employment while tram cars were being drawn up some distance ahead of him, where all ingress and egress to and from the mine was along this slope, and there were points at which a person could leave the track on the approach of descending cars,—especially where he was killed by a post which the descending cars struck and knocked against him while he was on the track. *Waters v. Zenith Coal Co.* (1899) 122 Ala. 118, 2 So. 124.

A mining company is not liable to an employee who, on his first day in the mine, was told by his "boss" to heed no one but him, but who, on the second day, not finding his boss at the surface, descended into the mine, undertook to find his place to work by himself, and, on being informed that the boss was on the

(6) Getting onto a stationary machine which may be put in motion at any moment.⁶

(7) Taking a position in which there is a risk of being struck by flying bodies.⁷

(8) Taking a position in which there is a risk of being struck by falling bodies.⁸

other side of the mine, carelessly crossed under the shaft without giving any heed to the danger of the situation, although there was a passageway around the shaft for the employees to use, and was injured by one of the cages. *Rush v. Coal Bluff Min. Co.* (1892) 131 Ind. 135, 30 N. E. 904.

See also § 333, note 4, *supra*; the cases cited as to injuries received by employees walking upon railway tracks in § 334, note 1, *supra*; and § 336, note 1, *supra*.

An employee who gets upon a machine which has been stopped temporarily, and which is operated by another employee who cannot see him, for the purpose of opening a valve over the machine, without being ordered to do so, and without being under any general duty to do so, is guilty of contributory negligence precluding recovery for injuries from the starting of the machine, where he knows that in the absence of a sufficient light, which is the negligence on the part of the employer complained of, he runs great risk of being injured if the machine is started. *Colorado Fuel & Iron Co. v. Cummings* (1896) 8 Colo. App. 541, 46 Pac. 875.

An employee who places one of his feet in the cogwheels of a shaft for two or three minutes while passing under a traveler or movable derrick is guilty of negligence which will prevent his recovering for injuries on its starting in a gust of wind on account of failure to block the wheels,—especially where it was not necessary for him to pass that way to reach the place he had started for. *Salem-Bedford Stone Co. v. O'Brien* (1895) 12 Ind. App. 217, 40 N. E. 430.

See also § 336, note 2, *infra*; and compare cases cited in § 334, note 3 *supra*, and note 2 of the present section.

An action by a servant temporarily in charge of a factory, who was injured by being struck by a block thrown from a rip saw while he was instructing an employee how to operate the same on a machine equally adjustable for a rip or cut saw, is barred by his contributory negligence in standing in front of the

saw, a place of obvious danger, and in cutting off small blocks from wooden strips with the rip saw instead of a cut saw. *Vicksburg Mfg. Co. v. Laughn* (1900; Miss.) 27 So. 599.

"An employee whose duty it is to guide by a tag rope stones swung into place by a hand derrick cannot recover for an injury to his foot by the breaking of the chain by which a stone is suspended, where it is unnecessary for him to have his foot under the stone. *Kilroy v. Foss* (1894) 161 Mass. 138, 36 N. E. 746. Distinguishing *Hackett v. Middlesex Mfg. Co.* (1869) 101 Mass. 101, and *Spicer v. South Boston Iron Co.* (1885) 138 Mass. 426, on the ground (1) that, in those cases, the injury was caused by the fall of a part of a permanent structure, which the plaintiff had a right to believe was in no danger of falling, while in the case at bar the appliances were in their nature temporary, and the danger that the stone might fall by the breaking of the chain was known and understood; and (2) that, in the earlier cases, it was expected that the persons injured might, in the usual course of their employment, place themselves where they would be hurt if the structure above them gave way, while, in the case at bar, the plaintiff need not have placed himself under the stone, and was furnished with the tag rope to enable him so to work as not to expose himself to injury if a stone should fall.

A special finding that a servant went, without specific direction, to a machine on which he was adjusting drills, placed his arm beneath a heavy chain to which the drills were suspended, knowing that they were so suspended, and held it there for a minute before the drills dropped upon it; that he selected his own position and mode of work, and placed nothing under the chain to keep it from falling; that it was daylight; and that there was another safe way of doing the work,—shows that plaintiff was guilty of contributory negligence. *Consolidated Stone Co. v. Redmon* (1899) 23 Ind. App. 319, 55 N. E. 454.

A laborer engaged in taking down a

(9) Taking a position where there is danger from the action leverage.⁹

(10) Taking a dangerous position on a ladder.¹⁰

(11) Taking dangerous positions in mines.¹¹

bank is negligent if he continues to work at a point where there is a manifest risk of the earth's falling upon him at any moment. *Nimmons v. Chicago & T. R. Co.* (1884) 110 Ill. 340.

In *Stuber v. McEnter* (1892) 47 N. Y. S. R. 294, 19 N. Y. Supp. 900, it was held that a servant was negligent in going into an unshored trench, there being no evidence either of an express or implied direction from the master to enter it in this condition, or of any express or implied representation as to its safety. The judgment was reversed in (1894) 142 N. Y. 200, 36 N. E. 878, but this point was not discussed. See also notes 11, 12, *infra*, and § 330, note 2, *infra*; and compare § 334, subd. (2), *supra*.

⁹An employee who stands upon one end of a plank so balanced that a timber falling on the other end is liable to throw him into the air, and who knows that timbers are liable to fall owing to the defective condition of the tongs used to hold the timber, is guilty of such negligence as will prevent a recovery for an injury. *Stobba v. Fitzsimmons & C. Co.* (1895) 58 Ill. App. 427. An employee who, while engaged in raising the framework of a building, unnecessarily stands upon one of the iron frames lying upon the ground, and thus causes it to tilt up and slip down upon his foot, is negligent. *Romona Oolitic Stone Co. v. Tate* (1894) 12 Ind. App. 57, 37 N. E. 1065, 39 N. E. 529.

¹⁰The question whether it was negligence for an able-bodied workman, in his forty-fifth year, to step on the second round from the top of a ladder a foot shorter than a new brick wall against which it rested, and on or over which the workman had to step over the upper end of the ladder, is for the jury. *Hanigan v. Guggenheim Smelting Co.* (1899) 63 N. J. L. 647, 44 Atl. 762. One who is upset and fatally injured while at work on a ladder putting up shades in the course of his employment, by a baggage truck wheeled against the ladder by another person, is not, as a matter of law, guilty of contributory negligence. *Krulder v. Woolverton* (1895) 11 Misc. 537, 32 N. Y. Supp. 742.

¹¹A miner who, knowing that the roof

of a tunnel is shattered and dangerous, assists in removing a supporting timber and before another is substituted, goes down to rest under the place where the timber has been removed, is guilty of contributory negligence. *Bunt v. S. Buttes Gold Min. Co.* (1885) 11 Sa. 178, 24 Fed. 847, Affirmed in (1891) U. S. 483, 34 L. ed. 1031, 11 S. p. Rep. 464. A miner who continues to work at a place where he could not be seeing that a fall of the roof might occur at any moment is negligent, although the necessary props had been ordered and were being brought. *Knights v. Cooper* (1892) 36 W. Va. 232, 14 S. 999. A miner who goes to work in a drift at a place where he has observed that the roof is in a dangerous condition cannot recover for injuries caused by a fall of the rock. *Evans v. Chesapeake* (1890) 38 Ill. App. 615. An experienced miner, extracting coal under contract by which he is to do his own timbering, and receive pay by the ton, is guilty of such contributory negligence as will prevent a recovery for an injury where on a day when work is not to be carried on in the mine he voluntarily and without any sudden emergency goes down under a hanging wall which he knows is dangerous and liable to fall any time. *Forster v. Pleasant V. Coal Co.* (1898) 16 Utah. 348, 52 P. 594. A miner who, in passing through an entry of the mine to the surface, stops at a place under the roof and a recent fall has demonstrated to be dangerous, is guilty of contributory negligence precluding recovery for his death caused by a subsequent fall, especially where he might have gone to the surface through another entry. *Colorado C. & I. Co. v. Carpita* (1895) 6 Colo. App. 248, 40 Pac. 248.

A miner who, with reason to suspect the presence of dangerous gases at a place at which he is working, remains for a considerable time engaged in conversation having no reference to the protection of the work of the mine, is guilty of negligence which will prevent recovery for his death caused by an explosion of such gases. *Morgan v. Cuyler Coal Co.* (1893) 6 Wash. 577, 34 P. 152, 772.

(12) Taking a dangerous position on a ship.¹²

(13) Taking a dangerous position with relation to electric appliances.¹³

(14) Taking a position which is dangerous with respect to inflammable gases.¹⁴

In the section dealing with the servant's duty to keep a proper lookout and take notice of his surroundings many other cases illustrating the extent of the servant's right to recover for injuries received while in a dangerous position are collected.

The extent to which the duty to avoid a dangerous position, as qualified by the servant's right to rely on a fellow servant's proper performance of his duties, is discussed in § 355, *infra*.

Whether an employee, who was engaged in blasting rock with dynamite in the employer's mine, and was killed by the explosion of a dynamite cartridge, was guilty of negligence in prematurely entering the mine twenty minutes after the fuse had been lighted, where cartridges generally exploded two or three minutes after the fuse was lighted, was properly submitted to the jury as a question of fact. *Eureka Co. v. Bass* (1886) 81 Ala. 200, 8 So. 216.

The conductor of a train of cars which is being hauled out of a mine cannot be held negligent, as a matter of law, in riding on the front car, where the evidence is conflicting as to what is the proper position under such circumstances. *Crabell v. Wapello Coal Co.* (1886) 68 Iowa, 751, 28 N. W. 50.

See also note 5, *supra*.

A longshoreman engaged in piling cotton bales upon a dock is guilty of contributory negligence which will prevent his recovery for injuries sustained by the fall of a bale through the slipping of the hooks used in hoisting it, where he stands under the bale while it ascends, when he is not ordered so to do, and the bale is not lifted until he himself gives the order therefor; and the fact that he is crowded by the trucks bringing cotton will not excuse such negligence, where the truckmen place the trucks where he requires them, and he can give directions which would leave him room to move out of danger. *Reeka v. Ocean S. S. Co.* (1893) 3 Misc. 526, 23 N. Y. Supp. 3.

A seaman who unnecessarily stays in a position where he is liable to become entangled in a towing hawser is negligent. *The Samuel S. Thorpe* (1900) 99 Fed. 108.

A lineman who, when sent to ascertain the nature and extent of trouble with telephone wires, caused by a charge of electricity transmitted from the wires of a trolley-car company, ascends a pole belonging to the latter company, and so comes into contact with a charged wire, is negligent if he could have done the same work and avoided that contact by ascending a pole close by, which belonged to the telephone company. *Jackson & S. Street R. Co. v. Simmons* (1901) 107 Tenn. 392, 64 S. W. 705.

The question as to contributory negligence of an employee of an electric railway company in mounting upon a box on the repair car while attempting to draw a trolley wire into position by means of a block and tackle, precluding recovery for injuries caused by falling when the wire broke and struck him, is for the jury, notwithstanding that the portion of the work at which he was engaged at the time of the accident could have been performed more safely while standing on the ground, it appearing that the elevated position was necessary to enable him to connect the trolley wire with the span wire, which was necessary to the completion of his task. *Dixon v. Bausman* (1897) 17 Wash. 304, 49 Pac. 540.

A servant who, when near an orifice from which an explosive or inflammable gas is escaping, carries an unprotected light in his hand, is negligent. *Bannon v. Lutz* (1893) 158 Pa. 166, 27 Atl. 890 (the evidence, however, was held not to show, as matter of law, that the accident was caused by his negligence); *Benfield v. Vacuum Oil Co.* (1894) 75 Hun, 209, 27 N. Y. Supp. 16.

336. Going into a dangerous position without notifying persons whose acts danger may be anticipated.—The fact that a servant, before putting himself in a dangerous position, had communicated intention to those persons whose acts, performed in the ordinary course of their duties, would be likely to injure him, if they proceeded with those duties on the assumption that he did *not* occupy that position, is sometimes an element which so far tends to negative the inference of culpability that a court cannot say, as matter of law, that recovery is barred.¹

On the other hand, his failure to notify those persons of what was going to do is an element which will often preclude him from maintaining an action under circumstances which would otherwise be either unquestionably indicative of an absence of culpability, or render it necessary to take the opinion of the jury upon the quality of his conduct.²

¹Where a car repairer was injured while on the side of the roof of a car attached to a train standing at its passenger station, through the negligent starting of the engine, and 15 minutes before starting time he notified the fireman in charge of the locomotive not to start because he had to measure a ventilator on the car, the question whether he was guilty of negligence in going on the car while standing at the station, instead of waiting until it had been placed in the yard, where such repairs were generally made, is for the jury. *Sherman v. Delaware & H. Canal Co.* (1899) 71 Vt. 325, 45 Atl. 227.

²Thus, a railway employee, when about to put himself in such a position with respect to a stationary car that, if it should be moved unexpectedly, he will in all probability be injured, is bound to notify all other employees whose work may, in its progress, produce a movement of the car, or to put out a flag or other signal which will show them where he is. *Whitmore v. Boston & M. R. Co.* (1890) 150 Mass. 477, 23 N. E. 229 (car inspector); *Alabama G. & N. R. Co. v. Rouch* (1895) 110 Ala. 266, 20 So. 132; (1896) 116 Ala. 360, 23 So. 52 (car inspector went under car standing on side track).

The same result follows where the injury is caused by the moving of the car upon which the servant is working. *Amesbury & W. R. Co. v. Graham* (1898) 96 Va. 430, 31 S. E. 604 (employee went under car forming part of a train); *Lumpkin v. Southern R. Co.* (1896) 99

Ga. 111, 24 S. E. 963 (night watchman climbed on car). The fact that a repairer who had put out no signal relied on another employee who was standing out-side, to give warning and prevent other cars from striking the car which he was working, will not enable him to recover. *Southern P. Co. v. P.* (1896) 150 U. S. 438, 40 L. ed. 485 Sup. Ct. Rep. 338; *Hulien v. Chicago & N. W. R. Co.* (1900) 107 Wis. 122, N. W. 710 (engineer went under engine); *Whitecomb v. McNulty* (1904) C. C. A. 90, 105 Fed. 863 (same facts); *Spencer v. Ohio & M. R.* (1892) 130 Ind. 181, 29 N. E. 915 (employee went under engine without notifying engineer).

A railroad brakeman is guilty of negligence preventing recovery for death, where he goes between cars in nighttime without any warning or signal to the engineer, and at a time when the latter is following the signals of another brakeman. *Atchison, T. & S. R. Co. v. Alsdorf* (1892) 47 Ill. App. 200 (1894) 56 Ill. App. 578. Or when he goes between cars at any time without giving any notice to those in charge of the engine and train, after he knows that two unsuccessful attempts have been made to couple the cars, and that the attempt to couple them has been suspended. *Nihill v. New York, N. H. & H. R. Co.* (1896) 167 Mass. 52, 44 N. 1075.

The same rule is applicable where an employee in a mine, familiar with the movement of the cars, gives no warn-

337. Going into or remaining in an unauthorized position.— In a later chapter (XXXIII.) we shall have occasion to consider the rule that a servant who is injured while in a place where his duties do not require him to be cannot recover for the reason that the obligations of the master do not follow him into such a place or inure to his benefit while he is in it. Under the circumstances presented in some cases of this type, his inability to recover may also be referred to the conception that, in going into the place in question, he was guilty of contributory negligence.¹ An additional ground for declaring his

to have the cars stopped while he is at work on the track, and is struck by a car while assisting the mining boss to repair a stairway beside the track on which the lifting cars ran. *Jenkins v. Makopac Iron-Ore Co.* (1890) 52 N. Y. S. R. 866, 10 N. Y. Supp. 484.

Similarly, any employee who is about to assume such a position with respect to stationary machinery that, if it begins to move, he will be injured, is negligent if he fails to give notice of what he is going to do to the person who controls that movement. *Cherry v. Dakota Packing Co.* (1898) 71 Minn. 150, 73 N. W. 717, Rehearing Denied in (1898) 71 Minn. 155, 73 N. W. 1099; *St. Louis Press Brick Co. v. Kenyon* (1893) 57 Ill. App. 640. So, a servant whose duties do not require him to go into an elevator well, and who has observed that the cage is standing at a floor above, cannot recover damages if, without giving any warning of his intention, he enters the well for the purpose of picking up an article which he happens to need, and is injured by the descent of the cage. *O'Donnell v. International Har. Co.* (1900) 49 App. Div. 408, 63 N. Y. Supp. 290.

Other illustrations of the general principle are furnished by the decisions that a railway employee who, when ordered to hurry from the rear of a train, goes close to a box car from which he knows that ties are being rapidly thrown, without giving any warning of his approach, when a way of safety is open to him, cannot recover for an injury caused thereby (*Thomson v. Chicago & N. W. R. Co.* [1894] 92 Iowa, 196, 60 N. W. 612); and that an employee who knows that a manhole leading to a sewer is used to clean out the sewer when it becomes clogged during the operations of the employer, and also for blowing off steam from boilers, is guilty of contributory negligence if he goes into it to clean out the sewer without

notifying the person in charge of the boilers (*McLean v. Chemical Paper Co.* [1895] 165 Mass. 5, 42 N. E. 330).

In Texas the failure to notify employees under such circumstances as those presented by the cases cited above is not negligence, as a matter of law. *Dowdell v. Houston, E. & W. T. R. Co.* (1900) 22 Tex. Civ. App. 403, 55 S. W. 534 (employee went on track); *Guth, C. & S. F. R. Co. v. Harris* (1899) Tex. Civ. App. 51 S. W. 864 (car repaired).

Compare also cases cited in §§ 334, note 3, 335, notes 2, 6, *supra*.

An employee who rides on the engine, when he is not engaged in operating the train, but merely conveyed on it as a passenger, is guilty of contributory negligence which will prevent recovery for his death by the collapse of a bridge under the engine. *Dequett v. Illinois C. R. Co.* (1872) 34 Iowa, 284. Negligence is inferable where a carpenter, employed to do work on the upper deck of a vessel in port, hid his tools below at night, and on going to get them fell into a bunker hole. *Richard v. Canada Ship-building Co.* (1885) 35 Hun. 347. A servant who gets into a car for the purpose of loosening the ore when it has become clogged in the chute discharging it is guilty of negligence which will prevent recovery for an injury received from an overhead trolley wire, where the evidence shows that he had never been authorized to get into the car for such a purpose, and it was unnecessary to do so. *Lappala v. Cleveland Iron-Min. Co.* (1900) 122 Mich. 633, 81 N. W. 553.

A conductor of an electric car, who is also a competent motorman, cannot be held negligent on the ground that he temporarily took the place of the regular motorman while the latter was eating his dinner. *Gamble v. Akron, B. & C. R. Co.* (1900) 63 Ohio St. 352, 59 N. E. 99 (collision with another car as a result of dispatcher's fault).

A workman employed outside a mill,

action not to be maintainable is shown where it appears that, in such a place, he conducted himself in an imprudent manner. Evidence to this effect obviously suggests a breach of the duty discussed in § 331, *supra*.

The boundary line between cases in which the position of a servant was merely one which he was not authorized to occupy, and cases in which that position was one which he had been expressly forbidden to occupy, is not easy to define. But the distinction, seldom, if ever, of any practical importance, the servant having a right of action in either event unless some qualifying factor is introduced by the evidence. The cases which deal with the effect of an express prohibition are reviewed in §§ 363, 364, *infra*.

338. Doing work in an unnecessarily dangerous manner; cases relating to work on railways.—(Compare § 348, subd. (3), *infra*.) The doctrine that negligence may be inferred, as a matter of law, when it is apparent that the act which caused the injury was done in an unnecessarily dangerous manner, has been applied in the predicaments exemplified in the following paragraphs:

(1) Operating cars in a dangerous manner.—Negligence is imputed, as a matter of law, to an employee who allows a car under his management to travel at a rate of speed which is dangerous under the circumstances.¹

who, after passing through it to get a drink of water, unnecessarily goes out of his way to assist a millhand and falls through a hole in the floor, not guarded as required by statute, cannot recover. *Finlen v. Miscampbell* (1891) 20 Ont. Rep. 29.

In a Scotch case, one of the judges declined to adopt in its entirety the doctrine of certain English cases cited, that no person who is injured in life or limb, when in a place where he ought not to be, can have an action against the master, although the latter may be in fault. But it was held that a workman cannot recover where he perseveres in going back to a place, after he has become aware of the danger to which he will be exposed. *Gray v. Lawson* (1860) 22 Sc. Cases, 2d Series, 710.

¹A servant who gropes along a dark passageway on his master's premises where he has no business, and opens a door and falls down an elevator which has a bar in front of it, has no cause of action against his master. *Pfeiffer v. Ringler* (1884) 12 Daly, 437.

A servant employed to scrub floors in a factory does not exercise ordinary care

in groping about in the dark in an unfamiliar part of the building, and cannot recover for an injury caused by falling through an unguarded opening to an elevator shaft, where her employer had knowledge that she would go into the room opening into such elevator. *Jorgenson v. Johnson Chair Co.* (1890) 67 Ill. App. 80, Affirmed in (1897) 1 Ill. 429, 48 N. E. 822, solely on the ground that she was in a part of the building where she had no right to be. See note 1, *supra*.

A railroad employee who, when on duty, loiters carelessly about the railroad tracks, and voluntarily puts himself in a place and posture of obvious danger, and neglects to use his senses to avoid injury, is guilty of contributory negligence. *Moore v. Norfolk & W. Co.* (1891) 87 Va. 489, 12 S. E. 908.

¹In *English v. Chicago, M. & St. R. Co.* (1885) 24 Fed. 908, Mr. Justice Brewer puts the case of an engineer who is told to take his engine and run it over a place over a track which he knows to be dangerous, the time at which he is to reach his destination not being specified, so that the rate

(2) Participating in the making of a flying switch.—As it is a universal practice to make flying switches, a brakeman is not guilty of contributory negligence, as a matter of law, in participating in the operation, although such method is not the safest which can be used.³ (See § 353, *infra*.) But such negligence will be inferred where the making of a flying switch is carried out in a dangerous manner.⁴

Adopting a dangerous method of coupling or uncoupling cars. (Compare § 334, subd. (10), *supra*.) A servant coupling cars may be found negligent, where he does not make a proper use of coupling pins;⁵ or where he does not regulate his movements with due reference to the fact that the cars have double buffers,⁶ or where he unites dissimilar couplings in an unsafe manner.⁶

and was reasonably within his control, and he, instead of going 5 miles an hour, which would be safe, goes 30 miles an hour, which is unsafe. If he is injured on the trip, he cannot say, "I was told to make that trip, and although I went at that rapid speed I am not guilty of contributory negligence." See also § 331, subd. (1), *supra*.

³*St. Louis & N. F. R. Co. v. French* (1894) 36 Kan. 584, 44 Pac. 12; *Florida C. & P. R. Co. v. Mooney* (1898) 40 Fla. 17, 24 So. 148.

⁴As, where an employee entrusted with the pulling out of a coupling pin, signaled the engineer to start before it had been pulled, the result being that the car was derailed and the employee killed. *Brouse v. New York & N. E. R. Co.* (1893) 158 Mass. 247, 33 N. E. 650. See also § 334, subd. (10), *supra*.

⁵A brakeman while uncoupling cars by placing his entire hand on the head of the bolt before the slack comes is not guilty of such contributory negligence as will prevent recovery for an injury to his hand, although some experienced brakemen testify that the prudent way is to take hold of the pin with the thumb and forefinger just as the slack comes, but that only experts can employ that method. *Campbell v. McCoy* (1893) 3 Tex. Civ. App. 298, 23 S. W. 34.

According to several decisions, negligence is inferable, as matter of law, where a brakeman who is reasonably well versed in his duties is injured through using a straight, instead of a crooked, link to couple cars having drawheads of unequal height. *Welch v. New York C. & H. R. R. Co.* (1892) 43 N. Y. S. R. 958, 17 N. Y. Supp. 342; *Hullett v. St. Louis, K. C. & N. R. Co.*

(1878) 67 Mo. 239; *Norfolk & W. R. Co. v. Emmert* (1887) 84 Va. 610, 3 S. E. 115; *St. Louis & N. F. R. Co. v. Hullett* (1881) 44 Ark. 20.

A switchman who in attempting to couple cars the drawheads of which were of unequal height, tried to force the link in the link or drawhead down to the lower one as the cars came together, after an unsuccessful attempt with the link in the lower drawhead, was guilty of such contributory negligence as precludes recovery for injuries sustained thereby, where it was the custom of switchmen in making a coupling of this kind to use a straight link placed in the higher drawhead and prop up the lower one, and his excuse for not doing so was want of time to prop the lower drawhead after the rebound of the car, and before it was "kicked" a second time against the other cars, and no emergency required him to risk his life or limbs in making the coupling at that time. *Moore v. Kansas City, Ft. S. & M. R. Co.* (1898) 146 Mo. 572, 48 S. W. 487.

A brakeman who, when he was coupling a Miller to a Janney coupler, placed the pin in the former and the link in the latter, instead of adopting the reverse arrangement, which was the only safe one, and then remained between the cars to shake the pin in, was held to be negligent, as a matter of law. *Norfolk & W. R. Co. v. McDonald* (1891) 88 Va. 352, 13 S. E. 706.

⁶A brakeman who undertakes to couple cars with double buffers by projecting his arm straight in between the buffers, when it is well known to railroad men that it cannot be done in that manner without injury, and it might be

(4) Passing over the cars of a moving train in an improper manner.—Walking over a train of flat cars when in motion, or stepping from one to the other, is not negligence *per se*.⁷ But an employee cannot recover for injuries caused by doing either of these acts in a dangerous manner.⁸

(5) Attempting to mount moving engines or cars.—(See also §§ 439, 440, subd. d, 442, *post*; and compare § 339, subd. (9), *infra*. In some cases the mere fact that a servant attempted to mount a moving train without any necessity seems to have been regarded as sufficient to prevent his recovering damages.⁹ But the preferable view would seem to be that, in view of the normal requirements of railway work and the universal practice of railway employees, the inference of negligence should not be drawn, as matter of law, unless there is proof of some aggravating circumstance which rendered the action of the servant especially imprudent. (Compare the analogous situation when the injury was received in coupling or uncoupling cars in motion.) Thus, it is reasonable to say that a servant ought not to be allowed to recover where the car or engine was moving so rapidly that no cautious person would have attempted to mount it,¹⁰ especially where the conditions under which the attempt was made rendered it unusually dangerous;¹¹ or where the part of the car

safely done by dropping his arm below the buffers, is negligent. *Illinois C. R. Co. v. Harris* (1894) 53 Ill. App. 592. § So. 360. Compare § 334, note 9 *supra*.

⁷ Negligence is inferable where a brakeman couples a common drawhead to a Miller drawhead, instead of the other way. *Texas, S. V. & N. W. R. Co. v. Guy* (1893; Tex. Civ. App.) 23 S. W. 633. ⁸ *Hurst v. Kansas City, P. & G. R. Co.* (1901) 163 Mo. 309, 63 S. W. 200 (brakeman signaled train to go ahead when it was stopping for him).

⁹ Recovery was denied in *Dorch v. Vicksburg & W. R. Co.* (1884) 61 Miss. 519 (train running 10 or 12 miles an hour); *Louisville & N. R. Co. v. Miller* (1891) 90 Tenn. 53, 15 S. W. 921 (similar facts). Where a servant sues his master for injuries alleged to be caused by the defective condition of the footboard of a locomotive, which the servant attempted to board while in motion, it is error to refuse to instruct that the verdict should be for the defendant if the injury was the result of negligence of the plaintiff in attempting to board the engine while it was going at a high rate of speed. *Houston & C. R. Co. v. Milam* (1900; Tex. Civ. App.) 58 S. W. 735. Reversed on rehearing (1901) 60 S. W. 591, but this point was not affected.

¹⁰ A section hand engaged in unloading dirt from a train of flat cars, injured by falling between two cars while running to the rear of the train, where he had been ordered by the conductor, is guilty of negligence and cannot recover where he had been repeatedly warned by the section boss of the danger of running on such cars while they were in motion. *Sauer v. Lake Shore & M. S. R. Co.* (1895) 108 Mich. 31, 65 N. W. 624. Negligence is inferable where a brakeman in passing from one gondola car to another jumps on the end gate of the former, and, owing to its not being fastened and giving way under him, is precipitated on to the track. *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 518,

or engine by which he attempted to mount was one of such a character, or in such a condition, as to make the act unduly hazardous;¹² or where he stood in the middle of the track in front of the engine

knowledge, very high, at a time when his right hand was encumbered with two lamps, and his duty did not require him to get on to the engine. *New York, L. E. & W. R. Co. v. Lyons* (1888) 119 Pa. 324, 13 Atl. 205. A brakeman who attempts, after dark, and with a lantern in his hand, to board a freight train running 8 miles an hour by catching the ladder on the side of the car, is negligent. *Kilpatrick v. Grand Trunk R. Co.* (1900) 72 Vt. 263, 47 Atl. 827. A brakeman who unnecessarily attempts to board a train moving 5 miles an hour, the night being dark and the ground muddy, is negligent. *Chambers v. Western North Carolina R. Co.* (1884) 91 N. C. 471.

It has been held negligence for a brakeman to attempt to get on the pilot of a moving engine. *Cornwall v. Charlotte, C. & A. R. Co.* (1887) 97 N. C. 11, 2 S. E. 659; *Grant v. Union P. R. Co.* (1891) 45 Fed. 673. A brakeman who knows that the track is very rough is guilty of such contributory negligence as will prevent a recovery for an injury by attempting to get on the pilot of the engine, upon which there are no hand-holds, with an iron pin and link weighing 15 pounds in his hands, while the engine is in motion. *Wabash, St. L. & P. R. Co. v. Kastner* (1898) 80 Ill. App. 372. Compare last note. An employee who, in endeavoring to couple an engine to a car, jumped upon a rim 14 inches wide extending around the pilot of the engine, while the engine was moving 4 or 5 miles an hour, and without having anything to catch hold of, is negligent. *Mayfield v. Savannah, G. & N. A. R. Co.* (1891) 87 Ga. 374, 13 S. E. 459. Where a brakeman attempts to mount a moving flat car by stepping on the journal box and taking hold of a standard placed on the car to keep freight from falling off, the car not being provided with means for mounting it, and the caboose, provided with steps intended for use in mounting the train, being only four cars back, he cannot recover for an injury caused by the standard's turning round, so that he lost his hold of it. *Quinn v. Alabama G. S. R. Co.* (1900) 111 Ga. 315, 36 S. E. 599.

An engine hostler who is injured in attempting to get on the cab of a mov-

ing engine by the step at its side, when there was no duty to perform on the cab and he might have got in the engine more safely by using the footboard at the rear of the tender, the attempt being rendered especially hazardous by reason of the steps being obscured by escaping steam, cannot maintain an action. *Union P. R. Co. v. Estes* (1887) 37 Kan. 715, 16 Pac. 131.

A brakeman is chargeable with negligence where in getting upon a freight train as it was leaving a station he permitted several cars fitted with side ladders to pass, and climbed over or under the bumpers of a car and attempted to pull himself up by an end ladder, which, being fastened to a rotten timber, gave way. *Wilson v. Michigan C. R. Co.* (1892) 94 Mich. 20, 53 N. W. 797. A brakeman who, without urgent necessity, climbs a ladder upon the side of a car having a grab iron dangerous to his own knowledge, and whose condition it was part of his special duties to examine, knowing that it was dangerous under any circumstances to climb such ladder while the train was moving, is guilty of contributory negligence which will prevent recovery for his death by falling from such ladder. *Patterson v. Foster* (1896) 18 C. C. A. 467, 25 U. S. App. 642, 72 Fed. 121.

The contributory negligence of a brakeman and switchman in mounting a flat car coming toward him, by grasping a brake staff which was loose and bent when he did not know of its defects, is a question for the jury. *Prosser v. Montana, C. R. Co.* (1895) 17 Mont. 372, 30 L. R. A. 814, 43 Pac. 81.

A brakeman's attempt to step on a jaw-strap under a coal car, out of sight, in order to get on over the side, just as the train was starting, when ordered to get on and ride to uncouple cars, whereby, as such strap was missing, his foot was run over and crushed, is not negligence, as a matter of law, but makes a question for the jury, where there is evidence of a custom to get on such cars in that manner, although the primary purpose of the jaw strap was to strengthen the car. *Cotter v. Boston & M. R. Co.* (1891) 153 Mass. 297, 10 L. R. A. 769, 26 N. E. 864. Compare § 342, *infra*.

or car which he was about to mount;¹³ or where he attempted to mount the car or engine at a point on the track at which the act was attended by some unusual hazard;¹⁴ or, possibly, in some case where he was aware of the incompetency of the co-servant who was controlling the movements of the car or engine.¹⁵

If any special emergency exists—as, where a railway policeman is trying to arrest a trespasser—the question of contributory negligence will, as a general rule, be for the jury to determine.¹⁶

(6) Attempting to dismount from railway cars while in motion. (For other cases bearing upon this subject, see §§ 439, 440, *subd. d*, 442, *post*.) So far as the writer's researches extend, no court has adopted the doctrine that a servant who alights from a moving car or engine without necessity is negligent, as a matter of law.¹⁷

Still less is negligence a peremptory conclusion of law where the evidence is substantially to the effect that the servant, either under the direct orders of a superior,¹⁸ or by the implied invitation of the company's agents,¹⁹ alighted from a car or engine moving at a moderate rate of speed.

¹³ *Ferguson v. Chicago, M. & St. P. R. Co.* (1897) 100 Iowa, 733, 69 N. W. 1026 (engine); *Cunningham v. Chicago, M. & St. P. R. Co.* (1883) 17 Fed. 882 (engine); *Grauer v. Chicago, R. I. & P. R. Co.* (1901) 93 Ill. App. 476 (brakeman stepped on brake beam).

¹⁴ A brakeman who becomes entangled with the handle of a switch while attempting to get upon a car, by which he is thrown under the train and injured, cannot recover where such switch was properly constructed for its purpose, and he had a safer way of getting on the train than at the switch. *Richmond & D. R. Co. v. Birina* (1893) 103 Ala. 142, 15 So. 515.

If the evidence is conflicting as to the question whether the place chosen was a proper one, the servant's contributory negligence is for the jury. *Donahue v. Boston & M. R. Co.* (1901) 178 Mass. 251, 59 N. E. 663. See also note 13, *supra*.

¹⁵ It has been held, however, that mere knowledge of an engineer's incompetency does not, as matter of law, charge him with contributory negligence in making an attempt to board the engine while in motion, where he would not be so chargeable in the absence of such knowledge. *Francis v. Kansas City, St. J. & C. B. R. Co.* (1894) 129 Mo. 658, 28 S. W. 842, Affirmed in 127 Mo. 676, 30 S. W. 129.

¹⁶ *Chicago, R. I. & P. R. Co. v. Kinare* (1900) 91 Ill. App. 508, Affirmed in (1901) 190 Ill. 1, 60 N. E. 57. See § 358, *infra*.

¹⁷ In *Texas & P. R. Co. v. Patton* (1894) 9 C. C. A. 487, 23 U. S. App. 313, 61 Fed. 259, where a fireman was injured by the turning of a loose screw while he was alighting from an engine moving at the rate of 3 or 4 miles an hour, one of the errors assigned by the defendant was that the plaintiff was negligent in going upon and dismounting from the engine until after the proper servants of the defendant had had an opportunity to inspect and repair it after its arrival in the yard. The majority of the court did not discuss the question of contributory negligence, and reversed the judgment of the lower court on the ground that the record failed to show any negligence on the part of the defendant. Toulmin, J., who dissented, expressed the opinion that the facts did not show that contributory negligence was an inference of law under the circumstances.

¹⁸ See § 439, note 4, *post*.

¹⁹ In *Louisville & N. R. Co. v. Stocker* (1888) 86 Tenn. 343, 6 S. W. 737, contributory negligence was denied to be a bar to the action of an elderly employee, fifty-seven years old, who, after receiving his wages on a pay car, undertook to dismount after it had begun to move

Whether a servant is ever justified, however slowly a car may be moving, in getting off in front of it and between the rails, is a matter of doubt under the cases as they stand.²⁰

But it seems safe to say that the limit of allowable speed under such circumstances must be lower than where the servant alights outside the rails, and at such a distance that the cars will clear him unless some unforeseen accident occurs.

As to the duty to look out for obstructions, when dismounting, see § 332a, note 3, *supra*.

- (7) Running alongside moving cars.²¹
- (8) Blocking cars which are running down a grade.²²
- (9) Method of doing repair work on railway cars.²³
- (10) Operating hand cars in a dangerous manner.²⁴

slowly, and was injured. He was regarded as having left the train under the implied order of the company.

In another case, where an employee jumped from a pay car while it was moving at the rate of 4 or 5 miles an hour, it was held proper to refuse an instruction that, under such circumstances he was negligent. *New York, P. & N. R. Co. v. Couthourn* (1888) 69 Md. 360, 11 L. R. A. 541, 16 Atl. 208.

In one case negligence was held to be imputable to a brakeman who, in getting off of an engine which was moving at least 6 miles an hour, alighted on the track between the rails, instead of jumping to one side of them. *Dandie v. Southern P. R. Co.* (1890) 42 La. Ann. 686, 7 So. 792. In another, recovery was denied where an engine was moving more than 4 miles an hour. *Gibbons v. Chicago, B. & Q. R. Co.* (1885) 66 Iowa, 231, 23 N. W. 644.

Where it does not appear that a brakeman, injured by tripping over wires stretched close to the ground near the track, while running alongside a moving locomotive, was violating any of the company's rules, it cannot be declared, as a matter of law, that he was guilty of contributory negligence, or that he assumed the particular risk by reason of violating such rules. *Fluttor v. New York, C. & St. L. R. Co.* (1901) 27 Ind. App. 511, 59 N. E. 337.

A brakeman injured while attempting to block a car on a down grade cannot be said, as a matter of law, to be guilty of contributory negligence in closing a long instead of a short block, or in not letting loose of it sooner. *Mahony v. Pleasant Valley Coal Co.* (1892) 5 Utah, 85, 30 Pac. 149.

A truck repairer who fails to place trestles provided for that purpose under the car, but relies upon the air jack alone, cannot recover for injuries sustained when the air-jack breaks and lets the car down upon him. *Wabash R. Co. v. Probst* (1900) 92 Ill. App. 485.

It is negligence to run a hand car over a railroad at a time when a train, if it is punctual, will be met. *Burling v. Illinois C. R. Co.* (1877) 85 Ill. 18.

In a case where a freight train was about half a mile distant from a station where it was likely to stop, it was held that a section man was not negligent, as a matter of law, in getting on a hand car with his foreman to run to a crossing on the opposite side of the station and about half a mile distant, where it was proposed to take off the car, and that, as he was justified in deferring somewhat to the judgment of the foreman, he was not necessarily negligent in acquiescing in the running of the train to a crossing further on, which the foreman thought it possible to reach before the car was overtaken by the train. As regards the latter of these acts, the court considered that the section man was not negligent himself, even though the foreman may have been at fault. *Slette v. Great Northern R. Co.* (1893) 53 Minn. 341, 55 N. W. 137.

Whether or not it was negligence as to a trackwalker who was obliged to traverse the track during the nighttime on a railroad velocipede, to run a freight train one-half hour ahead of the schedule time, is a question for the jury. *Baltimore & O. S. W. R. Co. v. Alsop* (1898) 176 Ill. 471, 52 N. E. 253, 732, Affirming (1897) 71 Ill. App. 54.

See also § 331, subd. (b), *supra*.

339. Doing work in an unnecessarily dangerous manner: cases not relating to work on railways.—The headings of the following paragraphs indicate the circumstances under which the doctrine stated at the beginning of the last section has been applied to servants other than those working on railways. Other cases involving situations similar to those reviewed are collected in § 331, *supra*.

(1) Attempting to get on a moving elevator cage.¹

(2) Failing to stop machinery when work is to be done which is dangerous while the machinery is in motion.—A servant who, with knowledge of the risk he is incurring, does acts about machinery while it is in motion, is guilty of contributory negligence, if he could have accomplished his purpose safely after stopping the machinery.²

¹ An employee injured in attempting to get upon an elevator while it is ascending, when it is not his duty to do so, cannot recover for the injury. *Block v. Swift & Co.* (1896) 161 Ill. 107, 43 N. E. 591. Affirming (1895) 58 Ill. App. 354. Compare § 338, subd. (5), *supra*.

² *Goffney v. J. O. Inman Mfg. Co.* (1895) 18 R. I. 781, 31 Atl. 6 (servant's hand was placed in a machine and crushed); *Cahill v. Hilton* (1887) 106 N. Y. 512, 13 N. E. 339 (servant took a belt off of a pulley); *Ingersoll v. Moore* (1890) 25 Pac. 275 (servant placed his hand in dangerous proximity to running saws, while attempting to remove an obstruction); *Atlas Engine Works v. Randall* (1885) 100 Ind. 293, 50 Am. Rep. 798 (servant allowed waste with which he was wiping a machine to hang down, and thus had his hand drawn into the machine); *Stoll v. Hooper* (1888) 12 Cent. Rep. 553, 14 Atl. 658 (hand of employee caught in cogwheels of machine which he was cleaning); *Deering v. Canfield & W. Co.* (1901) 126 Mich. 373, 85 N. W. 874 (employee attempted by means of a stick to push out the chips which accumulated between a circular saw and its guide); *Star Elevator Co. v. Carlson* (1896) 69 Ill. App. 212 (one employed about grain elevating machinery had a hand crushed which he put into the conveyor for the purpose of removing dirt and dust that had accumulated and stopped the conveyor); *Foss v. Bigelow* (1899) 102 Wis. 413, 78 N. W. 570 (workman attempted to clear away saw dust about a saw while it was in motion, with a short stick which was thrown upward with such violence as to break his jaw bone); *Gorman v. Des Moines Brick Mfg. Co.* (1896) 99 Iowa,

257, 68 N. W. 674 (servant's hand slipped and came into contact with cog wheel while he was using a wrench on a nut covered with oil and very slippery); *Hoffman v. American Foundry Co.* (1897) 18 Wash. 287, 51 Pac. 385 (injury received in attempting to take a belt on a pulley, there being a screw and collar close to the pulley to which the belt was caught); *Smith* (1893) 4 C. C. A. 654, 2 U. S. App. 618, 54 Fed. 896 (one engaged in paying out the rope of a hoist-paratus tried to throw the rope off the drum while it was in motion); *Reed v. Bay State Shoe & Leather Co.* (1880) 118 N. Y. 664, 23 N. E. 24 (servant attempted to adjust a mold while the press was in motion); *Moodie v. Scott* (1896) 61 Minn. 524, 67 N. W. 633 (employee attempted to replace a sas which had become insecure, while the edges were being shaved off by knives operated by machinery, without stopping the machinery). Compare also § 335, subd. (4), *supra*.

No action can be maintained for an injury caused by the plaintiff's getting his fingers between the moving cogwheels of machinery which he was turning with his own hands, where the complaint shows that the accident had occurred through his turning round to obey an order of his superior without stopping the machine. *Campan v. Walker* (1898) 25 Se. Sess. Cas. 4th series, 409.

The general rule that the servant's action is not barred unless he understood the danger has been applied in a case where it was held that negligence was not necessarily inferable because a servant tried to put a belt on machinery without waiting for it to be slowed

- (3) Adjusting machinery in a dangerous manner.³
- (4) Stopping machinery in a dangerous manner.⁴
- (5) Operating machinery in an improper manner.⁵

down. *McDade v. Washington & O. R. Co.* (1886) 5 Mackey, 144. Affirmed in (1890) 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1644.

That the doing of an act such as those which caused injury in the cases cited *supra* is not excused by the fact that it was done by the order of the master or his representative, see § 442, note 4, *post*.

³An employee who attempts to shift a belt upon a running shaft by hand, instead of using the belt shifter, is negligent. *Fleming v. Buswell* (1900) 48 App. Div. 635, 62 N. Y. Supp. 1137. Affirming (1899) 39 App. Div. 196, 57 N. Y. Supp. 230 (sudden moving of belt caused servant to step on the edge of the platform on which he was standing, and, being defective, it gave way).

Where a belt which a servant is removing from a fixed pulley on a shaft catches on the collar and injures him, he will be regarded as guilty of contributory negligence, where it is in evidence that by standing on a part of the machine one could lift the belt from the space between the fixed pulley and the collar and over the collar, and also that there was plenty of room on the shafting to the right, so that the belt might be removed in that direction. *Cushman v. Cushman* (1901) 179 Mass. 601, 61 N. E. 262.

An employee who has been employed sufficiently long to know how to adjust a set screw on the collar of a horizontal shaft, and to know the precaution necessary to be taken in returning it to its proper place when it has dropped out, and chooses to perform this duty without applying the clutch or hand lever, and also fails to stop with his work when the substitute for a belt shifter falls, but holds onto the set screw after the shaft begins to turn, in obedience to the friction of a belt, which shifts from a slack to a fast pulley, is negligent. *Carriere v. McWilliams* (1901) 104 La. 678, 29 So. 333.

An experienced servant who tries to hold a running belt in position with his hand is negligent. *Willingham v. Rockdale Oil & Fertilizer Co.* (1897) 101 Ga. 713, 29 S. E. 30.

A servant who, while attempting to adjust a mold while the press was in motion, puts his finger on the top of the

mold instead of the side, is negligent. *Hartwig v. Bay State Shoe & Leather Co.* (1889) 118 N. Y. 664, 23 N. E. 24.

An experienced servant, familiar with a machine, who uses his hand when he should have used a stick, is negligent. *Wetjen v. Southern White Lead Co.* (1878) 5 Mo. App. 598.

⁴A servant who had his hand crushed by keeping hold of a wheel in order to stop certain machinery—the act not being necessary, but safe if he had not kept his hand on longer than was requisite to stop the machine—was guilty of contributory negligence which will prevent his recovering damages, although the owner of the machinery had failed to furnish mechanical appliances to stop it. *White v. Sharp* (1882) 27 Hun, 94.

⁵A head sawyer in a sawmill who, while sawing a crooked log requiring unusual care in sawing, permits the log to move at an unusual and excessive speed, so as to render him unable to stop it upon the breaking of the machinery, and who fails to comply with his duty to slacken the motion when the saw is laboring,—is guilty of contributory negligence which will prevent his recovery for injuries from the giving way of the machinery. *Bibby v. Wausau Lumber Co.* (1891) 80 Wis. 367, 50 N. W. 337.

An employer is not liable for an injury to a skilled employee while operating an embossing and stamping press, although it was working at undue speed, where the whole of the employee's hand was under the press at the time of the injury, and only the hand so far as the second knuckle needed to be inserted to operate the press, and the speed had been increased at the instance of such employee himself. *Burland v. Lee* (1898) 28 Can. S. C. 348.

One experienced in the use of machinery, who knows that the usual way of starting a circular saw is to press it lightly with a stick, is guilty of such contributory negligence as will prevent a recovery for an injury, in applying with unusual force a block from 4 to 6 inches long which he wishes to saw. *Wulff v. Walter & Wood Harvester Co.* (1897) 67 Minn. 423, 70 N. W. 156.

An employee engaged in cutting pieces of plank 18 inches long into slats with a circular saw, who knows from his familiarity with the work that the gauge

- (6) Using tools in an improper manner.⁶
- (7) Handling electric appliances improperly.⁷
- (8) Improper method of performing work in connection with vessels.⁸
- (9) Improper methods of performing work in mines.⁹
- (10) Testing appliances in a dangerous manner.¹⁰

340. Doing acts with undue haste.—A nonculpable act may be con-

is liable to loosen and cause the wood to bind and fly up and back with great force, is guilty of contributory negligence preventing a recovery for the loss of his hand through being thrown against the saw, where he pushes forward a piece of plank with his hand within 4 or 5 inches of the saw, instead of using another piece of wood. *Wilson v. Steel Edge Stamping & Retinning Co.* (1895) 163 Mass. 315, 39 N. E. 1039.

An employee cannot recover for injuries received while using a circular saw, on the ground that he should have been furnished a helper, where he could have avoided any danger by going to the other end of the timber he was sawing and pulling it instead of pushing upon it. *Weigrefe v. Dair* (1891) 40 Ill. App. 53.

An employee is not, as matter of law, guilty of contributory negligence in attempting to run through a board on the left side of a saw after discovering that it was sawed "badly and crooked when run through on the right side of the saw." *Brown v. Concord & M. R. Co.* (1896) 68 N. H. 518, 39 Atl. 581.

"In an action for injuries caused by a flying chip from a defective hammer, it is error to refuse to charge that if the jury believe that the only tools used by plaintiff to perform his work were a hammer and a mandrel, and that such tools were reasonably safe, but that plaintiff used the hammer in so careless a manner as to strike the mandrel instead of the wire on which he was working, and thereby caused the hammer to chip, which flew in his eye, causing the injury, plaintiff was himself guilty of negligence and could not recover. *Duerst v. St. Louis Stamping Co.* (1901) 163 Mo. 607, 63 S. W. 827.

"The night inspector of an electric light company cannot recover for injuries due to the careless manner in which he handled one of the lamps. *Dixon v. Louisiana Electric Light & P. Co.* (1895) 47 La. Ann. 1147, 17 So. 696.

"A deck hand sent on shore by the captain before daylight, to cut ropes holding the boat for the night, who

struck the rope inside the knot which fastened it to the tree, which allowed it rapidly to unwind as the boat swung around, whereby the end struck and broke his leg, cannot recover for the injury. *Brown v. Wood* (1888) 2 Monaghan, 115, 16 Atl. 42.

"A driver in a mine, who, while in the act of mounting a car being drawn by a mule, was thrown forward by reason of his foot catching in some debris which had fallen from the roof, that he was struck by a timber and hurled in front of the car, which passed over him, is not chargeable with contributory negligence. *Consolidated Coal Co. v. Bokamp* (1897) 75 Ill. App. 605.

The driver of loaded cars in a mine, drawn by a mule, cannot be held guilty of negligence, as a matter of law, in attempting to climb on the front of a moving car, there being no evidence as to the speed at which it was moving. *Consolidated Coal Co. v. Bokamp* (1897) 75 Ill. App. 605.

A miner is not, as matter of law, guilty of contributory negligence in going down a ladder leading to the mine with his back to the ladder, where it is on an incline of only 36 or 40 feet to 100 feet. *Reese v. Morgan Silver Min. Co.* (1897) 15 Utah, 453, 49 Pac. 824.

A miner who attempts to dislodge a hanging piece of coal without placing sprags for the purpose of preventing from falling against a prop which has just been set up near it is negligent. *Penwell v. Harvey* (1898) 78 Ill. App. 278.

"There can be no recovery for the death of an employee killed by an explosion while testing steam radiators by pounding them with a hammer, where he had been repeatedly warned that it was dangerous to test them in that manner, and had notice that a radiator had exploded under the jar of two explosions the day before the accident. *Brewster* (1892) 131 N. Y. 606, 40 N. E. 124.

verted into a negligent one by proof that it was done with an excessive haste which was not necessary under the circumstances.¹

But the existence of an emergency prompting to rapid action will prevent this principle from operating as an absolute bar to the action. See § 358, *infra*.

341. Negligence inferred from the use of defective or unfit appliances.

—The general principle noticed in § 322, *supra*, involves the corollary that negligence is not necessarily inferable from the mere fact that an appliance which an employee undertakes to handle is specifically defective.¹ But no action is maintainable where the defect was of such a character that the employee knew or ought to have known that, under the given circumstances, the use of the appliance would expose him to imminent peril.²

¹*O'Neill v. Wilson* (1858) 20 Sc. Sess. Cas. 2d series, 427 (descending a ladder in a mine). A conductor who, in going back to signal a following train, after his own has been stopped by an accident, falls on a defective tie, cannot recover where he was hurrying along faster than there was any occasion for doing, in view of the time at which the coming train might be expected. *East Tennessee, V. & G. R. Co. v. Reynolds* (1894) 93 Ga. 570, 20 S. E. 70.

²Whether a brakeman injured by the moving of the train while he was endeavoring to put into shape a defective bumper was negligent is a question for the jury. *Central R. & Bkg. Co. v. Lanier* (1889) 83 Ga. 587, 10 S. E. 279. The fact that an engineer operated a train with an air brake which he knew to be out of order is not negligence which will prevent his recovering for injuries caused by a defective track. Under such circumstances there was no imminent danger, and the ultimate risk arose out of an event which he was not bound to anticipate. *Flynn v. Kansas City, St. J. & C. B. R. Co.* (1883) 78 Mo. 195, 47 Am. Rep. 99. A brakeman thrown off a defective footboard by an improper jerk of the engine is not necessarily debarred from recovery, where the footboard has been constantly used without any accidents. *Lytle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571.

³*Chesapeake & O. R. Co. v. Sparrow* (1900) 98 Va. 630, 37 S. E. 302 (rope taken to hold ferry boat in high water was obviously too weak to stand the strain); *Piedmont Electric Illuminating Co. v. Patterson* (1888) 84 Va. 747, 6

S. E. 4 (recovery denied for the death of an electric light employee, sent to look for a break in the circuit while the current was on, who selected and took with him an obviously defective shunt cord, and was killed while attempting to use it); *St. Louis & N. W. R. Co. v. Threat* (1896) 12 Tex. Civ. App. 375, 34 S. W. 152 (employee used a crane having, to his knowledge, a defect in the pulley attached thereto, which was such that no man of ordinary prudence, knowing of its condition, would undertake to use the crane to lift heavy weights); *Beall v. Pittsburgh, C. & St. L. R. Co.* (1893) 38 W. Va. 525, 18 S. E. 729 (brakeman unnecessarily used a brake, when the nut securing the wheel to the standard was missing); *Clary v. Long Island R. Co.* (1900) 54 App. Div. 284, 66 N. Y. Supp. 568 (recovery denied where a brakeman was injured while attempting to couple a car with a drawhead which had sunk below its proper level. See, however, last note); *Powers v. New York, L. E. & W. R. Co.* (1885) 98 N. Y. 274, Reversing (1884) 32 Hun, 415 (laborer, without special orders, assisted in propelling a hand car by means of a crowbar which had been substituted temporarily for a broken handle to the walking-beam).

It is negligence for an engine wiper to place his bare hand in open day upon the ragged steel splinters of a sliver 6 inches long projecting $\frac{1}{2}$ inch beyond the tire of the driving wheel of the engine, for the purpose of supporting himself in the performance of his work, when there are smooth and harmless surfaces all about him as serviceable for that purpose. *McCain v. Chicago, B. & Q. R.*

In the case of the smaller appliances which are ordinarily kept in considerable quantities, and are in their nature intended to be transported from place to place as they are required, this doctrine is expressed in the form that, where the master keeps an adequate and accessible stock of such appliances in good condition, contributory negligence is predicable of the act of a servant who selects an appliance which he knows or ought to know to be defective and dangerous.

Co. (1896) 22 C. C. A. 90, 40 U. S. App. 181, 76 Fed. 125. But whether plaintiff acted as a prudent man in taking hold of a drain pipe on the tender of an engine, which was defective in not having hand-holds, was held to be a question for the jury in *Cohy v. North Carolina R. Co.* (1901) 128 N. C. 534, 57 L. R. A. 817, 30 S. E. 43.

Where the foreman of a switching gang used a road engine without attaching a flat car in front of it, for the purpose of making a flying switch, and the evidence is that the danger would have been diminished by thus attaching a flat car, he may properly be found guilty of contributory negligence which will prevent his recovering for an injury caused by falling from the pilot of the engine while attempting to uncouple the car which was being switched. *Thompson v. Montana C. R. Co.* (1896) 17 Mont. 426, 43 Pac. 496.

Where the usual course of operations contemplates the cutting of bars of railroad iron in the shops, while they are in a heated state, a servant who undertakes to cut one cold and away from the shops, and receives an injury from a sliver which flies off the head of the chisel used for cutting, is guilty of contributory negligence. *Houston & T. C. R. Co. v. Conrad* (1884) 62 Tex. 627.

A servant who knew that an engine step was greasy, or would have known it if he had used ordinary care, cannot recover for injuries received by his slipping from such step while climbing on the engine to clean a headlight. *Bookrum v. Galveston, H. & S. A. R. Co.* (1900) Tex. Civ. App. 57 S. W. 919.

An experienced employee, who selects a fitting which is too light to bear the pressure to which he subjects it in shutting in and testing a well of natural gas, cannot recover. *Toohcy v. Equitable Gas Co.* (1897) 179 Pa. 437, 36 Atl. 314.

An employee who undertakes to lower a stone weighing 700 pounds into a pit 5 feet deep, by means of two wooden

skids 6 feet long and 2 inches thick, one of which is smaller and weaker than the other, with only one man in the pit and two at the top, is not chargeable with negligence unless he knew that the skid was unsafe or insufficient, or unless it was so obviously unsafe and insufficient to use for the purpose and in the manner in which it was being used that a man of ordinary prudence would not have known it. *Dillingham v. Haskins* (1894) 6 Tex. Civ. App. 474, 26 S. W. 914. An employee who, to make his work more convenient, attempts to use a casting weighing 1,250 pounds up an incline, with a stick, without asking for assistance, cannot recover for injuries caused by the stick breaking. *McGarrick v. Metcalf* (1891) 37 N. Y. S. 611, 14 N. Y. Supp. 269.

The question whether it was negligence for an able-bodied workman, in his forty-fifth year, to use a ladder a foot shorter than a new brick wall against which it rested, and on or over which the workman had to step over the upper end of the ladder, was for the jury in *Flanigan v. Guggenheim Sawling Co.* (1899) 62 N. J. L. 647, 44 Atl. 762.

² *East Tennessee, V. & G. R. Co. v. Perkins* (1891) 88 Ga. 1, 13 S. E. 952. *Parinto v. Taylor* (1898) 26 App. D. 518, 50 N. Y. Supp. 518.

The proprietor of a mill is not liable for an injury to an employee from the fall of red-hot "bloom" from tongs as in lifting it, due to the bitts becoming so smooth by use as not to grasp the bloom with sufficient firmness, when supply of tongs and bitts was furnished, and it was the duty of such employee to discontinue the use of a bitt when it became smooth and replace it with a sharpened one, and he knew that the bitts in use at the time of the accident were too smooth to be safe. *Phoenix Iron Co.* (1897) 182 Pa. 109, 36 Atl. 927.

A skilled mechanic who responds to the direction of a coemployee to get a cross bar and assist him in springing rails

342. Negligence inferred from the use of appliances for a purpose other than that for which they were designed.—In §§ 26, 27, *ante*, reference was made to the doctrine that, in respect to a servant who perverts an instrumentality from its proper function, a master is under no obligation to see that it is in a safe condition. In any case in which such an unauthorized application of the instrumentality subjects the servant to a specific danger which, if he had refrained from so applying it, would have been avoided, circumstances are presented which raise the question whether his conduct was or was not negligent. If the danger was one which ought to have been understood by any reasonably intelligent person who possessed the same amount of technical knowledge and the same familiarity with the work as the servant himself (see chapter XXI., *post*), a court is usually deemed to be justified in saying, as a matter of law, that he was in fault and cannot recover.¹

apart, gets a bar which he could have seen at a glance had a broken or worn point, and is injured by its slipping while he is prying the rails apart, cannot recover. *McBride v. Indianapolis Frog & Switch Co.* (1892) 5 Ind. App. 482 32 N. E. 579. A servant is not justified in assuming that because a worn implement remains among the stock of tools furnished, it is safe to use it, under conditions which render the particular defect which exists in it specially dangerous. *Hefferen v. Northern P. R. Co.* (1891) 45 Minn. 471, 48 N. W. 1 "side-set," a tool used for cutting iron, threw off a sliver when struck).

The Hadje (1881) 19 Blatchf. 354 planks spanning a hatchway, which were not laid to walk upon, gave way under a man engaged in stowing cargo; *Houston & T. C. R. Co. v. Myers* (1881) 35 Tex. 110 (brakeman tries to substitute the end of a switch chain for a coupling link); *Elgin, J. & E. R. Co. v. Docherty* (1895) 66 Ill. App. 17 (brake staff gave way when used as a hand-hold by a servant when mounting the car); *Thornell v. Alabama G. S. R. Co.* (1900) 111 Ga. 315, 36 S. E. 599 (stand and which brakeman grasped in attempting to mount a car by placing his foot on the journal box slipped in its socket and caused him to fall); *Tinamous v. Central Ohio R. Co.* (1856) 6 Ohio St. 196 (brakeman, when attempting to mount a moving train, seized the rim of the gravel box, and was injured by its sliding away); *Fortier v. Laurier* (1898) 104 P. 2d, Quebec, 14 C. S. 359.

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It is negligence for a railway workman to undertake to ride down a steep gradient on a push car which has no brakes. *Heller v. Union P. R. Co.* (1880) 2 McCrary, 87, 4 Fed. 763; *York v. Kansas City, C. & S. R. Co.* (1893) 117 Mo. 405, 22 S. W. 1081.

A section foreman cannot recover for a personal injury received by being struck by an extra train while he was inspecting the track upon a railroad tri-cycle, a conveyance other than that provided by the railroad company for the inspection. *Jolly v. Detroit, L. & N. R. Co.* (1892) 93 Mich. 370, 53 N. W. 526.

An employer is not liable for injury to an employee caused by the latter's contributory negligence and his use of an elevator for a purpose unauthorized by the employer, although he failed to provide the safeguards for the elevator shaft required by statute. *Günther v. Lockhart* (1891) 40 N. Y. S. R. 942, 16 N. Y. Supp. 717.

An employee who is injured while climbing upon a spout which under his weight, gives way and precipitates his arm into a set of cog-wheels, cannot recover for the injury, where the spouting did not give way because of any defect in its construction, but only because of its being used by plaintiff for a purpose and in a manner for which it was not designed,—especially where the same spouting had previously given way under his weight. *Schmidt v. Leistikow* (1889) 6 Dak. 386, 43 N. W. 820.

Where the rope by means of which the water is released from a tank is too

If it cannot be said to be a necessary inference from the facts that the unauthorized application was dangerous and that the servant understood or ought to have understood that it was dangerous, the right to maintain the action must be determined by the jury, a material element to be considered by them being the question whether it was customary for employees doing the same kind of work as the servant to use the instrumentality in the manner in which he was using it when the injury was received.² See § 343, *infra*.

343. Negligence in respect to the creation of the material condition which caused the injury.—Numerous decisions illustrate the principle that, where the material condition which caused the injury was produced prior to the time of the accident, by the culpable acts or omissions of the servant himself, he cannot be permitted to maintain an action for damages. Recovery has been denied on this ground where the evidence disclosed the existence of the various conditions mentioned below:

(1) The servant had left some part of the plant in such a position that it became a potential source of danger, if certain not unlikely events should occur.¹

When a servant, in order to reach a machine, is obliged to go to a place where it is dangerous for him to go, it is negligence for a brakeman to attempt to walk along the spout for the purpose of getting hold of it. *Humphreys v. Newport News & M. Valley Co.* (1889) 33 W. Va. 135, 10 S. E. 39.

A servant who, while coming from the hold of defendant's vessel, was injured by a fall resulting from his taking hold of an unfinished sheep trough placed by defendant's workmen near the hatch, and trusting his weight on it, cannot recover, as the trough was not placed there for such use as the servant made of it, and he knew that the work upon it had not reached that stage at which he would be justified in assuming that it was fastened. *Gibbons v. British & N. A. Steam Nav. Co.* (1900) 175 Mass. 212, 55 N. E. 987.

¹The fact that the primary purpose of a jaw strap is to strengthen a railway car will not render it negligence, as a matter of law, for a brakeman to use it as a support for his foot in mounting a moving car. *Cotter v. Boston & M. R. Co.* (1891) 153 Mass. 297, 10 L. R. A. 769, 26 N. E. 864. This decision seems to exemplify a more rational principle than the one cited in the last note, in which the accident was caused by the giving way of the brake staff.

The rule that an employer who fur-

nishes a proper machine is not liable for a servant injured while using it for an improper purpose does not apply in case of an injury to an incompetent employee who was using the machine in disobedience to the direction of a superior whom it was his duty to obey. *Abbott v. Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743.

²As, where the servant was injured by the fall of lumber or other heavy articles improperly piled by him and his fellow servants. *Langdon v. M. & N. R. Co.* (1892) 84 Me. 161, 24 Atl. 80; *Hoth v. Peters* (1882) 55 Wis. 405, 10 N. W. 219 (decided on demurrer); or by tools permitted to accumulate on the floor of a mill, where their presence was dangerous. *Dublin v. Phoenix Iron Co.* (1897) 182 Pa. 109, 37 Atl. 927. Or where a servant was injured by stepping in a manhole on a cable car which he had himself left open. *Bennett v. Front Street Cable R. Co.* (1888) 8 Wash. 363, 36 Pac. 272. Or where a car repairer was killed while repairing a car on a railroad track, by an engine on another track striking against it, and moved and left by him and his fellow servants too near such track, and derailing it against the car on which he was working. *Texas & P. R. Co. v. Gaston* (1893) 4 Tex. Civ. App. 25, 22 W. 47. Or where a railway employ-

(2) The servant had removed a certain safeguard designed to protect himself and his fellow workmen,² or had failed to take certain specific measures which it was his duty to take for the purpose of keeping the place of work safe.³

(3) Some appliance on which the servant's security depended had not been fastened, adjusted, or arranged in a proper manner.⁴

placed a tender, for the purpose of cleaning out the ashes, in such close proximity to another track in the yard as not to permit the passing of cars on such adjacent track, and was injured by cars on the other track striking the tender while he was cleaning out the ashes. *Tread & P. R. Co. v. Young* (1894), Tex. Civ. App. 27 S. W. 145. Or where a workman unnecessarily placed planks of a scaffolding in an elevator shaft through the loop of a rope suspended from the bottom of the car and attached to the side of the shaft, the result being that the scaffolding was overturned as the elevator ascended. *Humphrey v. Gerken* (1897) 19 App. Div. 68, 45 N. Y. Supp. 1100. Or where a workman left a beam lying on a pile of dirt with one end projecting, and was injured by its falling up when it was struck by a piece of a pile which he had helped to saw off. *Giesen v. Naguin* (1901) 115 Iowa, 7, 87 N. W. 445.

² *Schwandt v. William Wright Co.* (1901) 126 Mich. 609, 85 N. W. 1107 (servant climbed on a roof and removed a plank placed there to protect the building from the falling of heavy weights used in raising and lowering doors).

³ Where it is the duty of miners, under the rules of their employer, to prop up the roofs of their own excavations, the employer being, on his side, bound to furnish timber at the pit mouth for that purpose, it is their duty to refuse to work if no timber is furnished, and they are entitled to their days' wages in spite of such refusal if the timber has been asked for and not supplied. Hence, if one of them proceeds to work without props, although aware of the danger, he is not entitled to damages for injuries received through the fall of the roof, merely because the timber was not furnished. *McNeill v. Wallace* (1853) 15 Sc. Sess. Cas. 2d series, 818.

In an action for a death caused by neglect of a mine owner to furnish suitable props to support the roof of the mine, evidence is admissible to show that deceased endeavored to borrow props, but could get none, since it tends

to show that deceased exercised proper care for his own safety. *O'Fallon Coal Co. v. Laquet* (1900) 89 Ill. App. 13.

There can be no recovery for the death of an employee while laying up in the bottom of a sewer trench in process of construction by the employer, through the caving in of the walls of the trench, due to insufficient shoring and bracing, where such employee was himself in trusted with superintendence of the shoring and bracing, and paid higher wages because of it. *Conroy v. Clifton* (1893) 158 Mass. 318, 33 N. E. 525.

⁴ No action can be maintained where plaintiff, who was employed by defendant railroad company to transfer freight from one car to another, was injured by reason of the failure of himself and his fellow workmen to fasten a thin iron blade over which the freight was carried between the cars. *Hartin v. Louisville & N. R. Co.* (1901) 22 Ky. L. Rep. 798, 64 S. W. 417.

Where the duty of erecting a scaffold on a bridge was left entirely to the plaintiff and others, and it appeared that the company provided suitable timber therefor, and the injury was occasioned by the plaintiff's and his fellow workmen's negligence in not selecting proper scantling, or properly lashing or supporting the same, defendant was not liable. *Hogan v. Field* (1881) 44 Hun, 72.

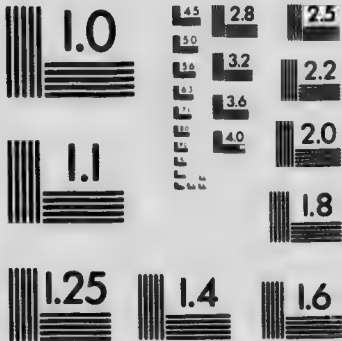
An employee on a towboat who, while looking after a certain line, steps upon a cover over a round hole in the deck, called a "hazarette," thus causing the cover to tip up and strike him between the legs as he fell astride it, cannot recover where it was part of his duty to take off and put on the cover, and he knew its condition better than anyone else did. *Watts v. Boston Ice & Fuel Co.* (1894) 161 Mass. 378, 37 N. E. 197.

A longshoreman who was directed after the loading of a steamship was completed, to close the hatchway, and who, after placing one of the hatches in position, stepped upon it to place another, when it gave way because not



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(4) The servant had omitted to make use of an appliance furnished by the master.⁵

caught upon the coaming it was intended to rest on, and who fell into the hold and was injured, cannot recover therefor where the work was simple, requiring neither skill nor judgment. *Preston v. Ocean S. S. Co.* (1898) 33 App. Div. 193, 53 N. Y. Supp. 444.

There can be no recovery for the death of an employee in a coal mine, whose duty it is to see that a spring switch connecting an "empty track" with the main track is in position in the morning for the passage of trains of cars on the main track leading to the shaft of the mine, and who fails to do so, although he knows that such switch is frequently left open by the men working in the mine at night, the consequence being that a train passes through the open switch and runs upon the empty track, onto which he steps from the main track upon the approach of the train. *Beckman v. Consolidation Coal Co.* (1894) 90 Iowa, 252, 57 N. W. 889.

A servant who fails to attend to the proper setting of the gauge furnished for the purpose of regulating the width of the pieces of wood to be sawed is guilty of negligence. *Eicheler v. Hanqqi* (1889) 40 Minn. 263, 41 N. W. 975; *Rorland v. Cannon* (1866) 35 Ga. 105.

An experienced seaman is bound to know that a barge nearly 300 feet in length is apt, while being moved in a narrow river, to strike some obstruction, thereby putting the wheel, if it is not secured, in rapid motion, and that the object of his being placed in the wheel-house under such circumstances, to await orders, implies that he is simply stationed there to act in an emergency which may require something to be done with the wheel. He is therefore guilty of contributory negligence if he unlashes the wheel without orders, and stands so near it that, if set in motion, it will strike him. *Hanson v. The J. B. Lyon* (1887) 33 Fed. 184.

An able seaman who is given a stout rope, block, and boatswain's chair for the purpose of painting a mast, is guilty of negligence in not so securing himself as to guard against a fall, although the toggle given him is not long enough and the rope is too stiff and unpliant to bind about the toggle. *Wm. Johnson & Co. v. Johansen* (1898) 30 C. C. A. 675, 58 U. S. App. 104, 86 Fed. 886.

A longshoreman employed in piling cotton bales on a dock cannot recover because the hook used in hoisting the bale allowed a bale to slip and fall upon him where, when properly adjusted, it were sufficient for the purpose. *Reid v. Ocean S. S. Co.* (1893) 3 Misc. 523 N. Y. Supp. 3.

The fact that a servant injured by the falling of a press frame had assisted in propping the frame does not preclude him from recovery on the ground that he had himself been guilty of contributory negligence in improperly propping it, where he had been called away before the work was finished and directed to perform other work. *Goss Printing Press Co. v. Lempke* (1900) 90 Ill. App. 427, Affirmed in (1901) 191 Ill. 199, N. E. 968.

The servant's negligence is a question for the jury where the act alleged to have been done for the purpose of securing a structure is susceptible of being construed in another sense. In a case where a servant was holding a guy rope while a derrick was being raised, a stake was driven at his request as a brace for his foot. When the derrick was about raised, he tied his guy rope to the stake and at the foreman's direction went to the top of the derrick, and while there on such foreman pulling on the rope holding the derrick, the stake to which the guy rope had been tied was pulled out of the ground by the strain upon it and let the derrick fall. It was held that, as the jury would be justified in believing that the plaintiff had merely tied the rope temporarily to the stake, and that the stake was not intended by him as a support for the derrick, a request in instruction that, because plaintiff had the stake driven and tied the guy rope to it, the foreman had the right to assume that plaintiff had properly secured it, was properly refused. *St. Louis W. R. Co. v. Smith* (1901; Tex. C. App.) 63 S. W. 1064.

The Locadia (1888) 35 Fed. 5 (rope substituted by servant broke). *Oeller v. Hayes* (1894) 8 Misc. 28 N. Y. Supp. 579 (ladder substituted for rope gave way). Compare § 26, ante, and 341, 342, *supra*.

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(5) The servant had adopted a dangerous method of executing the work in hand.⁶ See generally, as to this form of negligence, §§ 338, 339, *supra*.

Other decisions illustrating analogous situations are cited in the next section.

The cases in which the servant was held unable to recover, on the ground that he had failed to remedy the dangerous conditions, are collected in § 304, *ante*.

344. Negligence in respect to the exercise of functions of control.—(Compare preceding section.)—A superior servant cannot recover for injuries caused by his negligence in respect to the issue of orders, or in the matter of supervising the use, disposition, or movements of that part of the plant which is under his control.¹ This rule holds,

*A brakeman on a log train who has knowledge of the negligence of his employer in leaving a tree too close to the track is guilty of contributory negligence which will defeat an action for his death caused by running into the tree, where he negligently loads the logs on his train so as to strike the tree. *Powers v. Thayer Lumber Co.* (1892) 92 Mich. 533, 52 N. W. 937. A servant who is ordered merely to load a car with angle plates, and is injured by getting on the car and loading it so heavily on one side that it overturned, cannot recover. *St. Louis Bolt & Iron Co. v. Brennan* (1886) 20 Ill. App. 555.

Where a servant, who had been employed about six weeks in taking cinders and chips from a pit under a boiler and furnace, placed on edge one of the plates, weighing about 300 pounds, used to cover the pit, propping it up on the outside with a stick supported only by the smooth surface of the iron, and was injured by its fall, he cannot recover. *Brown v. Brown* (1888) 71 Tex. 355, 9 S. W. 261. There can be no recovery for injuries caused by the fall of a heavy piece of iron upon a laborer who had himself excavated the earth underneath it in the side of the pit where it was embedded. *McCarthy v. Whitney Iron Works Co.* (1896) 48 La. Ann. 978, 20 So. 171.

An employee cannot recover for injuries resulting from the emptying of pulp from a digester in which it has been cooked, without previously putting cold water into and through the digester in accordance with the previous custom, where such employee was responsible for the omission. *Berlick v. Ashland Sul-*

phite & Filler Co. (1896) 93 Wis. 137, 67 N. W. 712.

¹*Gorham v. Kansas City & S. R. Co.* (1893) 113 Mo. 408, 20 S. W. 1060 (conductor injured by running of train at dangerous speed); *Lane v. Central Iowa R. Co.* (1886) 6 Iowa, 443, 29 N. W. 419 (conductor killed by being crushed under a car derailed by coming into collision with a cow, while the train was being pushed in front of the engine, this arrangement, as well as the speed of the train, being entirely under his own control); *Chicago & N. W. R. Co. v. Snyder* (1886) 117 Ill. 376, 7 N. E. 604 (conductor killed by collision at intersection of two lines); *Devey v. Chicago & N. W. R. Co.* (1871) 31 Iowa, 373 (conductor directed engineer to run past horses on the track); *Galveston, H. & S. A. R. Co. v. Sweeney* (1896) 14 Tex. Civ. App. 216, 36 S. W. 800 (conductor failed to see if brakeman was at his post of duty).

No action can be maintained for the death of a conductor who, on taking charge of a train, was told that the steps at the rear end of the last car were broken, and who fell off the car through the broken steps, after he had given directions to keep the rear doors locked. *Cameron v. Great Northern R. Co.* (1899) 8 N. D. 618, 80 N. W. 885.

Negligence is inferable where an engineer allows a fireman who has not been declared competent for such a duty to take charge of the engine. *Louisville & N. R. Co. v. Scanlon* (1901) 22 Ky. L. Rep. 1400, 60 S. W. 643.

A section master on a railroad, who was thrown from a hand car and injured because a coemployee, who was

even where the particular employee whose compliance with the order of the superior servant caused the injury was unfit for his position and the master was, or should have been, aware of that fact.²

A similar principle prevents the maintenance of the action where it was the duty of the injured servant to direct other employees by means of signals, and the injury was due to the fact that those signals

turning the crank in a negligent manner, was caught by it and hurled against him, was held unable to recover. *Kennedy v. Central R. Co.* (1878) 61 Ga. 559. An employee in charge of a hand car, who, when a train is approaching, has sufficient time to get it off the track, and failing to do so is injured by a collision, cannot maintain an action. *Illinois C. R. Co. v. Modglin* (1877) 85 Ill. 481. A section foreman, who has three hand cars and the men upon them under his direct orders, cannot recover for an injury caused by a defective brake upon the second car, by reason of which it ran into the car in front after such employee had fallen off in front of it, causing the latter to run over him, as by the exercise of ordinary prudence he could have kept them at a safe distance apart. *St. Louis, A. & T. R. Co. v. Denny* (1893) 5 Tex. Civ. App. 359, 24 S. W. 317.

A station agent who directed the placing of two cars upon a side track having a slight downward grade, which were left exactly as he directed, was guilty of contributory negligence precluding recovery for his death from being struck by the forward car put in motion by the rear car, which was started by a sudden storm, where he knew that the front car was not "chocked" or "braked," and it was within the scope of his duty to know whether or not the rear car had also been left in such condition, although it does not appear whether or not he did know of that fact. *Brunswick & W. R. Co. v. Smith* (1896) 97 Ga. 777, 25 S. E. 759.

No recovery can be had under the Alabama employers' liability act (see chapter XXXVII., *post*) for a furnace company's failure to keep in repair a certain article belonging to its ways, works, machinery, and plant, on account of which its master mechanic is alleged to have been killed, where he was intrusted with the exclusive duty of seeing that such ways, works, machinery, and plant were in proper condition. *Birmingham*

Furnace & Mfg. Co. v. Gross (1862) Ala. 220, 12 So. 36.

In making an experiment to increase the pressure for the purpose of overcoming some difficulty in the supply of gas, the superintendent of gas works, who has full charge of the plant, at his peril upon the suggestions of persons who have no authority to direct him; and for injuries received from explosion during such experiment, the consequence of his own carelessness and lack of skill, his employer is not liable. *Taylor v. Baldwin* (1889) 78 Cal. 21 Pac. 124.

In *Evans v. Atlantic & P. R. Co.* (1876) 62 Mo. 49, it was held that an action was maintainable, where a station master, to whom was given the management of all the freight cars within his division, and on whom a special duty devolved of keeping the track clear of obstructions, was run over by a train, owing to the failure of the engineer to give a warning signal as the law required him to do. It is difficult to admit, however, that this was a proper case for the application of the doctrine in the text, unless the engineer were known to be careless or incompetent. The circumstances do not show the exercise by him of any personal supervision extending, at the time of the accident, to the particular operation to which the omission caused the injury was incident; and, in no respect, therefore, was he a participator in the culpable act.

The fact that a servant did not prevent his son from following him on a scaffold on which he was working, so that the scaffolding fell, does not constitute contributory negligence on the part of the servant as a matter of law, where no one testifies that the scaffolding was unsafe, although the boy had not been on the scaffold. *Cole v. Warren Mfg. Co.* (1899) 63 N. H. 626, 44 Atl. 647.

² *Roblin v. Kansas City, St. J. & C. R. Co.* (1894) 119 Mo. 476, 24 S. W. 1011.

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were improperly given,³ or were not given at such time and place as his duty required.⁴ But the employer is not absolved by the mere fact that the signal which brought about the occurrence which was the immediate cause of the injury was given by the injured servant. If the proper signal was given, the servant's obligations must evidently have been completely discharged, and there is nothing upon which to base an imputation of contributory negligence.⁵

The mere fact that a foreman renders manual assistance to his subordinates in performing a certain operation does not show that he was negligent.⁶

345. Failure of injured servant to influence the conduct of coemployees not under his control.—Where the injured servant had no right to control the conduct of the servant who inflicted the injury, it is plain that the former cannot be deemed culpable merely for the reason that he did not attempt to prevent the latter from doing the act which brought about the accident.¹ Nor is an injured servant deemed to have been culpable for the reason that he failed, by remon-

¹ A railroad company is not liable for the death of a brakeman killed while making a flying switch, by the engineer's running the train at an unnecessary, unusual, and dangerous rate of speed, where the engineer was under the control of the brakeman at the time of the accident, as to the rate of speed, and obeyed the signals given by such brakeman. *McDermott v. Atchison, T. & S. F. R. Co.* (1896) 56 Kan. 319, 43 Pac. 248. See also, to a similar effect, *Hudson v. Charleston, C. & C. R. Co.* (1893) 55 Fed. 248.

² *Le Bahn v. New York C. & H. R. R. Co.* (1894) 80 Hun. 116, 30 N. Y. Supp. 7; *Muldowney v. Illinois C. R. Co.* (1874) 39 Iowa, 615.

Where the testimony of defendant's engineer tends to show that the engine causing the injury was moved in response to a signal from a brakeman who was killed, it is competent in rebuttal to show by a witness that he was in a position to see intestate at the place where he was alleged to have been when the signal was given, and did not see him there, nor any signal given. *Louisville & N. R. Co. v. York* (1901) 128 Ala. 365, 30 So. 676.

³ See *Louisville & N. R. Co. v. Morgan* (1896) 114 Ala. 449, 22 So. 20; *Houston & T. C. R. Co. v. Kelley* (1896) 13 Tex. Civ. App. 1, 34 S. W. 809, 46 S. W. 863.

⁴ *Houser v. Chicago, R. I. & P. R. Co.*

(1882) 60 Iowa, 230, 46 Am. Rep. 65, 14 N. W. 778.

⁵ As, where the engineer of a switch engine, who was injured by collision with a train left standing at night on the main track, unguarded and without danger signals, allowed a switchman, whose duty it was to look out for signals, to ride in the engine caboose, instead of on the footboards, from which latter point he could have obtained a better view, the evidence being that the engineer had no authority to order him back to the footboards, and that the switchman could have a view of the track from his place in the caboose. *Atchison, T. & S. F. R. Co. v. Tunnell* (1897) 58 Kan. 815, Appx. 49 Pac. 661. Or where an employee on a hand car running at full speed into a place obscured with dense smoke failed to request or demand the foreman to stop the car, after learning that it was not his purpose to send a flagman in advance to learn if there were any trains on the track. *Woodward Iron Co. v. Andrews* (1897) 114 Ala. 243, 21 So. 440. Or where a road master traveling on a work train, in which cars were ahead of the engine, but not controlling the manner of its operation, was injured by a collision resulting from the fact that no flagman was posted on the leading car to warn the engineer of the danger. *Rinard v. Omaha, K. C. & E. R. Co.* (1901) 164 Mo. 270, 64 S. W. 124.

strance or otherwise, to procure a negligent fellow servant's compliance with a rule promulgated to protect employees of the class which they both belong.² Nor is it negligence in a servant to fail to draw the attention of a fellow servant to facts indicating impropriety of a certain course of conduct, when that fellow servant has actually observed, or, in view of the functions assigned to him, ought to have observed, those facts.³

Clearly, however, it is impossible to lay down any general rule to the effect that a servant is absolutely free from any obligation to supervise, and, if need be, influence, the conduct of his fellow servants. For instance, if one servant sees that the physical condition of another is such that, if left to himself, he will be incapable of performing a certain duty the execution of which for a limited period is of extreme importance in the interests of the employer and the public, but that the possible consequences of his unfit condition may be obviated by proper supervision, it may be justifiable for the former servant to continue working in company with the latter (see § 302) and if he does this, he is bound to exercise the necessary supervision and do what he reasonably can to prevent the incompetency of the fellow servant from producing injury to himself and others whose safety is involved.⁴

346. Departure from customary methods of work.—In one case it was laid down that the servant's noncompliance with a custom, in respect to the course of action followed at the time of the accident, was a circumstance proper to be considered by the jury, as tending to prove culpability on his part; but that it is not conclusive evidence

² *New Jersey & N. Y. R. Co. v. Young* (1892) 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 722; *Missouri, K. & T. R. Co. v. Fowler* (1900) 61 Kan. 320, 59 Pac. 648. In both these cases the contention was that a fireman should have endeavored to induce his engineer to comply with a rule prescribing that the speed of trains should be slackened when they are approaching switches.

³ *Missouri, K. & T. R. Co. v. Fowler* (1900) 61 Kan. 320, 59 Pac. 648 (fireman's first duty being to keep up steam, and when not thus employed to keep a lookout for signals, he is not bound to tell his engineer of the absence of a safety signal); *Lake Shore & M. S. R. Co. v. Wilson* (1894) 11 Ind. App. 488, 38 N. E. 343 (similar facts,—engineer had learned of danger signal, but determined to proceed).

⁴ A jury would be warranted in inferring negligence from testimony showing that a fireman who had, for several hours before the collision which caused his injury, known that his engineer was in such a somnolent condition as to have fallen asleep several times, had remained on the engine without taking active steps to keep the engineer awake or reporting the matter to the conductor, or notifying the train dispatcher. *Carroll v. East Tennessee, V. & G. Co.* (1889) 82 Ga. 452, 6 L. R. A. 210, 10 S. E. 163, holding that it was error to give the jury to understand that the fireman was not subject to the obligations thus indicated, in the absence of specific rules imposing them, and that he would be entitled to recover, if, at the time immediately before the moment when the collision occurred, he was free from negligence in regard to observing the engineer's condition and keeping him awake.

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such culpability.¹ This would certainly seem to be the correct principle, as the contrary doctrine would have the effect of assimilating a mere custom to a rule or a specific order. See subtitle D, *infra*. But there is one decision which, to say the least, leans very strongly in the opposite direction.²

C. QUALIFYING CIRCUMSTANCES TENDING TO NEGATIVE THE INFERENCE OF CULPABILITY.

347. Qualifying circumstances enumerated.—In the following subtitle it is proposed to discuss several evidential factors which, in many cases of the type reviewed in the preceding subtitle, will render it necessary to take the opinion of the jury with respect to the quality of acts or omissions which, if those factors were not involved, would be deemed conclusive proof of negligence. This result may be produced by testimony which tends to establish one of the following situations:

(a) That the servant was not of full age.

(b) That the servant did not control the production of the material conditions or the methods of work from which his injury resulted.

(c) That the servant had, at the moment when the accident occurred, temporarily forgotten the existence of the danger which caused that accident.

(d) That the servant, in doing what he did at the time of the accident, was complying with a formal rule of the employer.

(e) That the servant, in doing what he did at the time of the accident, conformed to customary methods of work.

(f) That the servant acted on the presumption that the master's plant was in good condition.

(g) That the servant acted on the presumption that the various operations incident to the use of the plant would be carefully performed.

¹ The mere fact that it was customary for train hands to lie down on the top of a car while it was passing through a tunnel, and that a servant who was injured by striking the top was sitting on the cupola of a caboose, does not necessarily show that he was negligent in taking that position. *Mexican Central R. Co. v. Eckman* (1900) 42 C. C. A. 244, 102 Fed. 274.

² *Georgia C. & N. R. Co. v. Hallman* (1895) 97 Ga. 317, 23 S. E. 73. There it was held that contributory negligence was a bar to the action of a conductor of a work train, who was injured by the derailment of a "shanty car" on which he had mounted to give signals. The specific grounds of the decision are not very clear from the report, but it would seem that the court relied mainly on the fact that the assumption of such a position was shown by the evidence to be both contrary to the usual custom, and unnecessary.

(h) That the course of action pursued by the servant was reasonable sense of the word, necessary.

(i) That the servant was acting in an emergency.

(j) That the servant was acting under the influence of fear.

(k) That the servant was acting under the influence of pain.

(l) That the servant was trying to save the life of another.

(m) That the servant was trying to preserve the master's property.

(n) That the servant acted under or in compliance with orders or instructions of the master or the master's representative.
See chapter xxiii., *post*.

(o) That he had been assured by the master or the master's representative that the act which caused his injury might safely be done.
See chapter xxiv., *post*.

The cases relating to each of these predicaments will be reviewed in the ensuing sections.

The above list might be supplemented by adverting to the question presented by evidence which indicates that the servant had notice, actual or constructive, of the danger to which the injury was due. But the true logical significance of such evidence is not that an essential element of negligence was absent, than that other opinions might reasonably have been entertained as to the question of the conduct in question. For this reason the effect of the servant's ignorance of the risk is more appropriately discussed in connection with the subjects treated in subtitle A, *supra*. See §§ 33 and 34, *supra*.

348. Minority of injured servant.—(This section stands in connection with §§ 244-251, 291, *supra*, and §§ 357-360, *supra*.) A detailed discussion of the extent to which minor negligence with contributory negligence would be out of place in this treatise. It will be sufficient, by way of introduction to the treatment of the effect of the various decisions, to refer succinctly to a few of the fundamental principles which determine whether a defense is available.

In the investigation of this question three distinct subsidiary questions present themselves for settlement:

(1) Had that person reached such an age that negligence could be imputed to him at all?

(2) Supposing him to have reached that age, did he understand the danger from which his injury resulted?

(3) Supposing him to have understood the danger, had he

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It is clear that there must be some age below which the capacity for negligence should be deemed entirely absent.¹

But as it has never been proposed to ascribe absolute incapacity to children above seven years of age,² and children under that age need not be taken into account as industrial factors or parties to contracts of employment, it follows that the first of the above questions may be considered to be of no practical importance in connection with the law of employers' liability.

With regard to the second and third questions the essential and controlling conception by which a minor's right of action is determined with reference to the existence or absence of contributory fault is that his capacity is the measure of his responsibility. If he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will *not* be imputed to him if he unwittingly exposes himself to that danger.³ For the exercise of such measure of capacity and discretion as he possesses, he is responsible.⁴ In a recent decision of one of the Federal courts of appeal it was laid down that, after passing the age of fourteen years, a child is

¹ See Shearm. & Redf. Neg. § 73a. In *McIntosh v. Missouri P. R. Co.* (1894) 58 Mo. App. 281, the court recognized three distinct periods during minority, saying: "There is no specific age at which the courts will or will not declare a party to be possessed of sufficient experience or discretion to look after his own safety. The circumstances have much to do in settling that question. The child is often of such tender years that the courts will say, as matter of law, that ordinary care cannot be expected of it, and that it should not be charged with contributory negligence. Then there comes an age, attended or not with experience or inexperience, when capacity is a question of doubt, and in such cases the courts submit the question to the jury or triers of the fact. Passing this, the party injured may be of such age and experience that there is no longer doubt as to the possession of sufficient capacity, and then the courts will treat the matter as beyond dispute, and hold the party to the exercise of ordinary care."

² See Shearm. & Redf. Neg. § 73a.

³ *Strachbridge v. Bradford* (1889) 128 Pa. 200, 18 Atl. 346, stating effect of *Philadelphia City Pass. R. Co. v. Harsard* (1874) 75 Pa. 367; *Crissey v. Hestonville, M. & F. Pass. R. Co.* (1874) 75 Pa. 86.

⁴ *Glover v. Gray* (1881) 9 Ill. App. 332, where it was held improper for the trial court to assume that a boy of twelve was wholly incapable of appreciating danger or of exercising any degree of care whatever, and to instruct the jury that the boy's "knowledge of the danger was not to be taken into account in considering his right to recover." A minor is bound to exercise, as much as if he were an adult, that degree of intelligence, knowledge, and judgment which he actually possesses. *Luthe v. Berlin Mach. Works* (1894) 88 Wis. 442, 60 N. W. 711. The care required of a minor who has attained years of discretion "is not, indeed, that required from persons of full age, but is to be ascertained with reasonable regard to the ordinary conditions attendant upon his years." *Beckham v. Hillier* (1885) 47 N. J. L. 12.

presumed to be capable of avoiding danger by the exercise of care.⁵ And this is probably the rule in all jurisdictions.⁶ Applying to some courts the presumption with regard to servants less than fourteen years is that they have neither sufficient capacity and understanding to be sensible of danger, nor the power to avoid it;⁷ or, as the doctrine has also been stated, a child between the ages of seven and fourteen is *prima facie* incapable of exercising prudence and discretion, and therefore *prima facie* incapable of contributing to negligence.⁸ What may be the precise effect of this presumption, considered as a rule of procedure, is not very clear. Apparent presumption is not overcome by evidence showing merely that the child is unusually intelligent for his age.⁹ For practical purposes, perhaps it may be said to imply nothing more than that the cases are very rare indeed in which a court will deem itself justified in declaring the servant negligent, as a matter of law.¹⁰ If this be really its effect, it would seem to put the servant virtually in the same position as the doctrine of the majority of the courts which is stated below.

In Scotland a somewhat similar conclusion is arrived at, but by a different route. The reasons assigned for that conclusion seem to be scarcely in harmony with the theory of contributory negligence, which is accepted in the English and American courts.¹¹ See §§ 33, *et seq.*, *supra*.

⁵ *E. S. Higgins Carpet Co. v. O'Keefe* (1897) 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900.

⁶ See *Shearn & Relf, Neg.* § 73a. It is not error to give an instruction to the effect that the jury, having seen the plaintiff, a minor of about eighteen, on the witness stand, might consider his appearance in determining the question of his intelligence and capacity to apprehend and avoid the dangers incident to his employment. *Disotell v. Henry Luther Co.* (1895) 90 Wis. 635, 64 N. W. 425.

⁷ *Nagle v. Allegheny Valley R. Co.* (1878) 88 Pa. 35, 32 Am. Rep. 413 (omission to look out for train, when about to cross track).

⁸ *Tutwiler Coal, Coke & Iron Co. v. Enlen* (1901) 129 Ala. 336, 30 So. 600.

⁹ In the Alabama case cited in note 7, *supra*, it was held that, in an action to recover damages for the alleged negligent killing of a boy fourteen years old, the mere fact that the said boy was shown to be "bright, smart, and industrious," without more, is insufficient to overcome the presumption of the want of judgment and discretion which his age *prima facie* implies.

In the Pennsylvania case cited in note 3, *supra*, it was left to the jury to determine whether the servant had sufficient understanding to comprehend and guard against the danger, the evidence being that, while in an elevated position, he allowed his foot to project over the platform and it came into collision with a projecting sill.

¹⁰ An injury received by a girl of less than fourteen years of age in manulating a carding machine is considered to be the consequence of the fault of the master in employing so young a girl in work so dangerous. Hence, although she may have been injured in doing something which, if she had been of full age, would have imported contributory negligence, she may maintain an action; therefore, the legal situation being that the culpability so imputed to the master "displaces any contention that she was so negligent" as to disentitle her to compensation. *Sharp v. Pathol*

In the majority of the courts the effect of the evidence is not considered with reference to any presumption entertained with respect to children under and over fourteen years. In all jurisdictions the power of controlling or setting aside verdicts is exercised more uniformly and more rarely in the case of very young children than in the case of those who are approaching full age. But in all cases in other circumstances in which the rights of the parties are dependent upon the view taken as to the respective provinces of courts and juries, there is a good deal of inconsistency in the treatment of essentially identical facts.

For the purpose of enabling the reader to compare the decisions regarding minors with those regarding adults, they are grouped with respect to the following predicaments, which correspond with those adopted as the basis of classification in the preceding sections. This remark is applicable more especially to cases involving injuries from moving machinery.

(1) Failure to use appropriate precautions.¹² See §§ 331, 336, *supra*.

(2) Failure to give proper attention to the surroundings.¹³ See § 332, *supra*.

Spinning Co. (1885) 12 Sc. Sess. Cas. 4th series, 574.

Where a young girl of seventeen years swears that she did not know of the danger that soda water bottles might burst at a certain stage in the process of filling, a jury is warranted in finding that she was not negligent in omitting to put on a mask provided by the employer. *Crocker v. Banks* (1888) 4 Times L. R. 324.

A boy sixteen years of age working as trackman is not guilty of contributory negligence in going on a hand car in company with his foreman, who had neglected his duty to ascertain whether it would be safe, into a deep cut around a curve where they meet an extra train. *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 675, 22 S. E. 83.

Where a servant aged seventeen years, who had been employed in defendant's mill for two years, and in the dye room for four weeks, before falling into a vat and getting badly scalded, testifies that he slipped on the wet floor while leaning over the vat, and that the floor was usually wet, there is a presumption of negligence on his part. *Bessey v. Newichonick Co.* (1900) 94 Me. 61, 46 Atl. 806.

A minor cannot recover for an injury

alleged to have been sustained by a defective machine at which he was at work, where, by the use of such care as his age and experience fitted him to exercise, he could have avoided the injury. *Roberts v. Porter Mfg. Co.* (1900) 110 Ga. 474, 35 S. E. 674.

A minor injured by a drill lowered by a shaft which he was ascending by means of ladders is guilty of contributory negligence in ascending without signaling in some manner to those on the surface. *Snyder v. Viola Min. & Smelting Co.* (1891) 2 Idaho, 771, 26 Pac. 127.

The mere fact that an inexperienced minor might, by using his eyesight, have observed the peril to which his injury was due, will not enable his employer to defeat his claim for damages on the ground that he was guilty of contributory negligence. *Hill v. Gust* (1876) 55 Ind. 45; *Hampes v. Erk* (1893) 6 Ind. App. 332, 33 N. E. 637.

In an action for damages for the death of a minor employee, evidence that, when shoving a car from a side to a main track, he was looking towards the engine, when he should have been looking ahead at the car before him, and that if he had been at the place where he should have been he would not have

(3) Taking or remaining in an unnecessarily dangerous place.
See §§ 334, 335, *supra*.

been hurt, demands a verdict for the defendant. *Littlejohn v. Central R. Co.* (1884) 74 Ga. 396.

It is for the jury to say whether an employee seventeen years of age is free from contributory negligence, where he permits his sleeve to come into contact with a set screw on a revolving shaft, of the danger of which he has full knowledge. *Keller v. Gaskill* (1893) 9 Ind. App. 670, 36 N. E. 303.

An intelligent boy familiar with the operation of a machine of which he had charge in a pulp mill, who, with nothing to distract his attention, in attempting to straighten a wrinkle in a piece of felt running between rollers, grasped the felt so closely to them that his fingers were cut and crushed, cannot recover. *Boglow v. Dunham* (1890) 102 Wis. 470, 78 N. W. 599.

Negligence is inferable where a boy of ordinary intelligence, over fourteen years of age, who for two months has been regularly assisting, three times a day, in tubing each of 28 "mules," allows his fingers to be caught in gearing which is in full view. *Silver v. Sagamore Mfg. Co.* (1901) 177 Mass. 476, 59 N. E. 73.

That a boy attending a machine having unguarded cogwheels allowed his hand to slip into such wheels because of his own inadvertence or inattention in watching another boy who was near by gives him no right of recovery against the employer. *E. S. Higgins Carpet Co. v. O'Keefe* (1897) 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900.

A boy of seventeen who is injured by dangerous machinery, near which he has been set to work by his master, and the dangerous character of which was as apparent to him as to the master, cannot recover therefor merely because he is a minor, where the injury was caused by reason of his own negligence and inattention to what he was doing; there being no necessity for him to expose himself to the danger in the prosecution of his work. *Morwood Co. v. Smith* (1900) 25 Ind. App. 264, 57 N. E. 199.

A boy of twelve is deemed to be guilty of negligence if, while not engaged in any duty, he falls down the open shaft of a freight elevator in a well-lighted room. *McDaniel v. Lynchburg Cotton Mills Co.* (1901) 99 Va. 146, 37 S. E. 781.

An instruction that if the jury found

that plaintiff, a boy of thirteen years of age, was carelessly playing on a cotton winding machine when injured (there being evidence to establish this fact), the plaintiff is guilty of contributory negligence and cannot recover.—Is not objectionable. *Reed v. Indian Orchard Mfg. Co.* (1896) 142 Mass. 522, 8 N. E. 401.

An employer is not liable for an injury to a boy of twelve and a half falling into the uncovered end of a machine in a scuffle between him and another boy, where the injury was not the result of the negligence of either. *Boon v. Holt & Nut Works* (1896) 129, 69 N. W. 254.

Contributory negligence of a twelve years old employee by a company cannot be based, as a matter of law, upon the fact that, in the absence of his duties, which were his crossing a switch upon which he was standing forming no part of the train, he crawled under the engine and was injured by a train backed up behind him, it appearing that he had been employed about the railroad yard where the accident happened, for the purpose of watching the signals, and that he had been cautioned to watch for signals and not to pass between cars when he might be in danger; it further appearing that the shifting of the train on the track, although a matter of course, was not one of necessity; and it appearing that no signal was given at the time the train was shifted on the track. *Omaha & R. Valley R. Co. v. Morgan* (1894) 40 Neb. 604, 58 N. E. 81.

An inexperienced boy of fifteen is not, as matter of law, contributorily negligent in placing his hand while engaged in his work so near the teeth of a saw as to be struck by them, where they are rapidly as to be invisible. *Bogard v. Field* (1896) 65 Minn. 355, 68 N. W. 101.

The negligence of a boy of twelve years, whose hand was caught in the cylinder of a stove planer as he was moving the staves which had been through it, is for the jury. *Gray* (1881) 9 Ill. App. 329.

Any boy of twelve who has eyesight and knows that his hand will be caught between the cogs, but thrusts it in, is contributorily negligent.

(4) Doing work in an unnecessarily dangerous manner.¹⁵ See § 339, *supra*.

Edge of the probable result of the insertion of the hand, and appreciation of the risk or possibility that the hand might be accidentally drawn between the wheels, are two entirely different things. Whether there is such appreciation in the case of a servant, of that tender age is a question for the jury. *Chapin v. Badger Paper Co.* (1892) 83 Wis. 192, 33 N. W. 452.

A boy of sixteen set at work at a dangerous machine without instruction or warning of the danger is not, as a matter of law, guilty of contributory negligence in placing his hand so near the revolving knives that it is drawn into them, while engaged in his duty. *Stewart v. Patrick* (1892) 5 Ind. App. 50, 30 N. E. 814.

A boy fourteen years of age and of ordinary understanding, who has for three weeks been familiar with the operation of machinery with revolving wheels, must be taken to know that his hand will be injured if allowed to come between the wheels. *Patnode v. Warren Cotton Mills* (1892) 157 Mass. 283, 32 N. E. 161.

A bright, active, and intelligent employee of nineteen, who has worked in a paper mill for nearly two years, and for three weeks about certain machinery which he oiled daily, is guilty of contributory negligence in attempting to pass over a revolving shaft 14 inches from the floor near a gearing and friction clutch on which are an oil cup and set screw, where he could pass safely by another way by waiting a moment. *Wabash Paper Co. v. Webb* (1896) 146 Ind. 303, 45 N. E. 474.

A child of fifteen years is bound to know that if she puts her fingers between two heavy rollers in a mangle, they will be crushed. *Phillips v. Michaels* (1895) 11 Ind. App. 672, 39 N. E. 669.

An intelligent girl fourteen and two-thirds years old, who knows how fast a box making uniform trips and stoppages moves, and how far it comes, and has worked at the same for six weeks, is negligent if she faces it on her knees and allows it to strike her on the head. *Gardner v. Cohannet Mills* (1896) 165 Mass. 507, 43 N. E. 294.

An employee eighteen years of age, of ordinary intelligence, well acquainted with the danger, who is injured while removing a roller from a printing press,

the manner of operating which he is acquainted with, by stepping inside it without fastening a belt shifter by which the press was set in motion, or throwing the belt off the pulley, or calling assistance, in either of which cases the work could have been done in safety, is guilty of contributory negligence, as a matter of law. *Loren v. Raplow* (1893) 6 Ind. App. 677, 34 N. E. 124.

An employee sixteen years old is, as a matter of law, guilty of contributory negligence precluding recovery for injuries from coming in contact with machinery in attempting to pass between the machinery and a post not more than 16 inches therefrom, upon receiving a direction from the engineer to go around to the other side of the machine, where the attempt was obviously dangerous and he could easily have passed around outside the post. *Eckendahl v. Hayes* (1896) 10 App. Div. 487, 42 N. Y. Supp. 226.

Where a fireman fifteen years old goes underneath his engine to clear the ash pan, at a time and place of unusual hazard, from the fact of cars and engines being constantly in motion on the track, there being no special necessity compelling the job to be done there, he cannot recover for injuries caused by another engine backing against his own. *Union R. & Transp. Co. v. Leahy* (1881) 9 P. pp. 353.

A danger from riding upon an elevator platform so filled with goods that a space of but 2 or 3 inches is left at the edge is so manifest that a minor of fourteen is chargeable with contributory negligence which will prevent his recovery for injuries resulting from his heel catching under a beam at the side of the elevator well. *Hochmann v. Moss Engraving Co.* (1893) 4 Misc. 160, 23 N. Y. Supp. 787.

A boy of thirteen was not necessarily negligent because he went to a place where he was not called by his duties. *Tutwiler Coal Coke, & Iron Co. v. Enslin* (1901) 129 Ala. 336, 30 So. 600. See however *Erans v. American Iron & Tube Co.* (1890) 42 Fed. 519, where the court seems to have assumed, in a charge to the jury, that a boy who goes to an unauthorized place in a mill, and, as a consequence, is injured by dangerous machinery, is negligent.

¹⁵The contributory negligence of a minor of seventeen is for the jury, where

(5) Use of improper appliances.¹⁶ See § 341, *supra*.

Disobedience to specific orders or to rules is no less fatal to the right of action where the servant is a minor than where he is an adult. See §§ 363, 365, *infra*.

For other cases bearing upon the contributory negligence of minors, see chapters XXIII.-XXV., *post*.

the evidence is that he was unskilled in the use of machinery; that he had been assigned, just before the accident, to the duty of putting corn in the hopper of a grinding machine, from which the stuff was discharged by a spout 5 inches in length; that it was impossible to see how far the machinery was from the mouth of the spout; that when the spout became choked the plaintiff thrust his fingers into it to clear it, and had them crushed by the machinery; and that the proper way to clear the spout was to strike it with some heavy object, but that the plaintiff had not been instructed as to this method. *Standard Oil Co. v. Eiler* (1901) 22 Ky. L. Rep. 1641, 61 S. W. 8.

A minor of thirteen is not guilty of contributory negligence in changing the gauge of a saw in the way in which he had been taught to do it, when that was the only method which his size and strength permitted him to use, although there may have been other and better methods of effecting such a change. *Sprague v. Atlee* (1890) 81 Iowa, 1, 46 N. W. 756.

Contributory negligence is not attributable to a minor of eighteen injured while attempting to fasten a bolt in a moving machine by winding a string about it, although the danger attending the screwing on of a nut would have been much less, where the foreman repaired a similar defect in the former way, and instructed the employee to do likewise. *Greenville Oil & Cotton Co. v. Harkey* (1899) 20 Tex. Civ. App. 225, 48 S. W. 1005.

An employee of eighteen who retains his hold of a set screw which he is adjusting, after the shaft to which it is attached has begun to revolve is negligent. *Carriere v. McWilliams* (1901) 104 La. 678, 29 So. 333.

A boy is not, as matter of law, guilty of contributory negligence in cleaning out the boot of a sand elevator with his hand, precluding recovery for an injury to his arm resulting from the sudden starting of the elevator by another, although the work might have been done

with a scoop, where there was no duty to be apprehended by doing the work in the former manner except in case of starting of the elevator. *Hess v. Mount Mfg. Co.* (1896) 66 Minn. 77, 85 N. W. 774.

The contributory negligence of a minor of twelve years of age is a question for the jury, where the evidence is that he was required to operate an elevator worked by a rope which he had to run through an aperture in the frame, in closing the cage; that, although he had been cautioned not to put his head through this aperture when the cage was moving, he had not been told about dangers which were incident to the machine when it was stationary; and the injury resulted from the sudden starting of the cage just after he put his head through the aperture to see what had caused the cage to stop suddenly between the floors. *O'Brien v. Sanford* (1892) 22 Ont. Rep. 137.

A minor of seventeen who was injured in attempting to remove a piece of wood from a machine in a tannery which was in operation, when he could have stopped the machine and removed the wood without danger, cannot recover if he knew, through instruction, the danger of operating the machine. *Betz v. Lutz* (1900) 195 Pa. 346, 45 Atl. 101.

A boy over seventeen years old, employed to feed circular saws, is negligent in attempting to clean the machinery without stopping the same, when he has had two years' experience, and knows that he is entitled to stop the machinery for the purpose of cleaning it. *Larson v. Knapp, S. & Co. Comp.* (1898) 98 Wis. 178, 73 N. W. 992.

An intelligent boy of fourteen, who dismounted towards the rear of a roller which was backing, when it opened to him to use the steps at the rear, was held negligent in *Barksdale v. Lenz* (1900) 58 S. C. 413, 36 S. E. 102.

¹⁶ In *Thompson v. Wright* (1892) 22 Ont. Rep. 127, the question whether a boy was negligent in using impure materials for cleaning machinery in a tannery was held to be for the jury.

349. Conditions or methods of work not under the control of the injured servant.—It is manifest that, where the injured servant was responsible neither for the creation of the conditions which caused the accident, nor for the selection of the methods of work, he cannot be debarred from recovery merely for the reason that those conditions or those methods were not such as a prudent man would have created or selected.¹ But in some, at least, of the cases cited in the note as exemplifying this principle, it seems to be at least an open question whether the servant, having full control of his actions, should not have been deemed culpable simply on the ground that he went into, or failed to retire from, the position in which he was when the accident occurred.

350. Temporary forgetfulness of danger:—contributory negligence negated on account of.—(Compare §§ 358-361, *infra*, and § 403, note 4, § 440, note 14, *post*.)—In § 281, *ante*, it has been shown that, according to what the writer believes to be the correct and logical theory, the mere fact that the servant, owing to his being absorbed in his duties, failed to remember, at the time of the accident, the existence of the abnormal risk which caused his injury, will not preclude the master from relying upon the plea that that risk had previously come to the servant's knowledge, and had therefore been assumed by him. A materially different situation is presented where that fact is considered in regard to its bearing upon the question of how far the servant's close attention to his duties tends to rebut the inference of contributory negligence. In this point of view the effect of the decisions may be summed up as follows: Where the servant failed to

¹A road master who has no control over the manner in which a work train is being operated cannot be held guilty of negligence for the mere reason that he rides in the caboose of such a train, which is run with the engine behind the cars and without any flagman on the leading car. *Rinard v. Omaha, K. C. & E. R. Co.* (1901) 164 Mo. 270, 64 S. W. 124. The fact that a section hand returns on a hand car from the place of work at a later hour than usual does not import contributory negligence where he was entirely under the control of his foreman as to the hours of labor and the movements of the car. *McKune v. California Southern R. Co.* (1885) 66 Cal. 302, 5 Pac. 482.

The speed of a switch engine not being under the control of a brakeman, he cannot be charged with negligence for the reason that it was run too fast. *Lockhart v. Little Rock & M. R. Co.* (1889) 40 Fed. 631.

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A servant operating a steam shovel, who is injured by an earth-slide, is not responsible for the dangerous condition of the bank excavated, where he had nothing to do with the work and was directed by another. *Altam Paring, Bldg. & Fire Brick Co. v. Hudson* (1897) 74 Ill. App. 612. Affirmed in (1898) 176 Ill. 270, 52 N. E. 256.

An instruction that if an employee injured by the explosion of a boiler knew of the danger, it was contributory negligence for him to remain in the vicinity without making efforts to draw the fire or reduce the pressure, should not be given, where, in connection with his assertion that he knew the danger, it was manifest that he was unable to draw the fire or reduce the pressure against the will of the person in charge, whom he was bound to obey. *Lehigh Valley Coal Co. v. Kissel* (1897) 25 C. C. A. 566, 51 U. S. App. 265, 80 Fed. 470.

take such precautions as were appropriate for the purpose of protecting himself at the moment when the accident occurred, evidence of such failure was due to the fact that his attention was engrossed by his duties is always competent for the purpose of rebutting the inference of contributory negligence which might otherwise be drawn from his conduct; and if such evidence is offered, a court is very seldom justified in declaring him to have been, as a matter of law, wanting in proper care.¹

¹ The following decisions exemplify the application of this doctrine to various states of fact:

(a) *Injuries on railways*.—Whether a blacksmith who had worked in the forging shop of a railway for seven years, and at the time of the accident was complying with a direction to assist in pushing a car along on a track near a building which it gradually approached, ought to have seen and understood the risk of being caught between the car and the building, was held to be a question for the jury, on the ground that he was giving his close attention to the work. *Ferren v. Old Colony R. Co.* (1887) 143 Mass. 197, 9 N. E. 608. It is not conclusive evidence of contributory negligence that an employee of a railroad, who was injured while coupling cars, did not observe the projecting timber on one of the cars, which caused his injury, while he was in the discharge of another duty and where his attention was directed to that duty until the very moment when it was necessary for him to go between the cars. *Northern P. R. Co. v. Everett* (1894) 152 U. S. 107, 38 L. ed. 373, 14 Sup. Ct. Rep. 474. Whether a railroad employee directed to make a coupling of cars was negligent in failing to observe, while his attention was engrossed in his duties, that stones on one of the cars to be coupled were unsecured, is a question for the jury. *Austin v. Fitchburg R. Co.* (1899) 172 Mass. 484, 52 N. E. 527. A railroad brakeman engaged in coupling cars and necessarily devoting his attention to that portion of the train to which the engine is attached and which is approaching him is not guilty of negligence in not examining the car behind him, to see whether it was properly loaded, so as to preclude recovery by him for injuries received from improper loading. *Louisville & N. R. Co. v. Robinson* (1891) 13 Ky. L. Rep. 153, 16 S. W. 707, 708. On the ground that the work required his exclusive attention, it has been held that the

failure of a brakeman to remember the drawheads on two cars which he about to couple were so constructed they would overlap was not negligence as a matter of law. *St. Louis, I. M. & O. R. Co. v. Higgins* (1890) 53 Ark. 14 S. W. 653. A brakeman is not a matter of law, guilty of negligence in failing to discover that the drawheads on two cars which he is required to couple are of different heights.—Especially when, preparatory to making the coupling, he has to open and close switches, procure a link and pin, and then overtake the moving portion of the train and adjust them in it. *Ohio & W. R. Co. v. Wangelin* (1892) 43 Ill. 324.

In an action for injuries received by a brakeman owing to the fact that one of the steps on the ladder at the end of a freight car was missing, which caused him to fall upon the track, it is not to submit to the jury the question whether, in forgetting, or not recalling, at the precise moment when he undertook to descend the ladder, that the missing step was the one which he had observed to be defective, he was in the exercise of due care, where the evidence is that the accident took place at night; that the weather was extremely cold; that snow was falling heavily; and that he had just left the caboose where he had gone to warm himself while the train was at a station, and was hastening back to his post after the train had begun to move. *Kane v. Northern P. R. Co.* (1888) 128 U. S. 91, 32 L. ed. 9 Sup. Ct. Rep. 16. The court said: "In the case before us, the jury may not unreasonably, have inferred from the evidence that, while the plaintiff was passing along the tops of the cars, for the purpose of reaching his post, he was so blinded or confused by the darkness, snow, and rain, or so affected by the severe cold, that he failed to observe the time to protect himself, that the train from which he attempted to let him-

This doctrine may be referred to the general principle that the failure of an employee to perform a duty will not constitute contributory

down was the identical one which, during the previous part of the night, he had discovered to be without its full complement of steps. While a proper regard for his own personal safety, and his duty to his employer, required that he should bear in mind, while passing over the cars to his station, that one of them was defective in its appointments, it was also his duty to reach his post at the earliest practicable moment, for not only might the safety of the moving train have depended upon the brakemen being at their posts, but the engineer was entitled to know, as the train moved off, by signals from the brakemen, if necessary, that none of the cars constituting the train had become detached. . . . And if his going back from the caboose was characterized by such haste as interfered with a critical examination of the cars as he passed over them, that may, in some measure at least, have been due to the fact that the first notice he had of the necessity of immediately returning to his post, was that the train was moving off."

In one case a doubt was expressed whether it would be reasonable to expect that train hands should retain constantly in their minds an accurate recollection of the precise relation to trains of the various objects which might be placed alongside of and near to the track. *Dorsey v. Phillips & C. Constr. Co.* (1877) 42 Wis. 583. In another (where the action was against a stranger), it was laid down that, as railway servants are not bound to keep in mind the precise position of every structure that may be dangerous to them when standing on the tops of cars, a brakeman was not, as a matter of law, guilty of contributory negligence precluding recovery for his death from striking his head against a cross beam, maintained by a patron of the road over the entrance of a switch track into its grounds, 4 or 5 feet above the top of the car on which he was standing, although he had been on the grounds before, and had had an opportunity to learn of the position of the cross beam. *McGovern v. Standard Oil Co.* (1896) 11 App. Div. 588, 42 N. Y. Supp. 595.

A switchman is not presumed to be negligent because, while making a coupling, he did not see a sliver projecting from the rail. *Lake Erie & W. R. Co.*

v. Mugg (1892) 132 Ind. 168, 31 N. E. 564.

A conductor may recover damages against the company for injuries caused by his stepping, in a dark tunnel, off the back end of a car negligently left unprotected, although he knew there were but three cars in the train, where he had momentarily forgotten that fact in taking up tickets. *Fiero v. New York C. & H. R. R. Co.* (1893) 71 Hun. 213, 24 N. Y. Supp. 805.

Where a switchman is injured through stepping on to an adjacent track and being run over, the question of his contributory negligence is for the jury, which has a right to take into account the fact that he was necessarily engrossed in his duties. *Blachorn v. Mississippi P. R. Co.* (1891) 108 Mo. 439, 18 S. W. 1103.

An employee of a contractor at work for a railway company is not culpable in being so engrossed in his work of holding the guy of a derrick that he fails to notice the approach of an engine. *Goodfellow v. Boston, H. & E. R. Co.* (1871) 106 Mass. 461.

One who, in the performance of his duty in setting a brake on a car, necessarily has his face turned in an opposite direction from that in which other cars are approaching, although those cars have once collided with the car upon which he is, and are reasonably certain to do so again, is not required to keep a lookout for his safety inconsistent with the duty he is performing. *Houston & T. C. R. Co. v. Smith* (1899; Tex. Civ. App.) 51 S. W. 506.

It is not conclusive evidence of a want of due care on the part of an employee that he stepped into a hole between a tie and a switch-rod,—even if he had knowledge of the hole,—while in the discharge of his duty, and while his attention was directed to his work in uncoupling cars. *Hannah v. Connecticut River R. Co.* (1891) 154 Mass. 529, 28 N. E. 682. A jury may properly find that an open sluice 2 feet wide, and deep, with a single plank across it in the middle of the track, made the place unreasonably dangerous to a brakeman whose hands and eyes were engaged in coupling; and that, as the act in which he was engaged necessarily required his whole attention, he was not necessarily chargeable with negligence, although he knew of the po-

negligence, where such failure results from the necessary observance of another duty of equal importance, and equally binding upon him.

sition of the trench. *Plank v. New York C. & H. R. R. Co.* (1875) 60 N. Y. 607. That a railroad employee did not see and avoid a trench under a track upon which he, with others, was pushing a car, which caused him to fall upon the track, where he was killed by the car wheel passing over him, was not negligence, as matter of law. *Gustafson v. Washburn & H. Mfg. Co.* (1891) 153 Mass. 468, 27 N. E. 179. The court emphasized the fact that the servant was not employed in digging the ditch, or about anything connected with the ditch, but was employed near it on other work, and proceeded thus: "The more exclusively he attended to his own duty, the less he would be likely to know about other kinds of work done by other employees. Whether he knew of the ditch before he came upon it when he was hauling the car must, under the circumstances, be a question for the jury. The most formidable argument is that, as it was daylight, and as the ditch was visible, and directly across his path, he would, if he had used due care, have seen it when hauling the car towards it, and would have avoided it. A majority of the court think that this, too, was a question for the jury. His attention was necessarily more or less directed to his own work, which would naturally require him to lean forward and bend down towards the track: the car moving constantly forward would somewhat impair his freedom of action if he came upon the ditch without knowing beforehand that it was there; and it is impossible to say, as matter of law, that he was careless in putting himself in the position he was in, if he did not know of the ditch."

A brakeman is not, as matter of law, guilty of contributory negligence in failing to notice a cattle guard constructed within the switching limits, while in the act of making a coupling. *Illinois C. R. Co. v. Sanders* (1897) 166 Ill. 270, 46 N. E. 799. Affirming (1896) 66 Ill. App. 439. The question whether a brakeman injured at night while attempting to couple cars, by so falling over uncovered signal wires along the track as to catch his arm between the deadwoods, assumed such danger as an incident of his employment, is for the jury where he had not been notified, and did not know, that the wires were not boxed at such

point, and his attention was not diverted by the work on hand, but his line of vision was necessarily above the wires. *Indiana, I. & L. R. Co. v. B.* (1893) 152 Ind. 590, 53 N. E. 175. The duty of a track repairer to see defects in cars approaching as he steps close to the track from a parallel track to avoid an approaching engine, and having his attention diverted by a companion endeavoring to get a tool from the track in front of the engine, cannot be held negligence on his part, as a matter of law. *Tobin v. Burlington, C. R. & N. R. Co.* (1894) 94 Iowa, 256, 33 L. R. A. 496, 62 N. E. 761.

Upon the question whether an engineer was negligent in looking out for defects in the track, the jury in action by him for personal injuries must take into consideration the other duties which he was required to perform. *Central R. & Bkg. Co. v. Kent* (1891) 61 Ga. 402, 13 S. E. 502. It is a question for the jury whether the plaintiff, locomotive engineer, who was injured in a collision with freight cars running on the main track in violation of the rule of the company, was guilty of contributory negligence in failing to look out for obstructions, where his train was running on time, when he might have seen the freight cars sooner had he not been watching the fireman fix the injectors. *Hall v. Chicago, B. & N. R. Co.* (1890) 46 Minn. 439, 49 N. W. 239. An engineer is not, as matter of law, guilty of negligence contributing to injuries received by him from the derailing of an engine at an open switch, where he failed to see that the switch is properly set and receives orders to move down the track, and keeps the best lookout he can for switches consistent with his other duties of equal importance, and is informed by his fireman that the switch is all right. *Louisville & N. R. Co. v. H.* (1893) 101 Ala. 34, 13 So. 139. A fireman is not guilty of negligence because while engaged in the duty of watching an approaching train, he failed to observe a mail crane by which he was struck. *Brown v. New York C. & H. R. Co.* (1899) 42 App. Div. 518, 59 N. Y. Supp. 672. Affirmed in (1901) 1 N. Y. 626, 60 N. E. 1107. It is a question of fact for the jury whether a fireman who was killed at night by his locomotive striking against a slanting telegraph

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pole but 4 inches from the side of the locomotive, while he was looking to see if a journal had become heated, was guilty of negligence in not bearing in mind the location of the pole and avoiding it. *Bentlin v. New York C. & H. R. R. Co.* (1897) 24 App. Div. 303, 48 N. Y. Supp. 503. Where water escaped from a locomotive tank owing to the substitution of a wooden plug for the valve stem, and fell onto the iron apron connecting engine and tender, where it froze, creating an icy covering, on which the plaintiff fireman slipped, receiving injuries, and plaintiff had observed the escape of water, but not the icy formation on the apron, it is for the jury to say, in view of the engrossing nature of a fireman's duties, whether, in failing to observe the formation of ice, plaintiff was guilty of contributory negligence. *Mason & O. R. Co. v. Yockey* (1900) 43 C. C. A. 228, 103 Fed. 265.

A yard clerk riding on a switch engine, whose duties require him to look in another direction, is not, as matter of law, negligent in failing to observe a push car so near the track as to collide with him. *Atchison, T. & S. F. R. Co. v. Slattery* (1896) 57 Kan. 499, 46 Pac. 941.

A foreman of a switching crew, whose attention is directed to his train, which had been cut loose by a sudden jerk of the engine, and whose back is turned to the "flag shanty," and who is wholly engrossed in the performance of his duties, cannot, as matter of law, be reasonably expected to anticipate danger by leaning out of the gangway of the engine for the purpose of signaling to the brakeman on top of the cars, though he may have been generally familiar with his surroundings. *Chicago, R. I. & P. R. Co. v. Cleveland* (1900) 92 Ill. App. 308. A locomotive fireman on a freight train was not, as matter of law, guilty of contributory negligence in failing to notice or to remember the location between the freight track and a passenger track of a mail crane, the bow of which extended to within 7 inches of the side of the cab, so as to preclude a recovery for his death from his coming in contact with the bow. *Brown v. New York C. & H. R. R. Co.* (1899) 42 App. Div. 548, 59 N. Y. Supp. 672. It is a question for the jury whether or not a passenger brakeman was guilty of contributory negligence precluding recovery for injuries from being struck by a chute used to transfer baggage from one train to another, as one end, which was projecting from the car, came in contact with a car

on another track, in failing to notice that the chute so projected, although he stepped over it in entering the car, where it was night, the car was not brilliantly lighted, express matter was piled about ready to be unloaded, his attention was directed to his duties, and it was the first time the chute had been placed in that position. *American Exp. Co. v. Risley* (1899) 179 Ill. 295, 53 N. E. 558. Affirming (1898) 77 Ill. App. 476.

(b) *Injuries in other occupations.*—Where plaintiff was injured while removing shavings from beneath a planer which had become clogged by reason of the defective blower which was intended to carry the shavings away, evidence that plaintiff was required to hold up the boards passing through the planer, so as to let them run over a pile behind it, was competent, as showing how completely plaintiff was engaged, and was therefore relevant to the question whether he was exercising due care, or was negligent in not noticing the condition of the shavings, and the manner in which the machine was becoming clogged, sooner than he did. *Bennett v. Warren* (1901) 70 N. H. 564, 49 Atl. 105.

A helper in a boiler shop, injured by having a heavy crane used for moving machinery run against him without any warning or precaution being taken for his protection, while he was in a dangerous position under the foreman's orders, performing a service never before performed by him, was not guilty of contributory negligence because he did not keep a lookout for his own safety, where, when he first assumed the position, the fire in the engine was out and the crane stationary, and the service was such as to engross his attention. *Michael v. Roanoke Mach. Works* (1894) 90 Va. 492, 19 S. E. 261.

A servant whose attention is distracted by the necessity of attending to a truck loaded with merchandise which is being hoisted on a freight elevator is not, as matter of law, negligent in failing to observe a girder which projected into the shaft so far as to be dangerously close to the platform of the elevator, where the shaft is so dark that the dangerous object could not readily be ascertained. *Olson v. Hanford Produce Co.* (1900) 111 Iowa, 347, 82 N. W. 903.

It cannot be held, as a matter of law, that a school teacher who, three weeks before she suffered injury by stepping into a hole in the floor of one of the rooms, had seen the hole, was guilty of negligence in failing to observe it on

the neglected duty in this instance being that of keeping a vigilant lookout.² See § 332, *supra*.

Or possibly the rationale of the doctrine may be said to be that a person whose faculties of observation or memory are temporarily suspended in regard to certain dangerous conditions is virtually in the same mental position as a person who has never acquired a knowledge of those conditions, and that, under the supposed circumstances, the suspension is not culpable.

Whenever the facts in evidence are such that the servant's temporary forgetfulness of the conditions may possibly be an excuse for conduct which would otherwise be culpable, the jury should receive appropriate instructions upon the subject.³

351. Limits of this doctrine.—To justify applying, for the servant's benefit, the doctrine stated in the last section, it must appear from the evidence that the circumstances were either such as to create a situation approaching to or constituting an emergency, or such as to exhibit the servant in the light of a person who was discharging a duty which demanded an unusual amount of attention. The effect of allowing it to operate in cases where he was merely discharging under normal conditions, some ordinary function incident to

the occasion of the accident, the facts upon which the decision was based being that, as she had been engaged during the intervening period in another room, it might properly have been found that she was entitled to act on the assumption that it had been repaired; that, owing to her thoughts and eyes being taken up with her pupils, she failed to notice that the hole was still unrepaired; and that, on the day of the accident, the cover of a book, not unlike the floor in color, had been laid over it. *Bussett v. Fish* (1878) 75 N. Y. 303 (hole in floor seen three weeks before).

Where a female employee had noticed two holes in the floor while on her way to the wash-stand in the toilet room of a factory, but forgot one of them when she turned to come away a few minutes later, and stepped into it, it was held that a nonsuit should not be directed on the ground of contributory negligence. *Servier v. Lowe* (1900) 32 Ont. Rep. 290. This case seems rather inconsistent with those cited in the following section, and is probably an illustration of the difference of opinion regarding the respective provinces of courts and juries which is disclosed by a comparison of the American with the English and colonial decisions. See § 330, *supra*.

²See *Louisville & N. R. Co. v. B.* (1893) 101 Ala. 34, 13 So. 130.

³It is proper to instruct the jury that, if the service was of such a nature as to require the exclusive attention of the servant to be fixed upon it, and that he should act with rapidity and promptness, the law does not require that he should always bear in mind the nature, kind, and character of the appliances to be handled, or be prepared at all times to avoid the danger incident to handling them. *Greenleaf v. Dubuque & S. R. Co.* (1871) 33 Iowa, 58 (braken struck by waterspout projecting over the track); *Martin v. California C. Co.* (1892) 94 Cal. 326, 29 Pac. 615 (next section, note 1).

A jury is properly charged that, in emergencies where exclusive attention, rapidity, and promptness are demanded of an employee, the fact that he has call to mind previous information or knowledge which, if remembered at the moment, would have enabled him to avoid the danger from which injury resulted, will not, as matter of law, constitute such negligence on his part as will bar a recovery. *St. Louis, I. & S. R. Co. v. Higgins* (1890) 53 Mo. 458, 14 S. W. 653 (for facts see note *supra*).

employment, would manifestly be to render the defense of contributory negligence little more than a merely nominal protection to the master.¹

The mere fact that an employee was required to do hurriedly what he was doing when he was injured will not absolve him from blame,

¹An excusable diversion of attention cannot be predicated in the case of a railway servant walking alongside the track in the performance of his usual duties in connection with the moving of the cars. An experienced switchman was accordingly held to have been guilty of contributory negligence where he was walking on a track or between the tracks, toward a switch standard which he was about to move, and, when he reached the standard, was struck by the projecting side of the rear car of a train backing at the rate of 4 miles an hour, with the bell ringing and an outlook stationed at the end of the rear car, who, observing the switchman, and believing that he saw the train, which was in view for 142 feet before reaching the standard, did not give him any special warning. *Cincinnati, I. St. L. & C. R. Co. v. Long* (1887) 112 Ind. 166, 13 N. E. 659.

Recovery cannot be had for the death of a railroad employee while walking between the rails in violation of a printed order of the company, of which he has a copy, where he was familiar with the place, knew that switching was then being done on the track or that the engine was approaching, where his mind was occupied with something else, as, reading a paper. *Chicago, B. & Q. R. Co. v. Muney* (1894) 55 Ill. App. 588. The mere fact that a conductor was watching a brakeman throwing a switch was no excuse for his having failed to notice the approach of a train which struck him, inasmuch as the duty to be performed by the brakeman was simple, and the brakeman presumably competent. *Redmond v. Rome, W. & O. R. Co.* (1890) 31 N. Y. S. R. 366, 10 N. Y. Supp. 330.

In *Martin v. California C. R. Co.* (1892) 94 Cal. 326, 29 Pac. 645, where the servant was injured by dissimilar couplings, alleged to be dangerous when used in combination, the action was held not to be maintainable for the reason that there was no sudden danger or emergency to distract the servant's attention.

Neither a minor employee nor his father, who knew of his employment and

did not object thereto, can recover from a railroad company for injuries, while getting on a moving train, from striking against a mail crane beside the track, not shown to be dangerous to employees engaged in their duties,—especially when he testifies that he would not have been hurt had he thought of the crane. *Wolf v. East Tennessee, V. & G. R. Co.* (1891) 88 Ga. 210, 14 S. E. 199.

A boy fifteen years of age, employed as a "helper" in a carding room, who, after being warned to keep his sleeves rolled up in order to avoid having them come in contact with the rollers, disregards the caution and in a moment of forgetfulness extends his arm with the sleeve unrolled, in a place where there is no occasion for his being, by which it is caught and drawn between the rollers, is guilty of such contributory negligence as will prevent a recovery. *Truth v. North Star Woolen-Mill Co.* (1894) 57 Minn. 52, 58 N. W. 832.

A servant who, with knowledge of a dangerous machine, unnecessarily places a rephladder in close proximity thereto while discharging his duties as oiler, and unconsciously places his hand on the machine, is guilty of contributory negligence precluding recovery for the resulting injury. *Perlick v. Detroit Wood- en-Ware Co.* (1899) 119 Mich. 331, 78 N. W. 127.

An employee in a plant for the manufacture of salt, in which there are two large pans in which the brine is heated, with a runway 16 feet wide between them, with drip boards 6 or 7 inches above the floor of the runway, is guilty of such contributory negligence as will prevent a recovery for his death from scalding, when he was injured in another pan than that from which he was raking salt, and in order to get into it must have stepped upon the drip board and passed over salt which was on the same. *Foster v. Kansas Salt Co.* (1899) 60 Kan. 859, Appx., 57 Pac. 961 (the excuse urged was that the steam bewildered the servant).

A fireman upon a tug, who unthinkingly and carelessly steps within the loose coils of a line as it is thrown to a boat, is guilty of contributory negli-

where he was permitted to do the act in his own way, and it was light at the time.²

It has been intimated that the boundary line between the case in which the servant's absorption in his duties is an excuse for his temporary forgetfulness of a danger and the cases in which that absorption is not an excuse may sometimes be drawn with reference to the character of the instrumentality involved.³ But the distinction suggested seems to rest on no sufficient logical basis.

The servant is manifestly not entitled to go to the jury on the ground that he temporarily forgot the existence of a danger, when that danger would not have been encountered if he had not committed an antecedent breach of duty.⁴

352. Compliance with a rule.—Since a rule constitutes a deliberate and formal statement of what the master himself conceives to be

prudence. *The Ida B. Cothell* (1894) 10 C. C. A. 634, 23 U. S. App. 395, 62 Fed. 765.

In Virginia it has been held that a brakeman who knew of the location and dangerous character of an overhanging bridge, the stringers of which were but 28½ inches above the top of the front car, was, as a matter of law, guilty of contributory negligence precluding recovery for his death from striking his head against a stringer, notwithstanding that the engineer had just given a whistle for brakes. *Haffner v. Chesapeake & O. R. Co.* (1898) 96 Va. 528, 31 S. E. 899, First Appeal (1894) 90 Va. 621, 19 S. E. 166.

Other cases which involve a similar situation, and which impliedly propound a similar doctrine, are noticed in § 30a, ante.

In *Chicago & N. W. R. Co. v. Donahue* (1874) 75 Ill. 106, where a switchman, while engaged in controlling the movements of a train in a yard, stepped on one of the tracks and was struck by another train, the court said: "Whether plaintiff in this case observed due care for his personal safety is one of the controverted facts. According to his own testimony it was not necessary, in the performance of his duty, that he should step upon the track where he received his injury. There was room enough elsewhere. It is urged in his behalf his mind was so absorbed he did not notice he was stepping into danger. That is no valid excuse. He was in a place where danger was imminent, and it was his duty to keep a constant watch for his personal safety. It will avail

him nothing that he was not thinking of danger. He was in a position that if he omitted any reasonable care for his security, it was at his peril. There was safe ground upon which he could stand and he ought to have occupied it."

² *Watts v. Boston Tour Boat Co.* (1894) 161 Mass. 378, 37 N. E. 196.

An oiler of the cars and repairer of the trucks of a street cable railway, while after oiling the sheave wheels bearing the cable, leaves the manhole open and being roughly called by the superintendent, and runs into the power house returns with an oil can to place it in a car which he has not before supplied therewith because he is a little late, hurried, and steps off the car into the manhole and is crushed to death, is guilty of contributory negligence. *Bannan v. Front Street Cable R. Co.* (1898) 8 Wash. 363, 36 Pac. 272.

³ In *Brown v. New York C. & H. R. Co.* (1899) 42 App. Div. 548, 59 N. Y. Supp. 672, the court seems to have been of the opinion that a fireman is bound at his peril to remember the location of a bridge or station house, a contrast is drawn between such structures and a mail crane, which it was held that he might forget without being necessarily in fault.

⁴ See *Bedgwick v. Illinois C. R. Co.* (1888) 76 Iowa, 340, 41 N. W. 35, where a brakeman who undertook, in violation of a rule, to uncouple cars after he had begun to move, although he had tried unsuccessfully to remove the cars before they started, fell into an uncoupled cattle guard.

preferable course of action under the circumstances to which it is applicable, there seem to be good grounds for adopting the theory that, by promulgating it, he impliedly declares, or estops himself from denying, that a servant who obeys it shall be deemed to have fully discharged his contractual duty in the premises, whatever might be the inference drawn as to the quality of his conduct if there had been no such rule. This theory, although not explicitly put forward in the terms here suggested, may fairly be said to represent the doctrine applied in the few cases bearing upon the subject.¹ It is obvious, however, that this doctrine can only be applied with propriety when the rule in question was one which prescribed a specific course of action in respect to a specific conjuncture, and is not necessarily a protection to a servant who, in endeavoring to comply with a general rule which has no direct relation to any particular hazard, runs into imminent danger, and imperils his own safety as well as that of other persons.²

353. Conformity to a customary practice.—A circumstance frequently adverted to as one which tends to negative the inference that the servant was guilty of contributory negligence is that the course of action which he was pursuing at the time the injury was received was the one customarily followed by himself or his coemployees under similar circumstances, with the approval or tacit acquiescence of the master or his representative. How far this circumstance is actually a differentiating factor, serving to fix the line of demarcation between evidence which does and which does not warrant a court in saying, as a matter of law, that the action is not maintainable, is a question to

¹ A brakeman who, while walking along the tops of rapidly moving cars, was thrown to the ground through the separation of two of them, while he was stepping from one to the other, cannot be held negligent, as matter of law where his action is shown to have been done in compliance with his duties as prescribed by the rules and usages of the company. *Louisville, E. & St. L. Consol. R. Co. v. Utz* (1892) 133 Ind. 265, 32 N. E. 881.

The fact that a servant injured while coupling cars, the couplings of which were not properly matched, was complying strictly with a rule framed with regard to a contingency of that description, was treated as an element tending to negative fault on his part, in *South-eastern P. Co. v. Burke* (1893) 9 C. C. A. 229, 13 U. S. App. 110, 23 U. S. App. 1, 60 Fed. 704.

The fact that a rule permitted brakemen to go between cars moving at a safe rate of speed was tacitly assumed in one case to exclude the inference of negligence as regards a brakeman who was injured under the circumstances contemplated by the rule. *Hollenbeck v. Missouri P. R. Co.* (1897) 141 Mo. 97, 38 S. W. 723, 41 S. W. 887.

Such is possibly the rationale of the decision that an engineer is not only at liberty, but is required, when running over a road during or immediately after heavy storms, to run cautiously, and without regard to schedule time,—especially in places liable to slides or wash-outs. *Successy v. Minneapolis & St. L. R. Co.* (1885) 33 Minn. 156, 22 N. W. 289.

which the cases supply no definite answer. The only doctrine which it seems possible to formulate upon the subject is the somewhat extreme one, that unless what the servant did was necessarily and inevitably so dangerous that it is impossible to concede that any prudent man would have acted in such a manner, evidence showing that he acted in compliance with a custom, known to and expressly or impliedly sanctioned by his employer, will generally turn the scale in his favor, and so give him the privilege of having the quality of his conduct determined by the jury, although he would otherwise have been declared incapable of recovering.¹ The reasons for not inferring negligence in this matter of law, under such circumstances, are, of course, strong. It appears that the practice in question was pursued not only by the servants of the injured person, but also by servants in other concerns of the same kind as that carried on by his employer.²

In order that this doctrine may inure to the plaintiff's advantage it is not enough to show that other servants were in the habit of doing

¹ In a case where a brakeman was injured by striking against the eaves of a section house, as he was descending a side ladder on a moving train, for the purpose of opening a switch, evidence that it was the general custom of brakemen on the road to do this is competent. *Flanders v. Chicago, St. P. M. & O. R. Co.* (1892) 51 Minn. 193, 53 N. W. 544. A brakeman injured by being carried against a car standing on a side track, while he was standing on a ladder on the side of a moving car, and signaling to other train hands, may adduce evidence that it was customary to cut moving trains at that particular station. *Pennsylvania Co. v. McCormack* (1891) 131 Ind. 250, 30 N. E. 27. Where a conductor of a freight train was injured while pouring water into a hot box,—he having descended a ladder on the side of a moving freight car for that purpose, and being injured by the breaking of the hand-hold, or by being struck by a cattle guard too near the track,—evidence was held admissible to show that in like circumstances conductors frequently went down ladders of cars to look after the running apparatus. *San Antonio & A. P. R. Co. v. Englehorn* (1900) 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68.

An instruction that if plaintiff, injured while riding on the pilot of an engine, could have ridden on the steps of the engine with more safety, but for

his own convenience preferring to stand on the pilot, defendant would not be liable, unless its negligence increased the danger assumed, is properly refused where the evidence shows that the custom was the necessary and customary one for a brakeman while making a bar coupling, which plaintiff was at the time. *San Antonio & A. P. R. Co. v. Beam* (1899) Tex. Civ. App. 381, 62 S. W. 411.

See also *Burnside v. Novelty Mfg. Co.* (1899) 121 Mich. 115, 79 N. W. 1000 (here the method adopted was one which the servant had been directed by his foreman to follow); and the cases cited in the following notes.

The absence of evidence that the defendant's act was not a customary one is sometimes mentioned as a corroborative reason for declining to hold the defendant to be negligent in cases where the quality of his act would otherwise be for the jury, for the reason that no evidence had been offered that the custom was a dangerous one. *Hoskins v. Co. v. Fields* (1894) 138 Ind. 58, 36 529, where a servant in a sawmill allowed a saw to remain in motion not in use, and held back by a rope injured by its falling forward where the rope broke.

² *Florida C. & P. R. Co. v. Moore* (1898) 40 Fla. 17, 24 So. 148 (switch).

acts similar to that which caused the injury,—it must also appear that this habit was known to the employer or his agents.³

The cases illustrating this doctrine will be collected under headings which correspond to those used in the sections in which cases of a similar type, but not involving this element, have already been discussed. See also § 363, *infra*.

(1) Taking a position on a railway car which is dangerous with relation to object beside the track.⁴ Compare § 334, subd. 5, *supra*.

³*Coff v. Chicago, Mt. P. M. & O. R. Co.* (1894) 87 Wis. 273, 58 N. W. 408 (a case where a trainhand jumped from a moving engine).

⁴The fact that plaintiff was sitting on the car, with his feet and legs hanging over its side, did not constitute such contributory negligence as would preclude him from recovery; the evidence being that it was a common thing for section hands to ride upon the cars in that manner, and not necessarily dangerous to do so, and that the injury was not inflicted by his foot coming in contact with a stationary object near the track. *Illinois C. R. Co. v. Clark* (1900) 21 Ky. L. Rep. 1549, 55 S. W. 699.

A yard brakeman is not, as matter of law, guilty of contributory negligence in riding at one end of a car with one foot on the bumper and another in the iron stirrup at the side of the car, and is not, on this ground, debarred from recovering damages where the car is derailed owing to a defect in the track, and crushes him against a pile of lumber. *Pennsylvania R. Co. v. Zink* (1889) 126 Pa. 288, 17 Atl. 614.

Whether a brakeman sitting on top of a freight car, with his feet over the side, was guilty of contributory negligence precluding recovery for his death caused by being knocked from the train by a mail bag suspended from a "mail crane" is a question for the jury, where the mail bag hung about 8 inches nearer the track than required by the government, and there was evidence that a brakeman's duties require him to be on top of the cars, and that on long runs it is impracticable for them to stand up all the time, and it is customary for them to sit on the side of the car. *Louisville & N. R. Co. v. Milliken* (1899) 21 Ky. L. Rep. 489, 51 S. W. 796.

When it was the custom of the employees of a railroad company employed upon gravel trains to ride where they

pleased,—in the caboose, or upon the flat cars,—and such custom was known to the company, and was not objected to or prohibited, riding on a flat car is not contributory negligence, as matter of law. *Taylor, B. & H. R. Co. v. Taylor* (1890) 79 Tex. 101, 14 S. W. 518. The doctrine that a passenger who protrudes his person beyond the out-er face of a car is guilty of negligence which will prevent his recovering for injuries caused by a dangerous object close to the track is not applicable to a trainman. As contrivances are provided on the cars for the express purpose of enabling such an employee to ascend and descend over their sides, and it is often necessary for him to do this in the course of his ordinary duties, as well as to lean out when giving or receiving signals, it will not be declared, as a matter of law, that he was negligent in extending his person beyond a car, even when, under the immediate circumstances, it was not necessary for him to do so in the discharge of his duties, unless he knew of obstructions or had reason to believe there were obstructions which injected an element of danger beyond the ordinary into the situation. *Kansas City, M. & B. R. Co. v. Burton* (1893) 97 Ala. 240, 12 So. 88.

A brakeman is not guilty of contributory negligence in riding on the ladder on the side of a freight car to a point where his services are required. *Martin v. Louisville & N. R. Co.* (1894) 16 Ky. L. Rep. 150, 26 S. W. 801.

A brakeman injured by being struck by a car standing on a side track in dangerously close proximity to the track upon which he was riding on the ladder of the rear car after making a coupling was not guilty of contributory negligence in riding in that position, where that was the usual and customary mode of riding after making couplings, and he had nothing to do with the kicking in of the car by which he was struck. *Louis-*

(2) Taking a position on a railway car or engine which is dangerous with relation to the movements of such engine or car; compare § 334, subd. (6), *supra*.

ville & N. R. Co. v. Earl (1893) 94 Ky. 308, 22 S. W. 607. In a case where a brakeman, while he was on a side ladder, came into collision with the eaves of a section house, it was held that he was not necessarily negligent because he had begun to descend the ladder some time before the switch which he was about to open when the train stopped was reached. *Flanders v. Chicago, M. & N. P. M. & O. R. Co.* (1892) 51 Minn. 193, 53 N. W. 544.

A fireman who is directed by the engineer to look at a hot box is not negligent in leaning out of the gangway instead of the cab window. Such a position, though unusual, is one which the company, in erecting structures near the track, are bound to anticipate that employees will occasionally assume. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* (1895) 73 Fed. 661, distinguishing *East Tennessee, V. & G. R. Co. v. Reid* (1893) 92 Ga. 723, 18 S. E. 976, where the servant unnecessarily assumed a dangerous position.

The mere fact that a switchman had seen and handled a switch negligently maintained by the railway company so close to the track that when an arrow 17 inches long on the switch is turned towards the track the point is only 9 inches from the side of a freight car, does not, as matter of law, make him guilty of contributory negligence in riding on a ladder on the side of a car while performing his duties, when the arrow is turned. *Southern Kansas R. Co. v. Michaels* (1896) 57 Kan. 474, 46 Pac. 938.

The fact that a brakeman, in going to take his place at the brakes, climbed out of a caboose window which was so close to the end of the car as to be dangerous, does not necessarily prove negligence, where the evidence is that the usual way to his post was through that window. *Louisville, N. A. & C. R. Co. v. Hobbs* (1891) 3 Ind. App. 445, 29 N. E. 934.

In an action against a railway company for the death of plaintiff's intestate, evidence that deceased was a sectionman engaged in repairing the railway track, that he was standing on a car loaded with ties in a train having a caboose attached, that it is the custom of employees to ride on cars loaded

with ties, that he was killed by being thrown from the car by the engine suddenly starting without any signal, and that he was seen by the engineer and conductor before the latter directed the engineer to start the train, is sufficient to sustain a judgment in plaintiff's favor. *Union P. R. Co. v. Taylor* 52 Kan. 308, 34 Pac. 887. The jury relied on by the court was not misled by the fact that the deceased had been told that there was no signal to be unloaded, supposed to be the proper place was on the car side of the ties were.

A switchman is not guilty of contributory negligence in riding on the board in front of the head of an engine, which he accompanies in the course of his duty. *Lockhart v. Rock & M. R. Co.* (1889) 40 Ill. Whether a switchman who stands on the footboard of an engine while pushing cars, so as to uncouple the proper time, was guilty of negligence, is a question for the jury. He was injured when the cars slipped over an open switch and collided with others left upon a side track. *Rock & M. R. Co. v. Harrington* 45 Ill. App. 499. Evidence of a long standing custom to step on the footboard of slowly moving switch engines at a rate was 3 or 4 miles an hour excludes the inference that it is negligent as matter of law, for a brakeman switchman to do this. *O'Malley v. St. J. & C. B. R. Co.* 115 Mo. 205, 21 S. W. 503 (swain injured by slipping off the board).

A freight brakeman is not, as matter of law, guilty of contributory negligence in going upon the pilot of a locomotive to couple a car thereto, that is the usual manner of making coupling. *Eddy v. Balkin* (1890) Civ. App.) 28 S. W. 54.

In *Missouri P. R. Co. v. Taylor* (1889) 41 Kan. 639, 21 Pac. 5, the court discussed the right of recovery under the assumption that it was not to introduce evidence to show that a brakeman had followed the custom of employees of the company to ride on the pilot of a freight car while he was helping to switch a yard. The jury, it was said, naturally infer from such evidence

(3) Taking a dangerous position near railway tracks.⁶ Compare § 334, subds. (1), (2), *supra*.

(4) Taking a dangerous route.⁷ Compare § 335, subd. (5), *supra*.

(5) Coupling cars in motion.⁸ Compare § 334, subd. (9), § 338, subd. (3), *supra*.

such an act was a necessity, arising from the structure of the engines used in switching; that the company had sanctioned the practice; and that the brakeman had only done what he had seen habitually done by other employees engaged in the same kind of duty.

In an action for injuries received by a brakeman who, while stepping from one car to another, was thrown between them as a result of the engineer's suddenly putting on steam, evidence is admissible to show that, where a train was slackening speed as it approached a siding, it was customary for brakemen, after they had set the brakes, to walk forward to the engine and dismount therefrom, in order to be as near as possible to the switch which was to be thrown. *Whitsett v. Chicago, R. I. & P. R. Co.* (1885) 67 Iowa, 150, 25 N. W. 104.

An employee of a coal company who goes between a coal chute and a car which is being filled, to clear a clog in the chute, which method is customary for workmen to adopt, is not guilty of such negligence as will prevent a recovery for an injury caused by bumping another car against the one which is being loaded, without warning the employee. *Wenona Coal Co. v. Holmquist* (1893) 51 Ill. App. 507.

A servant who steps onto the conveyor in an ice house and is caught by the endless chain which works in it is not negligent, as matter of law, if there is evidence that it was customary for the workmen to cross the conveyor by stepping onto it. *Wootney v. Queen City Ice Co.* (1900) 49 App. Div. 485, 63 N. Y. Supp. 535.

An instruction to the effect that a spinner in a manufacturing establishment is not guilty of contributory negligence in passing to the rear of the machine on which she is working to assist the minder, where it is customary for spinners to do so and the machine would have to be stopped unless they did so, is not erroneous. *Calliatt v. American Mfg. Co.* (1897) 71 Mo. App. 163.

A switchman is not, as matter of law, guilty of contributory negligence in going between cars to uncouple them

while in slow motion, and using a stone as he walks along to loosen the pin, where such act is not necessarily dangerous and there is a custom of uncoupling cars in such manner. *Curts v. Chicago & N. W. R. Co.* (1897) 95 Wis. 460, 70 N. W. 663.

A switchman is not, as matter of law, guilty of contributory negligence in attempting to uncouple cars while they are slowly moving, where such practice has long been carried on with the knowledge and approval of the company. *Henneman v. Chicago & N. W. R. Co.* (1898) 99 Wis. 109, 74 N. W. 554.

Evidence of a custom of long standing for brakemen and switchmen to walk ahead of slowly moving cars when adjusting couplings is admissible upon the question of contributory negligence of a switchman in so doing. *Riley v. Minneapolis & St. L. R. Co.* (1898) 72 Minn. 469, 75 N. W. 704.

Compliance with custom is an element tending to negative fault in a case where the injury was caused by attempting to couple moving cars. *Illinois C. R. Co. v. Cozby* (1898) 174 Ill. 109, 50 N. E. 1-11, Affirming (1896) 69 Ill. App. 256.

A railroad brakeman is not, as matter of law, guilty of such contributory negligence as will preclude a recovery for injuries sustained while coupling cars equipped with a "standard coupler," because he stepped in front of a slowly moving car 5 or 6 feet distant from the stationary car, to open a movable jaw of the coupling, and was caught between the cars while pushing the jaw back into place, upon discovering that the pin which secured it was broken, which rendered it liable to fall to the ground, although the jaw of the coupling on the stationary car was open, and couplings could ordinarily be made with but one jaw open, where it was sometimes necessary to open both jaws to make a "sure" coupling and that was the usual manner in which they were made. *Hunch v. Great Northern R. Co.* (1898) 75 Minn. 61, 77 N. W. 541.

The question in an action against a railroad company for personal injuries to a helper in a switching crew, as to whether it had not been a uniform cus-

(6) Using appliances for a purpose for which they were not designed.⁹ Compare § 342, *supra*.

The complement of the doctrine thus illustrated is that the existence of a custom to do acts like the one in question is not a protection to a servant who complied with it, where the practice sanctioning the custom cannot reasonably be regarded as a safe one.¹⁰ Thus, say, the responsibility of a servant for his own injury cannot be terminated by considering whether other employees of the railroad, similarly situated, engaged in negligent practices, even with the know-

tom for many years of all helpers in switching crews in the yard where the accident occurred, after going between cars to couple them, to come out again immediately if they failed to make the coupling the first time, and look for coming cars, should be submitted to the jury at the request of defendant, where there is evidence of such a custom and of facts applicable to the question of plaintiff's contributory negligence, and negligence by the foreman of the switching crew. *Andrews v. Chicago, M. & St. P. R. Co.* (1897) 96 Wis. 348, 71 N. W. 372.

⁹One of the grounds on which a court has declined to rule that a servant was negligent in attempting to mount a moving car by putting his foot into the jaw-strap underneath it was that there was evidence that this method was customary. *Coates v. Boston & M. R. Co.* (1891) 153 Mass. 297, 10 L. R. A. 769, 26 N. E. 864.

A servant is not, as a matter of law, guilty of contributory negligence in riding upon a freight elevator operated by a cable which he knew was worn, although there was another elevator which he might have used, and there was a stairway which afforded him access to the upper floors, where he was informed by the superintendent that the cable was safe enough for the rest of the season, and it was customary, if not necessary, for employees to ride on the elevator with the freight. *Stomne v. Hanford Produce Co.* (1899) 108 Iowa, 137, 78 N. W. 841.

¹⁰"The doing of a dangerous and needless act by any number of persons, any number of times, cannot make the act right." *Chicago, R. I. & P. R. Co. v. Clark* (1883) 108 Ill. 113.

An unqualified instruction that if plaintiff employee did the work assigned to him in the usual and customary manner, he could not be charged with doing

it negligently, so as to contribute to the injury received, is erroneous. *Ward v. Charleston & W. C. R. Co.* (1891) 61 S. C. 468, 39 S. E. 715.

In *Warden v. Louisville & N. R. Co.* (1891) 94 Ala. 277, 14 L. R. A. 276, the following language was used by the court: "The fact that it is the habit of doing an obviously dangerous thing does not make his act less a dangerous one. The fact that many or all of a limited class of persons customarily ride upon the engine does not alter the character of obvious peril which they put themselves to that position. It is not *per se* for persons to walk up and down the track of railroads. Doubtless many persons are in the habit of using the track in this way, yet it has never been held that such custom would convert the track into a safe place, or that the law declares to be a dangerous place, into a safe place."

Custom and usage may be used to excuse the violation of a duty when the act involved is not negligent in itself, but only by relation to the duty violated; and so, when an act is done in two or more ways, a rule, neither of which involves such a peril as raises the legal presumption of negligence in the doing of it, a custom or usage to do it in a particular way may be looked upon as tending to show that it was negligence to resort to that method in a particular instance under consideration. But custom can in no case impart the presumption of due care and prudence to an act which involves obvious peril, which is habitually and unnecessarily done, and the law itself declares to be negligent. This statement of principles is repeated in *Andrews v. Birmingham & Great R. Co.* (1892) 99 Ala. 438, 432.

of the employer himself.¹¹ Considered with reference to the facts involved, some of the cases illustrating this phase of the subject seem to be scarcely reconcilable with several of a similar type in which the servant has been allowed to recover.¹²

Of course the mere fact that a breach of statute was customary, and that the custom was approved and sanctioned by the master, will not repel the inference of contributory negligence which that breach requires.¹³

354. Course of conduct selected by the servant, with reference to the presumption that the plant was not defective.—(Compare § 440, subd. b, *post.*)—It is a general principle of jurisprudence that "every person pursuing his lawful affairs in a lawful way has a right to assume,

"*Carrier v. Union P. R. Co.* (1900) 61 Kan. 447, 59 Pac. 1075 (approving exclusion of evidence that the servant had made a coupling in the ordinary manner); *Andrews v. Birmingham Mineral R. Co.* (1892) 99 Ala. 438, 12 So. 432 (similar decision, where the plaintiff offered to prove by his own testimony that it was the custom and practice on defendant's road and on other well-regulated railroads, for brakemen, when doing switch work in the yard limits, to stand and ride upon the pilot of the engine, and to jump off the pilot to do switching before the engine came to a full stop).

"A brakeman who attempts to pull a coupling pin out of a drawhead while he is standing on the deadwood of a moving car is deemed to be negligent, although he and his coemployees have been accustomed to do this. *Kroy v. Chicago, R. I. & P. R. Co.* (1871) 32 Iowa, 357.

Attempting to couple cars while standing on the footboard of a tender which is running 15 miles an hour, though apparently not only dangerous but reckless, will not prevent a recovery for injuries sustained while so doing, if, in the experience of railroad men, it is actually safe, and the injury resulted solely from the fault of the engineer in managing the engine. *Rebb v. East Tennessee, V. & G. R. Co.* (1891) 87 Ga. 631, 13 S. E. 566.

The fact that switchmen are in the habit of riding on the cowcatchers of engines is no excuse for taking that position. *Glover v. Scotten* (1890) 82 Mich. 369, 46 N. W. 936.

In an action for injuries received by a switchman who was riding on the foot-

board of a switch engine while it was pushing two cars, which collided with others, evidence of a usage of switchmen to occupy that position is inadmissible. *Chicago & A. R. Co. v. Harrington* (1898) 77 Ill. App. 499.

Evidence of the usual mode of coupling and uncoupling cars is inadmissible upon the question whether the mode adopted by the servant was negligent. *Chicago, R. I. & P. R. Co. v. Clark* (1883) 108 Ill. 113; *Henderson v. Coons* (1888) 31 Ill. App. 75 (holding that custom was no excuse for attempting to couple slowly moving cars). See, however, § 364, subd. 9, *infra*.

Whether it was customary or not, trying to board a train while it is running 10 or 12 miles an hour is negligence. *Dowell v. Vicksburg & M. R. Co.* (1884) 61 Miss. 519.

The custom of other switchmen will not excuse a switchman for going between the pilot of an engine and a box car to uncouple them, while they were moving at the rate of a rapid walk. *George v. Mobile & O. R. Co.* (1896) 109 Ala. 245, 19 So. 784.

It is proper to reject evidence to the effect that, in jumping off a moving train without looking to see where he would alight, the plaintiff, a brakeman, was doing only what was ordinarily done by employees of the same class under similar circumstances. *Thompson v. Boston & M. R. Co.* (1891) 153 Mass. 391, 26 N. E. 1070.

¹² *Vosheskey v. Hillside Coal & I. Co.* (1897) 21 App. Div. 168, 47 N. Y. Supp. 386; *Coal & Min. Co. v. Clay* (1891) 51 Ohio St. 542, *sub nom. Consolidated Coal & Min. Co. v. Floyd*, 25 L. R. A. 848, 38 N. E. 610.

and act upon the assumption, that every other person will do the same thing."¹

As applied to the relation of master and servant, this principle involves the corollary that the servant, except in so far as he is chargeable with knowledge, actual or constructive, of some special breach of duty on the master's part, is entitled to act on the presumption that the various instrumentalities and materials by which safety may be affected are in such a condition that he will not encounter any abnormal dangers in the course of his employment.

¹*Jetter v. New York & H. R. Co.* (1865) 2 Keyes, 154. "In general, it is not negligent not to anticipate wrongful negligence on the part of a defendant." *Davis v. New York, N. H. & H. R. Co.* (1893) 159 Mass. 532, 34 N. E. 1070, Citing *Hayes v. Hyde Park* (1891) 153 Mass. 514, 12 L. R. A. 249, 27 N. E. 522.

²"In determining whether plaintiff exhibited ordinary care in the situation in which he is found in the case before us, we should, with the other facts, consider the exigency of his duty as a faithful employee, and the confidence he might fairly entertain (in the absence of knowledge or notice to the contrary) that the master's personal obligation, in respect to the machinery before him, had been met." *Blanton v. Dold* (1891) 109 Mo. 75, 76, 18 S. W. 1149.

"The degrees of care in the use of a place in which work is to be done, or in the use of other instrumentalities for its performance, required of the master and servant in a particular case, may be, and generally are, widely different. Each is required to exercise that degree of care in the performance of his duty which a reasonably prudent person would use under like circumstances; but the circumstances in which the master is placed are generally so widely different from those surrounding the servant, and the primary duty of using care to furnish a reasonably safe place for others is so much higher than the duty of the servant to use reasonable care to protect himself in a case where the primary duty of providing a safe place or safe machinery rests on the master, that a reasonably prudent person would ordinarily use a higher degree of care to keep the place of work reasonably safe, if placed in the position of the master who furnishes it, than if placed in that of the servant who occupies it. Of the master is required a care and diligence in the preparation and subsequent

inspection of such a place as a room in a mine that is not, in the first instance, demanded of the servant. The master must watch, inspect, and care for the slopes through which and in which the servant works, as a person charged with the duty of keeping them reasonably safe would do. The latter is not to presume, when directed to work in a particular place, that the master has performed his duty, and to proceed with his work in reliance upon this assumption, unless a reasonably prudent intelligent man in the performance of work as a miner would have had facts from which he would have apprehended danger to himself." *Low v. R. Co. v. Jarvi* (1892) 3 C. C. A. 10 U. S. App. 439, 56 Fed. 65. (Rock fell from roof of entry). *Fell v. Western Coal & Min. Co. v. Long* (1895) 17 C. C. A. 71, 36 U. S. App. 70 Fed. 219 (defective timbering in mine).

The doctrine thus laid down has been applied in the following cases: *D. T. & Ft. W. R. Co. v. Smoot* (1897) Colo. 456, 48 Pac. 681 (railway servant entitled to assume that a trolley standing on a side track, and apparently in a condition for hauling, is reasonably safe); *Louisville & N. R. Co. v. B.* (1895) 106 Ala. 624, 17 So. 452 (proving of a charge embodying the doctrine in the text); *The Lizzie F.* (1887) 31 Fed. 477 (chock used in lashing was insecurely fastened); *G. Patten & S. R. Co.* (1899) 93 Mo. 44 Atl. 361 (frogs not blocked as required by statute); *Eastbrook v. C.* (1901) 165 N. Y. 420, 59 N. E. 202 (versing) (1898) 28 App. Div. 121, 3 Y. Supp. 1140, 53 N. Y. Supp. (plaintiff, while engaged in carrying firewood into a dark cellar, fell in hole therein); *Galveston, H. & S. Co. v. Adams* (1900) Tex. Civ. App. 55 S. W. 803, Judgment affirmed (1900) 94 Tex. 100, 58 S. W. 831.

Especially will a court refuse to say that a servant was negligent in making use of an appliance for a certain purpose, where his fellow

ten platform was covered with paint and appeared safe); *Musick v. Jacob L. & Packing Co.* (1894) 58 Mo. App. 322 (cover left off tank of hot water after the employees had quit work); *Hackett v. Middlesex Mfg. Co.* (1869) 101 Mass. 101 (servant who had put his head inside the shaft of a freight elevator, after signaling for it to descend, was injured by the fall of the car, due to a defective chain); *Gulf, C. & S. F. R. Co. v. Winton* (1894) 7 Tex. Civ. App. 57, 26 S. W. 770 (defective tie in platform of turntable); *La Salle v. Kostka* (1900) 92 Ill. App. 91, affirmed in (1901) 190 Ill. 139, 60 N. E. 72 (workman entitled to presume that the work of bracing walls of trench had been properly performed when it was once begun); *Hoes v. Ocean S. S. Co.* (1900) 56 App. Div. 259, 67 N. Y. Supp. 782 (coiler on steamship turned steam into feed pump which had just been repaired, and was killed by the blowing out of the cushion valve).

A brakeman killed by coming in contact with a low bridge while performing his duty in compliance with a specific order to flag the rear end of the train, requiring him while riding on top of a freight car to look in the direction opposite that in which the danger lay, was not negligent in so riding, although he knew there were low bridges, since he had the right to suppose that tell-tales would be in proper order and position to give him timely warning. *Maker v. Boston & A. R. Co.* (1893) 158 Mass. 36, 32 N. E. 950 (distinguishing some earlier Massachusetts cases turning on the failure of the servant to keep a proper lookout).

A brakeman, seeing that the entrance to a tunnel is high enough to permit safe passage while standing on top of a train, has a right to assume, in the absence of notice to the contrary, that the tunnel is of such height throughout. *Hunter v. New York, O. & W. R. Co.* (1889) 116 N. Y. 615, 6 L. R. A. 246, 23 N. E. 9. Whether a conductor of a freight train, who was injured by striking his head against a rock in the roof of a tunnel, while seated on the cupola of the caboose, where he had stationed himself that he might see the engineer, was negligent in taking that position, is a question for the jury, where the evidence tends to show that, before being

struck, he had already passed safely through two or three tunnels, that he had received no notice that the tunnel in which he received the injury was not of a uniform height, and that his position was not improper, although it was the custom for train hands on the tops of cars to lie down in passing through tunnels. *Mexican C. R. Co. v. Eckman* (1900) 42 C. C. A. 344, 102 Fed. 274.

A servant in a mine is not negligent, as matter of law, in riding on an ore car which is so high that it brings him into collision with the roof of an entry, although he knew that it was higher than the others in use. *Tennessee Coal, I. & R. Co. v. Currier* (1901) 47 C. C. A. 161, 108 Fed. 19.

A brakeman, having the right to assume that structures will not be located dangerously close to the track, is not guilty of contributory negligence in climbing the side ladder of a moving car without looking forward to see if he was imperiled by a certain telegraph pole. *Whipple v. New York, N. H. & H. R. Co.* (1896) 19 R. I. 587, 35 Atl. 305. An engineer who is struck by a mail crane, while leaning out of his cab to ascertain the condition of his engine, is not debarred from recovery on the ground of contributory negligence, where the crane was 7 inches closer to the track than any other on the road. *International & G. N. R. Co. v. Stephenson* (1899) 22 Tex. Civ. App. 220, 54 S. W. 1086.

It is not contributory negligence, as matter of law, for a switchman directed by the foreman of the switching crew to assist him in coupling an engine to a flat car, to stand on the footboard of the engine on the inside of a curve of the track while helping to make the coupling, in making which he is injured by being caught between the car and the engine, as a result of the yielding of a defective drawhead. *Bonnett v. Northern P. R. Co.* (1892) 3 N. D. 91, 54 N. W. 314.

A conductor to whom has been delivered a sleeping car as part of a regular through passenger train is justified in assuming that such car and the steps leading from it are safe, until he actually discovers that the steps have been removed. *Cameron v. Great Northern*

R. Co. (1898) 8 N. D. 124, 77 N. W. 1016.

A brakeman who, to couple an engine to a standing car, placed the pilot bar upon his knee which, after the coupling was made and before the car had run 3 feet, was crushed by reason of one of the car wheels sinking at a low joint, is not guilty of such contributory negligence as will bar a recovery. *Texas & P. R. Co. v. McCoy* (1897) 17 Tex. Civ. App. 494, 44 S. W. 25.

A fireman is not, as matter of law, negligent in taking hold of a piece of cord which had been spliced for the use of short men to the end of a rope provided to operate the valve of a water tank, although the cord was in fact rotten, and he could, with great inconvenience, have reached the main rope. *International & G. N. R. Co. v. Elkins* (1899; Tex. Civ. App.) 54 S. W. 931.

The action of a laborer who, while working in the hold of a grain ship, is injured by the fall of a number of sacks of grain, owing to the breaking of a defective hoisting chain, cannot be barred on the ground that he was guilty of negligence in not standing back underneath the deck, while the sacks were being hoisted. *Rooney v. Allan* (1883) 10 S. Sess. Cas. 4th series, 1224.

One engaged in shoveling cinders into a bag to be hoisted from the hold of a vessel is not guilty of negligence in working beneath the hatch while a bag of cinders is being hoisted, and by the fall of which, due to a weak handle, he was injured, where there are cinders there which need to be shoveled up, and he has only been notified to keep from under the hatch while a bag is descending. *The France* (1893) 53 Fed. 843. (This decision was reversed in (1894) 8 C. C. A. 185, 20 U. S. App. 212, 59 Fed. 479, on the ground that no negligence that could be charged to the defendant was proved. The question of contributory negligence was not discussed.)

An employee attending to his work in the usual manner has the right to rely on the safety of the machinery, and is not required to anticipate danger from the falling of a derrick. *Ashley Wire Co. v. McFadden* (1895) 66 Ill. App. 26.

It cannot be said, as matter of law, that a workman is negligent in using a car for carrying cores for forming iron pipe, of great weight, upon standards the point of equilibrium of which is so narrow that the cores are liable to top-

ple off, so that an action for injury caused by the fall of one of the must be taken from the jury, who plaintiff is a common laborer, who has been operated six months without accident, and the plaintiff relies on the exercise of care by his employer in furnishing safe appliances for the work. *James R. Clair & Sons v. Bell*, 34 C. C. A. 550, 92 Fed. 572. A brakeman has the right to rely upon the presence of a telltale as a means only of warning him of the approach of a train to a low bridge, but of attracting his attention at the place where the telltale is located and causing him to look out for danger ahead, where the company has adopted such manner of warning its servants of approach to a bridge, and the failure of such brakeman to heed and remember a warning given by his fellow servant, and to see the telltale when within a short distance of it, his face turned toward it and the telltale distinctly visible, does not necessarily constitute contributory negligence. *Campanella v. F. & W. R. Co. v. Day*, 91 Cal. 676, 17 S. E. 959. (Chief Justice dissented on the ground that the brakeman had received ample warning as to the danger, and that his attention had apparently not been diverted by the necessity for attending to his duties by any other occurrence.)

A carpenter employed by a railroad company is not, as matter of law, guilty of negligence contributing to injury by falling over an unprotected wing wall of a bridge carrying a highway over a track, while on his way to work, at daylight, in running to catch the train by which he was to be taken to his home. *Gates v. Pennsylvania R. Co.*, 154 Pa. 566, 26 Atl. 598. A fireman who was ordered to take down a wire extending from the top of a pole to a tree 120 feet distant, and cut the wire at the end next to the pole, the pole being that the pole fell with him, is not to be held negligent, as a matter of law, where he had no reason to suppose that the pole was not sunk sufficiently deep to stand without the support of the wire. *Bland v. Shreveport Bell Tel. Co.* (1896) 48 La. Ann. 1057, 36 L. R. 114, 20 So. 284.

A servant is not guilty of contributory negligence in assuming that his employer or his employer's agents were competent to do their duty in erecting a scaffolding, which proved defective. *Stuart v. Evans* (1883) 49 L. T. 138, 31 Week. Rep. 706. A work-

workmen have been using it without injury up to the time of the accident.³

The cases dealing with a servant's duty to examine into the condition of the appliances which he uses (chapter XXI., subtitle E) should be compared with those cited in this section. See also § 410, subd. b, § 451, *post*.

It will be observed that the circumstances under which the doctrine explained becomes applicable are such that it may also be regarded, in a logical point of view, as a direct deduction from the general principle that negligence cannot be imputed to a servant to whom the existence of the conditions which caused his injury and the dangers created by those conditions were not known, either actually or constructively. See §§ 319-321, *supra*.

355. — and that the work done in connection with the plant will be prudently done.— Another obvious corollary of the general principle stated at the beginning of the last section is that, in the absence of some special reason for ordering his conduct upon a different footing, a servant is entitled, when he is undertaking any particular duty or selecting any particular method of performing a certain piece of work, to assume that, in carrying on the various operations incident to the conduct of the business, both his master and his coemployee

negating contributory negligence is sustained by evidence which shows, among other things, that the plaintiff was not present while the scaffold which proved defective was being placed; that he was told by the scaffold builders that it was all right; that before getting down upon it he looked over the side of the vessel to see if it was all right, and it appeared to be so; and that no other persons who viewed it from different directions testified that it tipped the wrong way. *Cadden v. American Steel Barge Co.* (1894) 88 Wis. 417, 60 N. W. 800.

Where deceased, who was engaged in digging a trench for a water main where the ground was solid, was ordered to another part of the trench, which had been dug by other workmen, where the ground was loose, and largely composed of gravel, the fact that he went along the bottom of the trench to a designated point, and had a good opportunity to notice the change in the character of the soil, is not sufficient to charge him, as a matter of law, with contributory negligence. *Ft. Wayne v. Patterson* (1900) 25 Ind. App. 547, 58 N. E. 747.

In an action for the killing of a sec-

tion foreman by a defective door of a passing freight car swinging outward and striking him, it is not error to instruct the jury that he had a right to presume that defendant railroad company would use reasonable care to see that its car doors were in a reasonably safe condition, and that the jury, in determining the question of his contributory negligence, might consider his right to entertain this presumption. *Chicago & A. R. Co. v. Cullen* (1900) 187 Ill. 523, 58 N. E. 455, affirming (1899) 87 Ill. App. 374.

It is not negligent, as matter of law, to carry a naked light into a mine tunnel, when the foreman sees it done and makes no remark. *Cocher v. Moersby Coal Co.* (2 B. D., 1885) 1 Times L. R. 575.

See also *Lawless v. Connecticut River R. Co.* (1883) 136 Mass. 1, § 322, note 2, *supra*.

³ *McDonald v. Srenson* (1901) 25 Wash. 441, 65 Pac. 789, a case where workmen employed in loading a ship had used the rigging in ascending to the wharf, and a ratline gave way under one of them, while he was stepping from the rigging to the wharf.

far as they can attain that result by the exercise of proper care, avoid subjecting him to abnormal risks of a transitory character.¹

The extent to which he may rely upon the assumption that proper measures will be taken to secure his safety is primarily a question for the jury.² But see next section.

Some of the cases in which it has, on this ground, been held unjustifiable to declare the servant guilty of contributory negligence, as a matter of law, present situations in which it would have been practically impossible for the servant, without instituting special inquiries which would have been quite incompatible with an expeditious performance of his work, to have ascertained that he was being exposed to a danger against which he should have been protected.³ In other cases the essence of the situation is that his reliance upon a proper performance of their duties by his master or his fellow servants led him to omit certain precautions which it was in his power to take and which were unnecessary if those duties were properly performed.

¹ "One may, without fault of his own, be in a situation where he must choose a perilous alternative. The degree of danger, the stress of circumstances, the expectation or hope that others will fully perform the duties resting on them, may all have to be considered." *Miner v. Connecticut River R. Co.* (1891) 153 Mass. 398, 26 N. E. 994.

² *Bartolomeo v. McKnight* (1901) 178 Mass. 242, 59 N. E. 804.

³ An employee of an electric-light company engaged in trimming electric lamps during the daytime has the right to assume that the wire used for lighting a house which he is trimming is dead, and that no negligent act of omission or commission on the part of the employer will contribute to make it a live one, where the trimmers are not set at work during the daytime trimming lamps on live wires. *Harroun v. Brush Electric Light Co.* (1896) 12 App. Div. 126, 42 N. Y. Supp. 716, Appeal Dismissed in (1897) 152 N. Y. 212, 38 L. R. A. 615, 46 N. E. 291. A carpenter sent during the daytime to remove a lamp from an electric-light tower is not negligent, as a matter of law, in acting on the presumption that the current will not be turned on at an earlier hour than usual. *Colorado Electric Co. v. Lubbers* (1888) 11 Colo. 505, 19 Pac. 479. A servant is entitled to act on the presumption that the master has done his duty in regard to ascertaining the existence of danger from unexploded blasts. *Kelley v. Cable Co.* (1887) 7 Mont. 70, 14 Pac. 633.

⁴ For the purposes of ready comparison with the decisions in the preceding subtitle, the rulings exemplifying this situation may be arranged under the following heads:

(a) *Dangers incurred by servants engaged in the operation of trains.*—The crew on a passenger train are not guilty of negligence in assuming that the crew on a freight train which has passed given point a short time before the passenger train have not left open a switch which it was the duty of such crew to close. *Chicago & A. R. Co. v. Healy* (1898) 172 Ill. 601, 50 N. E. 151. Assuming (1896) 71 Ill. App. 147. It is for the jury to say whether a locomotive engineer was guilty of contributory negligence, precluding recovery for his death in a collision between his train and another train at the crossing of two tracks, in assuming that the engineer of the train approaching on the other track would avail himself of the opportunity to observe the rear portion of the first train, afforded by a clear view of the passing between obstructions on the side of the track which prevented the deceased from seeing the other train, or failing to send a flagman forward to ascertain whether the crossing could be safely made before proceeding. *Wells v. Brantner* (1898) 59 Kan. 117, 52 P. 80. An engineer is not negligent in stopping at a station to inquire of the whereabouts of a train ahead, a sign being there displayed meaning no order but a clear track, and to go on. *Hobbs*

Another situation in which some relaxation of vigilance is always deemed excusable is presented in those cases in which he had reasonable grounds for believing that, if he was threatened by some transi-

ton & T. C. R. Co. v. Higgins (1900) 306, 45 N. E. 531 (action against another company).

(b) *Dangers incurred by servants working on or near railway tracks.*—A trackman working at the crossing of two railroads is justified in assuming that an engineer will obey the statutory mandate to come to a full stop before crossing, to ascertain whether any other train is approaching on the other track; and the fact that he worked for five or six minutes without looking will not be held contributory negligence, as matter of law. *Shover v. Pennsylvania Co.* (1891) 130 Ind. 170, 28 N. E. 616, Rehearing overruled in (1892) 130 Ind. 179, 29 N. E. 775.

Where a train which struck a servant while he was crossing or working on or near the track was running at an illegal speed, it is only under very exceptional circumstances that a court is justified in declaring, as a matter of law, that he was guilty of contributory negligence in failing to observe it in time to escape injury. See *Nelson v. New Orleans & N. E. R. Co.* (1900) 40 C. C. A. 673, 100 Fed. 731; *Schultz v. Chicago & N. W. R. Co.* (1878) 44 Wis. 638. A railroad policeman is not guilty of negligence, as a matter of law, where he was struck by an engine moving at an unlawful rate of speed, while he was standing near the track loading his revolver, and with his back to such engine. *St. Louis, A. & T. H. R. Co. v. Eggman* (1896) 161 Ill. 155, 43 N. E. 620, Affirming (1895) 60 Ill. App. 291.

No presumption of contributory negligence is raised by a declaration which alleges substantially that the plaintiff, a car inspector in the employ of a railway company which was using the yard jointly with the defendant, was injured by reason of the fact that a locomotive and cars of the defendant were placed in the hands of inexperienced and unskilful servants, and backed through the yard, without a light being displayed, or a person stationed on the rear end of the train to give warning of its approach, and that this occurred at a time when another train, with its bell ringing and steam escaping, so as to drown the noise made by the backing train, was also passing. *Cleveland, C. C. & St. L. R. Co. v. Kernochan* (1896) 55 Ohio St.

306, 45 N. E. 531 (action against another company).

A member of a track gang, struck by an engine while leaning over the track as required by the discharge of his duty, is not, as matter of law, guilty of contributory negligence, where he could not see any considerable distance along the track, and no warning was given of the approach of the engine, although no unusual cause existed why he should not hear or see the train. *Lake Shore & M. S. R. Co. v. Murphy* (1893) 50 Ohio St. 135, 33 N. E. 403.

The contributory negligence of the servant was held to be for the jury, where the evidence was that he was struck by an engine which issued from a doorway close to a crossing over which he was required to run a wheelbarrow several times every night; that the doorway was obscured at the time by steam from an exhaust pipe close by it; that he had been working only three nights prior to the accident; that, during that time, an engine had come out only once when he was passing; and that on the occasion in question a boy had preceded it and given him warning. *Bethlehem Iron Co. v. Weiss* (1900) 40 C. C. A. 270, 100 Fed. 45.

Where a servant is working on a track where he is liable to be struck by trains, and in a place where he cannot see them approaching until they are quite close, he is not bound to exercise greater care than would be adequate to protect him if proper provision had been made for giving him the warning to which he was entitled. *Felice v. New York C. & H. R. R. Co.* (1897) 14 App. Div. 345, 43 N. Y. Supp. 922. It is for the jury to say whether a servant in a railway ash pit was negligent in failing to discover an approaching locomotive in time to escape, where there is evidence of a custom of the station yard for the bells of locomotives to be continuously rung while approaching the ash pit, and that on the occasion in question the locomotive ran towards the pit at a greater than the usual rate of speed. *Sullivan v. Tioga R. Co.* (1887) 44 Hun. 304.

A brakeman is not guilty of contributory negligence, where, in jumping from a moving train after dark to throw a switch, and going on ahead to make a

necessary coupling to get his train off the track of an overdue fast train, he steps into a hole and is run over because the engineer comes after him without waiting for proper signals. *Richards v. Louisville & N. R. Co.* (1899) 20 Ky. 1 Rep. 1478, 49 S. W. 419.

The fact that an employee who was under a car on a siding to do some work, omitted to station someone near the car to watch for approaching trains, does not show such contributory negligence as will preclude recovery for an injury caused by other cars running onto the siding, where it is also in evidence that he had notified the yard master that he was at work on the car, and had therefore a right to suppose that no cars would be switched on the siding without notice to him, or that, if they were so switched, the operation would be conducted in a reasonably careful manner. *Berry v. Central R. Co.* (1875) 40 Iowa, 561.

Where the place where a car repairer is ordered to work is not necessarily or inherently dangerous, he has a right to presume that he will not be exposed to unnecessary danger, and that the master has used proper care to render the place where he is to work reasonably safe. *Pool v. Southern P. Co.* (1899) 20 Utah, 210, 58 Pac. 326.

A night watchman is not chargeable with contributory negligence in failing to anticipate the transfer of cars onto the repair track by a flying switch, where there was no light on the cars, and no notice was given of their approach, and the transfer, contrary to the usual custom, was made by an engine which was pushing cars as well as drawing those which were transferred. *Galveston, H. & S. A. R. Co. v. Hynes* (1899) 21 Tex. Civ. App. 34, 50 S. W. 624. Where plaintiff, a section hand, knew of a rule requiring two certain tracks to be kept clear for ten minutes before the time of two certain trains, and was injured, while walking along one of such tracks, by an engine being propelled along such track in violation of the rule, an instruction that the rule was made for the dispatch of defendant's business, and that plaintiff had no right to rely on it, is erroneous. *Kingma v. Chicago & N. W. R. Co.* (1899) 85 Ill. App. 138.

An employee in a yard has a right to assume that the company's agents in charge of cars allowed to drop down a track by gravity will comply with the custom of stationing a man on such cars to warn persons on the track of their

approach. *Sours v. Great Northern R. Co.* (1900) 81 Minn. 337, 84 N. W. 114. A track repairer is not negligent in relying on the assumption that a bell, as required to be rung before the starting of a train, will be rung before the starting.

S. Galt v. Chicago & N. W. R. Co. (1878) 44 Wis. 638. A section hand, while working on a side track in a yard, is negligent in relying upon the due observance of a custom requiring the bells of locomotives when they are moving about. *Dithmer v. Chicago, M. & St. P. R. Co.* (1879) 47 Wis. 138, 2 N. W. 69.

A station agent is not guilty of contributory negligence in attempting to pass between two cars, relying upon the ringing of the bell, as required by custom, to apprise him of the approach of an engine which he knows is on the track for the purpose of pushing cars together, where before making the attempt he looks, but fails to discover the approach of the engine, which, without ringing the bell, pushes the cars together, causing his death. *Gulf, C. & S. F. R. Co. v. Calvert* (1895) 11 Tex. Civ. App. 297, 32 S. W. 246.

In a case where an employee was struck, while crossing a track, by the rear section of a train which had broken in two from an unusual cause, it is held that he was not negligent in assuming that there were no other cars coming after the front section had passed by. *Griffin v. Boston & A. R. Co.* (1886) 148 Mass. 143, 1 L. R. A. 698, 19 N. E. 166.

In an action for the killing of a track walker by a train which approached from the rear, it is competent to show that the statutory signals were not given at a highway crossing $\frac{1}{4}$ of a mile from the accident, not as showing a want of right of recovery, but as tending to negative want of care and culpability on the deceased's part. *Baltimore & O. S. W. R. Co. v. Alsop* (1898) 52 N. E. 253, 732, 176 Ill. 471. Affirming (1897) 71 Ill. App. 54. Evidence to show the duties of a foreman with reference to keeping the time of trains and to the workmen of the approach of trains is admissible upon the question of the negligence of a section hand who was struck by a train while working upon the track under the foreman's direction. *Union Stock v. Union P. R. Co.* (1895) 56 Kan. 228, 42 Pac. 724.

Where a switchman signaled a tower man, who controlled the manual throwing of all the switches in a railroad yard, to throw a certain switch, and the tower man threw a wrong switch, caus-

ing an approaching train to run against the signal man, it is error to direct a verdict for the defendant, though the ground was covered with snow, and a snow-storm was raging, and the signal man failed to go to the foot of the tower, and clear away the snow and ice covering a dwarf switch, which would have shown him that his signal was not obeyed. *Witch v. New York, N. H. & H. R. Co.* (1900) 176 Mass. 393, 57 N. E. 668.

Where plaintiff's intestate, a bridge watchman, was overtaken by a train and killed, while on a trestle leading to a bridge, and while attempting to get his tricycle to a platform a short distance ahead of him, the train schedule showing that the train, which was running 40 miles an hour, was limited to a speed of 22 miles, was admissible as bearing on the question of contributory negligence. *Louisville & N. R. Co. v. Seibert* (1900) 21 Ky. L. Rep. 1603, 55 S. W. 892.

See also note 5, *infra*.

(c) *Dangers incurred in coupling or uncoupling railway cars.*—Negligence is not a necessary inference where a car coupler, after having given the signal to stop the train, though not on the usual side, as the train was on a curve, and having seen his signal correctly repeated by a brakeman, steps upon the track, and is struck by the train through misunderstanding of the signal by the engineer. *Bucklee v. Central Iowa R. Co.* (1884) 64 Iowa, 603, 21 N. W. 103. A brakeman is not necessarily negligent in stepping from a car which had been kicked forward upon the track in front of the moving engine which he had signaled to stop, and believed had done so. *Pringle v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 613, 21 N. W. 108. Where a brakeman has attempted to uncouple cars, and finding them moving too fast, has signaled the engineer to slow up, and, without waiting to see whether his signal was obeyed, makes a second attempt, and is killed, he is not guilty of contributory negligence, as he has a right to believe that his signal will be immediately obeyed. *Beems v. Chicago, R. I. & P. R. Co.* (1882) 58 Iowa, 150, 12 N. W. 222; *Nichols v. Chicago, R. I. & P. R. Co.* (1886) 69 Iowa, 154, 28 N. W. 571.

A train coupler who is injured between cars which are started in disregard of a known rule of the company is not guilty of negligence. *Central R. Co. v. Harrison* (1884) 73 Ga. 744. Where a bumper on one of two adjoining cars

is broken, and they are connected by a chain, the question whether an employee was guilty of contributory negligence in going between cars to pull a coupling pin, although he knew they were going to be moved to loosen the tension of the coupling, is one of fact for the jury, since he may have been justified in assuming that they would not be moved enough to bring them together. *Koth v. Carrington* (1897) 75 Ill. App. 159.

A brakeman injured while making a coupling between a moving train and a standing car is not guilty of contributory negligence in not noticing that the conductor had not gone upon the moving train to apply the brakes, and that the speed was not lessened, where it was the duty and custom of the conductor to go upon the cars and apply the brakes, and the brakeman believed he was about to do so. *Henry v. Sioux City & P. R. Co.* (1888) 75 Iowa, 84, 39 N. W. 193. Former Appeal (1885) 66 Iowa, 52, 23 N. W. 260.

A brakeman is not guilty of contributory negligence, as a matter of law, in taking a position in front of the drawhead of a car while walking backward in front of it endeavoring to fix an air cock in order to stop the forward motion of the rear section of the train, which he had uncoupled from the front portion, precluding recovery for injuries from being caught between such drawhead and the drawhead on the rear car of the front section, owing to the engineer's stepping the front section, in obedience to orders of the conductor, where the brakeman knew that the engineer had been instructed to take the front section to a side track. *Tobbs v. Alabama G. S. R. Co.* (1895) 111 Ala. 419, 19 So. 969.

Where the jury are entitled to find from the evidence that a fireman was handling an engine under the direction and supervision of the regular engineer, the mere fact that a brakeman, who, while making a coupling, was injured by the carelessness of the fireman, knew that he was handling the engine, will not disable him from recovering damages, inasmuch as he had a right to assume that the engineer would exercise ordinary care in controlling the movements of the engine. *Leonard v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1896) 62 Minn. 489, 65 N. W. 1084.

See also subd. i, *infra*.

(d) *Dangers caused by objects above railway tracks.*—In an action for injuries to a trainman from a guy stretched across the track, it is proper to refuse

an instruction that plaintiff cannot recover if he knew the work requiring the guy was going on and paid no attention at all to it, if there is no evidence that he paid no attention, and the element of his right to rely on the duty of the railroad company to see that the tracks were not left in a dangerous condition was not stated. *New York, N. H. & H. R. Co. v. O'Leary* (1899) 35 C. C. A. 562, 93 Fed. 737.

(e) *Dangers caused by objects near railway tracks.*—A switchman is not negligent in extending his person beyond a car on which he is performing his duties, so as to be struck by another car negligently left standing on an adjacent track in dangerous proximity, even though it was not necessary for him to do so in the discharge of his duties, unless he knew or had reason to believe that there were obstructions near the track. *Kansas City, M. & B. R. Co. v. Burton* (1893) 97 Ala. 240, 12 So. 88.

In an action by a street railway employee for personal injuries caused by the crushing of his leg between a bank of rock and the side of a motor upon which he was being transported home, and over the edge of which his leg was projecting, after he had been carried beyond a certain switch where he was to get off, evidence that such switch was a regular stopping-place is competent as showing that he had a right to expect that he would have an opportunity to get off, especially if he signaled the motorman for that purpose. *Denver & B. P. Rapid-Transit Co. v. Dwyer* (1894) 20 Colo. 132, 36 Pac. 1106. Reversing (1893) 3 Colo. App. 408, 33 Pac. 815.

An employee is not guilty, as matter of law, of contributory negligence in failing to discover that one of a number of cars placed on the switch was left standing too near the main track, by reason of which he is injured, although there was a general duty resting on the crew of which he was a member to look after such matters, where under the particular circumstances a special duty rested upon another member of the crew. *International & G. N. R. Co. v. Sipole* (1895; Tex. Civ. App.) 29 S. W. 686.

(f) *Dangers incurred in handling machinery.*—A boy is not, as a matter of law, guilty of contributory negligence in cleaning out the boot of a sand elevator with his hand, precluding recovery for an injury to his arm resulting from the sudden starting of the elevator by another, although the work might have been done with a scoop, where there was no danger to be apprehended by doing

the work in the former manner, as in case of the starting the elevator. *Hess v. Adamant Mfg. Co.* (1895) Minn. 70, 48 N. W. 774.

One in charge of a machine is under the duty to keep it in order as a matter of law, guilty of negligence proceeding to oil it from under a place where it is necessary to have hand between the spokes of a wheel contributing to injuries from the starting of the machine by an officer of the corporation employing him having no authority of the factory, where he had no right to anticipate such starting. *St. Louis & N. W. Ry. Co. v. Walworth & N. Mfg. Co.* (1891) Mich. 411, 57 N. W. 251. A man engaged in repairing the separator of a threshing machine has a right to expect that the machine will not start, until it is set in motion by the engineer, is therefore not negligent in not disconnecting the separator from the engine while he is at work. *Hucke v. R. Co.* (1901) 24 Wash. 556, 64 Pac. 755.

An employee in a sawmill who is at the "tail stock" while one of the employees operates the carriage has the right to assume that such employee will start the carriage back while the foreman is seen by him to be in a place of danger. *Rhoades v. Varney* (1898) 91 Vt. 222, 30 Atl. 552. A servant who is engaged in repairing a block and pulley used for dragging rails up a river is entitled to assume that the engine which operates the tackle will not start in motion without warning. *W. & Cape Girardeau S. W. R. Co.* (1894) 44 Mo. App. 51.

(g) *Dangers incurred in handling heavy objects.*—Contributory negligence is a question for the jury when one employed in loading rails upon flat cars means of skids placed for the work under orders of the foreman in the employee's absence is injured by the fall of one of the skids, which caused them to strike him. *Great Northern R. Co. v. McLaughlin* (1895) 17 C. C. A. 344 U. S. App. 189, 70 Fed. 669.

A stevedore is not guilty of contributory negligence in being under a hoist when a sling load is being lowered, if, if his duties require him to be there, and he is justified in expecting notice before drafts are swung over a lowered. *McGough v. Ropner* (1895) 87 Fed. 531.

An employee engaged in the construction of the walls of an elevator, though he is an experienced carpenter, is not, as a matter of law, guilty of such contributory negligence as will prevent a recovery.

ary for an injury by the breaking of a staving on which he is standing by the fall of a heavy cross beam, one end of which a fellow servant negligently pried at a wall at the order of the employer, where such order was wholly unexpected, and the injured employee was not in a position to know how the order was being executed. *Mahre v. Timmshausen* (1896) 64 Minn. 541, 67 N. W. 660. The question of a servant's due care is for the jury, where he was working a corkscrew with a bar in the usual and customary way, and stopped lowering when told to do so, and started again when directed to lower 2 inches more, whereupon a timber came loose, fatally injuring him. *Knight v. Overton Wheel Co.* (1899) 174 Mass. 455, 54 N. E. 890.

An employee in the construction of a bridge has the right, in the absence of any warning or explanation, to rely on a vice principal to hold and steady a heavy iron which the latter undertook to do while attempting to raise it. *Pittsburg Bridge Co. v. Walker* (1897) 70 Ill. App. 55. Affirmed in (1897) 170 Ill. 550, 48 N. E. 915.

The foreman of a crew of bridge repairers, who has just given directions with regard to the manner in which a gin pole is to be taken down, is justified in acting on the assumption that his directions will be followed, and is not necessarily negligent because, instead of supervising the work, and giving his attention to seeing that his orders are obeyed, he turns away from the pole and proceeds to render manual assistance to some other members of his crew in performing another operation. *Houser v. Chicago, R. I. & P. R. Co.* (1882) 69 Iowa, 230, 46 Am. Rep. 65, 14 N. W. 778.

A seaman knocked into an open hatch way by a barrel which was being loaded on the vessel, and killed, is not guilty of contributory negligence merely because he did not anticipate negligence on the part of the man in charge of the loading. *Darica v. Oceanic S. S. Co.* (1891) 89 Cal. 280, 26 Pac. 827.

(h) *Dangers incurred in dealing with explosives.*—A servant is entitled to act on the presumption that the master has done his duty in regard to the ascertainment of the existence of danger from exploded blasts. *Kelley v. Cable Co.* (1887) 7 Mont. 70, 14 Pac. 633.

An employee in a quarry was not guilty of contributory negligence in failing to discover a quantity of dynamite that had been left in the quarry, al-

though he knew that some had been found therein, where he did not know that it was found at the place where he was injured by its explosion, and he had heard the foreman order its removal. *Allen Lime & Cement Co. v. Culley* (1892) 47 Ill. App. 343.

(i) *Dangers incurred in excavating banks of earth, etc.*—An employee is not, as a matter of law, guilty of contributory negligence in continuing to excavate an embankment at its base after seeing the bulged condition of the bank overhead, with knowledge that earth had frequently fallen from the embankment at other points, where the bank had been in such condition for three or four hours and he relied upon the foreman to remove the overhanging portion as fast as safely required. *Bondley v. Chicago, M. & St. P. R. Co.* (1897) 138 Mo. 293, 39 S. W. 763. A laborer who is set to work at the foot of a bank, and who does not know of the dangerous condition into which it has been brought, as a result of the efforts of his collaborators to throw out a large mass by inserting levers into the upper surface of the bank, at a place where he cannot see what has been done, is not necessarily negligent because he remained at work, relying on the exercise of care by his superiors. *Doppe v. Chicago, R. I. & P. R. Co.* (1874) 38 Iowa, 592.

(j) *Dangers incurred by workman on ships.*—(See also subd. (7), *supra*.) A grain trimmer who proceeds to work under a hatchway, after an indication by the mate that it is time to resume work, and the hatch covers have been placed in position, so as to exclude the light, has a right to assume that the adjustment of the hatch covers has been completed, and is not negligent in being under the hatch. *Crawford v. The Walla City* (1889) 38 Fed. 47.

(k) *Dangers caused by open trap doors, etc.*—A servant does not assume the risk from an open trap door in a passageway, over which he is required to pass in the course of his duty, although he knows of the existence of the door, where he does not know that it is open, and the master has neglected his duty to place lights or guards to protect him from danger. *Trmer v. St. Louis Brewing Co.* (1897) 69 Mo. App. 17. A workman who is injured, during the construction of a ship, by falling through an unbolted door at the side of the ship, is entitled to go to trial on averments that it was the duty of the foreman, a person "exercising superintendence," to see that the doors were

tory danger, he would receive timely warning of its approach to an employee or employees whose duty it was to give the warning.

fastened, or to have warned him that they were not fastened; that this person failed to perform either of these duties; and that the plaintiff, having to step back in the course of his work, came against what he was entitled to assume was fixed, and fell through to the dock. *Thomson v. Scott* (1897) 25 So. Sew. Cas. 4th series, 51.

² This is the rationale of the decisions asserting the action to be maintainable where a part of a train which had been uncoupled and drawn some little distance, backed up again without warning and struck the brakeman, who, after uncoupling the cars, had proceeded to do some work on the coupler. *Hooper v. Great Northern R. Co.* (1905) 80 Minn. 100, 83 N. W. 440. Where a switchman engaged in engrossing duties was run down by a train. *Cincinnati, I. St. L. & C. R. Co. v. Long* (1887) 112 Ind. 166, 11 N. E. 322. Where a switchman, engaged in coupling cars that were being kicked towards him by another switching crew on a transfer track, was injured, eight or ten cars being kicked towards him at a high rate of speed. *St. Louis, I. M. & S. R. Co. v. McCain* (1900) 67 Ark. 377, 55 S. W. 165. Where an engine wiper was injured, while engaged in coupling, owing to his having stood with his back to an approaching engine, which did not give the usual signal as it drew near. *Rahman v. Minneapolis & N. W. R. Co.* (1890) 43 Minn. 42, 43 N. W. 522. Where a car inspector stood upon a track in a railroad yard, relying upon the observance of the duty and practice of the employees to keep the bells ringing on engines moving within the yard. *Missouri, K. & T. R. Co. v. McGlimory* (1896) 89 Tex. 635, 35 S. W. 1058, Reversing (1896) Tex. Civ. App. 34 S. W. 359. Where a station agent engaged in unloading a car—work requiring his presence on the main track—was run down by a freight train. *Snyder v. Cleveland, C. C. & St. L. R. Co.* (1899) 60 Ohio St. 487, 54 N. E. 475. Where cars were run against the one which the injured servant was loading. *Freeman v. Illinois C. R. Co.* (1901) 107 Tenn. 340, 64 S. W. 1. Where a section hand was struck by a train while working upon the track in a stooping position. *Comstock v. Union P. R. Co.* (1895) 56 Kan. 228, 42 Pac. 724 (appeal was on demurrer to evidence). Where a brake-

man, while walking so near an engine truck, only 8 feet distant, in compliance with an order to walk from the rear of the train on a particular section, same, that he was struck by a car on the engine thereon. *McLeod v. Chicago & N. W. R. Co.* (1897) 104 Iowa, 139, 81 W. 614. Where a station agent attempted to pass between two cars ringing upon the ringing of the bell required by ordinance, to apprise him of the approach of an engine which he knew was on the track for the purpose of pushing the cars together. *Chicago & N. W. R. Co. v. Culvert* (1895) 111 Ill. Civ. App. 297, 32 S. W. 246. Where a servant working in the hold of a car was injured by a sack of bran which was thrown down after he had reported that no more be thrown down. *J. Walsh* (1898) 98 Wis. 348, 74 N. W. 212.

A railroad switchman is not guilty of negligence in going between detached cars which he has been ordered to couple, notwithstanding that an engine is attached to the body of the train and the train has been moved a time before towards the cars, which has been the custom to give notice of such movements to those making couplings, and no notice was given by further movements. *Lee v. Illinois C. R. Co.* (1891) 87 Mich. 53, 3 N. W. 909.

A section foreman who, before proceeding to repair a broken frog on a trestle, gives an engineer permission to move his train forward on the trestle until signaled to do so by the foreman, has the right to rely on his instructions to the engineer, and is bound to be on the lookout for the approach of the train until it is signaled. *Richmond & D. R. Co. v. Farmer* (1897) 97 Ala. 141, 12 So. 86. A section hand riding on a hand car is not, as a matter of law, guilty of contributory negligence in failing to discover an approaching freight train until it is close at hand, where it was hidden by a curve in the road, and the customary signal of an approaching train was not given. *Houston & T. C. R. Co. v. Rodican* (1897) 15 Tex. Civ. App. 40 S. W. 535. Car inspectors, one of whom was at work at the end of a track and the other was holding a light for him, were not guilty of negligence in failing to observe the approach of a

In some instances the servant's right to rely upon the performance of a co-servant's duty is rendered, if possible, still more unquestionable by the fact that he himself had taken specific steps calculated to secure such performance,⁶ or by the fact that the co-servant on whose acts

engine and car belonging to another company toward the other end of the car, where there were signals upon that end of the car indicating that it was the end car of a train, and they had no reason to believe that any other car was to be attached, or to believe that a car would be run upon their track and coupled with such car without previous notice or permission, *Abbitt v. Lake Erie & W. R. Co.* (1895; Ind.) 40 N. E. 40. The mere fact that an employee in a car shop remained under a car repairing it when he knew that the foreman, who had promised to protect him, had gone to another portion of the shop, will not bar a recovery unless he knew that the foreman was not keeping watch, and had taken no other steps to secure the safety of the employee as effectually as his own personal attention would have done, *Missouri P. R. Co. v. Williams* (1889) 55 Tex. 4, 12 S. W. 835. A verdict in favor of a railroad brakeman for injuries sustained in coupling cars is supported by evidence that he was directly in the line of his duty when injured, doing the particular thing necessary to be done to make the coupling, and relying on the fact that until he should give directions the train would remain where it had been stopped by his directions, and that while engaged in changing the pin, with his hand between the bumpers, it was caught and injured because of the negligent act of the fireman in starting the train back without notice, *Neidams v. Chicago, R. I. & P. R. Co.* (1894) 90 Iowa, 85, 57 N. W. 694.

It is for the jury to say whether a car inspector was in the exercise of due care, where the evidence tended to show that it was customary to examine trains in motion, and that the plaintiff was inspecting such a train; that the train which struck him came upon him unexpectedly and rapidly, without such warning or signal as he might well expect to have received; that his duty called him to work in dangerous places, where it would be careless for ordinary persons to go; and that there was a foreman on the coming train, who, according to the usual custom, and in the proper discharge of his duty, would either slacken the speed of the train, or give sufficient warning to enable the

plaintiff to get out of the way. *Stupp v. Old Colony R. Co.* (1892) 156 Mass. 262, 30 N. E. 1137.

⁶The fact that an employee of a railroad company while under and repairing a car on a branch track, in the act of turning a nut upon a bolt between the bumpers, took hold of the bumper with one hand for the purpose of supporting himself, is not negligence, as a matter of law, as he had the right to suppose that the company's servants would discharge their duty, and that a conductor would not disregard his signal flag, and shunt an unattended freight car down upon the branch track against the car he was repairing. *Murphy v. New York C. & H. R. R. Co.* (1890) 118 N. Y. 527, 23 N. E. 812. An engineer is not guilty of contributory negligence precluding recovery for his death caused by another train running into the rear of his train, in going under his engine to remedy a hot box without ascertaining whether the conductor had sent back a flagman to protect the train when it stopped, as required by the rules of the company, in the absence of any negligence on his part in giving the proper signal to the conductor to send back a flagman. *International & G. N. R. Co. v. Calpepper* (1898) 19 Tex. Civ. App. 182, 46 S. W. 922. Trackmen on a hand car have a right to suppose that an approaching train will slow up in obedience to a warning that has been sent by a flagman, and are not negligent in remaining at their places upon the hand car, with their boss, until it appears that the train is not about to heed the signal. *Howard v. Delaware & H. Canal Co.* (1889) 6 L. R. A. 75, 40 Fed. 195. Contributory negligence is not available as a defense to an action by a brakeman who attempted to pick a coupling pin from the track, as a train was slowly backing towards him, having first signaled the fireman who was in charge of the locomotive to stop, and was injured by the failure of the fireman to obey the signal. *Stole v. Central R. Co.* (1876) 43 Iowa, 109.

A miner was not guilty of contributory negligence in returning to his work for the purpose of igniting a blast, after going to notify the person in charge of the ventilation of the mine that a dan-

his safety depended had expressly promised to protect him;⁵ or the fact that the duty, from a breach of which his injury resulted, to his knowledge been regularly fulfilled for a considerable period.

The right of a servant to rely upon the master's having taken the necessary precautions to meet certain contingencies is not affected by his knowledge that his fellow servants are habitually guilty of a practice which seriously endangers his safety.⁶

356. Limits of the servant's right to act upon these presumptions.

The servant's right to act upon the presumptions exemplified in the two preceding sections is predicated only in so far as he is not acting with notice of circumstances which would indicate to any reasonable intelligent man that those presumptions were unjustified. To ascribe any larger effect to such presumptions would virtually re-

quire a dangerous amount of gas had accumulated at the place where he was working, if it is not shown that he did not allow a reasonable time to elapse before returning, in which to free the place of the gas. *Sommer v. Carbon Hill Coal Co.* (1898) 32 C. C. A. 156, 59 U. S. App. 519, 89 Fed. 54. A carpenter employed to reconstruct the paneling around an elevator, who, while thus engaged, is struck by a descending elevator, after he had told the elevator boy who had gone up with the elevator to stay up, because he had got to do the work, can recover for the injuries received from the owner of the building, by whom the elevator boy was employed. *Donoran v. Gay* (1888) 97 Mo. 440, 11 S. W. 44.

⁵ As, where a car inspector continued the inspection of the cars after he had consented to the removal of certain other cars from the train, reliance being placed upon the promise of the yard foreman, who controlled the movement of cars, that none would be sent back on that track. *Canon v. Chicago, M. & St. P. R. Co.* (1897) 101 Iowa, 613, 70 N. W. 755.

The contributory negligence of a brakeman is a question for the jury, upon evidence that his conductor ordered him to examine the couplings, promising him to keep watch, and that while he was engaged in repairing a defective coupling the conductor, without warning, signaled the engineer to back other cars against the stationary one on which the brakeman was at work, thereby injuring him. *Walker v. Gillett* (1898) 59 Kan. 214, 52 Pac. 442.

⁶ In *Shaner v. Pennsylvania Co.*

(1891) 130 Ind. 170, 28 N. E. 618. The facts of which are given in note 4. (b), *supra*, the court said: "That the appellant had worked on the same section and had resided in the immediate vicinity for three years strengthens the conclusion we have reached. In the absence of any statement to the contrary, it will be presumed that during those years the employee, appellant, working at that place, had been observant of the duty of reasonable care for the safety of each other, which the law imposes on them, and had obeyed the law requiring the stopping of trains, and observation of the track before attempting to run over the crossing. If so, his knowledge, thus acquired, would indicate that the safest place for a workman, on the line of the railroad, would be the crossing, as he would be reasonably certain to be seen and warned in time to escape danger."

⁷ *Pennsylvania Co. v. Mt. Vernon* (1894) 139 Ind. 430, 38 N. E. 67. It was held that the knowledge of a foreman that a train crew was habitually depleted at the point where a hand car was thrown off the track, while running with only one of the crew, did not charge him with contributory negligence in attempting to place the hand car on the track, without knowing that the crew was depleted. The theory of defendant was that the plaintiff's knowledge of the habit threw upon him the duty of inquiring, with a view to finding out whether the habit was persisted in on any particular occasion.

in absolving him from the obligation of using ordinary care to secure his own safety.¹

Nor is the servant who has to work in a position where he is exposed

"A servant has no right to assume that the master has done his duty in providing the appliances with which to work, and, acting on this assumption, to neglect the exercise of ordinary care for his own safety against open and patent dangers discoverable by the use of his own senses." *Anderson v. C. N. Nelson Lumber Co.* (1896) 67 Minn. 79, 69 N. W. 630.

"No sane man is expected to act upon an assumption which he knows to be false." *Jennings v. Tacoma R. & Motor Co.* (1893) 7 Wash. 275, 34 Pac. 937. "A servant of street car company held to be negligent in continuing to walk alongside a car which he was pushing, when it was approaching a place where the distance between it and a wall would be so small that he would be crushed).

Unless the master, as well as the servant, has notice of a defect, the latter is not justified in assuming, when he has occasion to use the defective appliance after the lapse of a few weeks, that it has been repaired. *Pennsylvania Co. v. Burgett* (1893) 7 Ind. App. 352, 33 N. E. 914, 34 N. E. 650 (wagon).

If the rules of a railway company made it the duty of the engineer to slow up or stop as he approached a switch, and also made it the duty of a brakeman to signal the engineer to slow up at such a place, the brakeman cannot recover if he fails to perform this duty, and is injured by a derailment resulting from that failure. In such a case he would have no more right to presume that the engineer would do his duty by slowing up and stopping than the engineer has to presume that the brakeman would do his duty by giving the signal. *Louisville & N. R. Co. v. Mothcrshead* (1893) 97 Ala. 261, 12 So. 714.

The conductor of a train is guilty of negligence if he relies on a signal of a watchman at a bridge, which is not given in accordance with the rules of the company; and if he does, he cannot recover for an injury received by him in consequence. *Columbus & W. R. Co. v. Bridges* (1888) 86 Ala. 448, 5 So. 864.

In *Central R. & Bkg. Co. v. Brantley* (1893) 93 Ga. 259, 20 S. E. 98, where a servant was injured by reason of the fact that a train was run at a rate exceeding that allowed by the company's rules and by a municipal ordinance, the

court laid it down that it was error to charge that he could act upon presumptions, without charging in the same connection that he must act upon what he saw and heard at the time; and if he saw that the engine was moving at a high rate of speed, he had no right to act upon the presumption that it was moving at a rate different from that at which he saw it was moving, merely because the law required it to move at a slower rate.

A brakeman about to couple cars is not justified in acting on the presumption that a stop signal given by him will be obeyed, where he knows, or by the exercise of ordinary care might know, that the signal has been misunderstood, or is not being obeyed. *Nichols v. Chicago, R. I. & P. R. Co.* (1886) 69 Iowa, 154, 28 N. W. 571. It is negligence for a brakeman to assume that an engineer could see the signals he made before going between cars to couple them, although he could not himself see the engineer because of the cars standing on a curve. *Long v. Coronado R. Co.* (1892) 96 Cal. 269, 31 Pac. 170. It is negligence for a brakeman to give signals to an engineer out of sight, and then proceed with a coupling, on the assumption that the signals were seen. *Richmond & D. R. Co. v. De Butts* (1894) 90 Va. 405, 18 S. E. 837.

A brakeman who, after seeing that his signals to the cars to slow up while approaching for coupling were not obeyed, steps in between them to make the coupling, is negligent. *Norfolk & W. R. Co. v. Cottrell* (1887) 83 Va. 512, 3 S. E. 123.

An employee who goes in front of an engine which has almost reached a turntable, knowing that it is still moving with substantially unchecked speed, is negligent, although it was the duty of the hostler in charge of the engine to stop it, and wait for a signal before going on the turntable. *Charles v. Chicago, R. I. & P. R. Co.* (1897) 102 Iowa, 507, 71 N. W. 580.

An engineer who knows that the conductor of his train has received notice that there are no further orders for his train, and that the rules of the company require the train to remain at the station where it is until the arrival of a train from the opposite direction, and that there will probably be a collision

to certain well-known dangers of a transitory nature relieved out of the duty of keeping a lookout for those dangers.²

The presumption that a coemployee will perform a certain duty inures to the benefit only of servants who know that the duty in question has been imposed on that coemployee,³ and whose work requires

if he starts his train, is guilty of such contributory negligence as will prevent a recovery for his death by obeying a signal of the conductor to start the train, where one of the rules provides that the conductor shall have charge and control of all persons employed on the train except where his directions conflict with the rules, or involve risk or hazard, in which case the engineer will be held equally accountable. *York v. Chicago, M. & St. P. R. Co.* (1896) 98 Iowa, 544, 67 N. W. 571. The court said that the engineer was not justified in acting on the assumption that the conductor had received information which would warrant moving the train.

It is error to give an instruction in such terms that the jury may infer that the rule of law is "that the right of one employee to presume that other employees will do their duty will exempt him from responsibility for his own negligence." *Alabama G. S. R. Co. v. Rouch* (1895) 110 Ala. 266, 20 So. 132 (a case in which the injury was due to the fact that the servant, a car repairer, had not put out danger signals).

²The failure of a train which a section hand knows customarily signals at a whistling post, to give such signal, will not of itself excuse him from want of performance of the general duty of using his eyes while working upon the track, but he has a right to depend upon the knowledge of such custom to some extent. *Davis v. New York, N. H. & H. R. Co.* (1893) 159 Mass. 532, 34 N. E. 1070.

A railroad employee engaged in cleaning under a switch bar in the yard, so that his attention will naturally be withdrawn from approaching trains, but separated from the other section men, who, as well as himself, are under charge of a foreman who ordinarily looks out for the men and warns them, must know that under such circumstances he is not relieved from the necessity of keeping watch for himself, and is not free from negligence in failing to do so. *Lynch v. Boston & A. R. Co.* (1893) 159 Mass. 536, 34 N. E. 1072.

A request by the foreman of a yard of railroad men to the engineer to look out for the engine when he comes back does not create of such men to go upon the track in the dark without any light, in reliance on the engineer's warning him to come back with his engine. *Tumulty v. New York, N. H. & H. R. Co.* (1898) 170 Mass. 164, 49 N. E. 85.

The mere fact of the engineer's having rung his bell, as was customary when returning with the engine, making a flying switch, will not prevent the inference of negligence of the brakeman, who was familiar with the method of switching, stepped off the track just after the passage of the engine, for the purpose of blocking the track being switched, so as to prevent it from colliding with another one, and was struck by the engine. *St. Louis & S. R. Co. v. Ross* (1892) 56 Ark. 19 S. W. 837.

An instruction which relieves a man of any imputation of negligence in going between a standing and a moving car to examine the automatic couplers, if he gave the signal to stop, in such circumstances as would reasonably impress him with the idea that the signal would be observed by the engineer or by the conductor and communicated to the engineer, although he did not see whether his signal had been obeyed, imposes too low a degree of attention upon the brakeman. *West v. Co. v. Williamson* (1895) 114 Ala. 21 So. 827.

³A rule of a railroad company requiring yard engines to carry lights at night except when passing with headlight both front and rear does not relieve an employee who does not know of such rule from being guilty of contributory negligence in working in the dark at night upon a track, at a time which is very dangerous even in the time. *Tumulty v. New York, N. H. R. Co.* (1898) 170 Mass. 164, 49 N. E. 85.

them to be at the place where the nonperformance of the duty will expose them to danger.⁴

357. Necessity of act which caused the injury.—An act of a non-culpable character cannot be converted into a culpable one merely by showing that it was not necessary under the circumstances.¹ But the fact that a certain course of conduct which is deemed to import negligence was adopted without any necessity is frequently adverted to as an element which constitutes a corroborative or cumulative reason for declaring the action not to be maintainable.² And this conception may evidently be regarded as an implied element in numerous other cases where it is not mentioned.

On the other hand, it is conceded that evidence which tends to show that the servant acted under the pressure of necessity will frequently render it impossible to say, as a matter of law, that he was negligent, although the circumstances may have been such that, if the factor of necessity were abstracted, he could not have recovered.³

¹In *Loeffler v. Missouri P. R. Co.* (1888) 96 Mo. 267, 9 S. W. 580, it was held that a servant who was run over in a tunnel where he had no right to be at that time was guilty of contributory negligence, and could not recover, even if the bell on the engine was not rung, no ordinance having been violated by this omission. Compare cases cited in § 337 *supra*, and chapter XXXIII., *post*.

²*Hollenbeck v. Missouri P. R. Co.* (1897) 141 Mo. 97, 38 S. W. 723. Affirmed in *Banc* in 141 Mo. 113, 41 S. W.

brakeman went between slowly moving cars to couple them, such an act being deemed negligent in Missouri).

³See, for example, *Texas & P. R. Co. v. Patton* (1894) 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. 259; *Osborne v. Knox & L. R. Co.* (1877) 68 Me. 49, 28 Am. Rep. 16; *Union P. R. Co. v. Estes* (1887) 37 Kan. 715, 16 Pac. 131; *Danhe v. Southern P. R. Co.* (1890) 42 La. Ann. 686, 7 So. 792; *Larkin v. New York C. & H. R. R. Co.* (1896) 166 Mass. 110, 44 N. E. 122; *Harris v. Chesapeake & O. R. Co.* (1895; Va.) 23 S. E. 219.

⁴A case it was declared that a petition which alleged that a foreman of a switching crew was compelled, in the performance of his duties, to cut off three cars while a train was in motion, and was injured by the unballasted condition of the track, was demurrable, as there was no averment with regard to the rate at which the train was moving, nor any statement that he was compelled either by duty, or by an order, or by

the necessity of the case, to go between the cars while in motion. *Parrott v. New Orleans & N. E. R. Co.* (1891) 62 Fed. 562. Contrast cases cited in § 334, note 16, *supra*.

A ruling which assumes that a certain act of the plaintiff was unnecessary, when such necessity is one of the issues directly involved in the case, upon which evidence is introduced on both sides, is properly refused. *Hannah v. Connecticut River R. Co.* (1891) 154 Mass. 529, 28 N. E. 682.

⁵Evidence that, owing to its peculiar construction, a certain engine could not well be oiled when it was stationary has been held sufficient to exclude the inference that the engineer was, as matter of law, negligent in standing on the foot-board to oil it while it was in motion. *Missouri Furnace Co. v. Abend* (1883) 107 Ill. 44, 47 Am. Rep. 425. A brakeman was not guilty of contributory negligence in riding on the tender of a backing engine, it being necessary for someone to be in that position to keep a lookout for obstructions on the track. *Southern R. Co. v. Barr* (1900) 21 Ky. L. Rep. 1615, 55 S. W. 900. The question of contributory negligence is for the jury upon evidence that a switchman got upon a caboose car at the front end, and finding the door locked and the platform crowded with a number of his fellow servants, took his seat upon the second step of the platform with his feet on the lower step, and that by reason of a sudden lurch of the car some

portion of his person was forced beyond the line of the car and thus came into collision with a switch stand. *Boss v. Northern P. R. Co.* (1891) 2 N. D. 128, 49 N. W. 655. It is not, as a matter of law, contributory negligence for a brakeman in charge of a train to ride on the top of a coal car, instead of on the platform at the end. If he is jerked off by a sudden stoppage of the train, due to the engineer's negligence, it is for the jury to say whether he acted prudently, taking into consideration the demands of duty, and especially the need of being in a position where he could observe the cars to which that on which he is riding is about to be coupled, and signal to the engineer when occasion required. *Kansas City, Ft. S. & M. R. Co. v. Murray* (1895) 57 Kan. 336, 40 Pac. 646.

It is not negligence, as a matter of law, for the engineer of a train, in an emergency, to step out from the engine, which is on a side track, to the main track, to get signals. *Barry v. Hannibal & St. J. R. Co.* (1889) 98 Mo. 62, 11 S. W. 308.

Evidence that an unusual strain to which a brakeman subjected a brake was necessitated by the fact that it was the only one on the train in good working order is admissible to rebut the inference of negligence in the manner of handling the brake. *St. Louis, P. & N. R. Co. v. Dorsey* (1901) 189 Ill. 251, 59 N. E. 593. Affirming (1899) 89 Ill. App. 555.

A railroad switchman is not negligent, as matter of law, in placing himself in front of a moving car, where his duties may require it. *Paine v. Eastern R. Co.* (1895) 91 Wis. 340, 64 N. W. 1005.

A brakeman is not guilty of contributory negligence in assisting in the making of a "flying switch," which is a highly dangerous operation, where the exigency of the case demanded that the switch should be made in that way. *Dooner v. Delaware & H. Canal Co.* (1894) 164 Pa. 17, 30 Atl. 269.

An instruction that if plaintiff, injured while riding on the pilot of an engine, could have ridden on the steps of the engine with reasonable safety, but for his own convenience preferred to ride on the pilot, defendant would not be liable unless its negligence increased the danger assumed, is properly refused where the evidence shows that the pilot was the necessary and customary place for a brakeman while making a pilot bar coupling, which plaintiff was doing at

the time. *San Antonio & A. P. R. Co. v. Beam* (1899) Tex. Civ. App. 50 S. 411.

Where a brakeman was injured while coupling an engine with a drawbar, so low that it passed under the coupling which it was being connected, the defendant is not entitled to an instruction that, if plaintiff knew of these conditions, he was negligent in attempting to make the coupling, where the evidence that it was necessary for the cars should be moved quickly to make way for an expected train. *Less v. Connecticut River R. Co.* (1886) 136 Mass. 1. The court said: "If plaintiff had the knowledge supposed by the requests for instructions, the question of his due care depended to some extent upon the view the jury took of his necessity for immediate action, the distance the hunters would have to pass each other before the engine and engine would come so near together as to injure him, the speed at which the engine was moving, the knowledge he had that the engineer knew the engine, the confidence he was entitled to place in that the engineer would so manage the engine as not to injure him, the fact that he was reasonably entitled to place in his ability to make the connection so as to prevent the hunters passing, and probably other circumstances."

A laborer on a gravel train who is thrown off as a result of the train's jolting to move while he was attempting to mount a car by putting his foot on a drawbar cannot be held negligent as a matter of law, on the ground that it was necessarily imprudent to do so at a time when orders had been given for the train to start, and he must therefore have known that it might move at any moment. The quality of conduct is a question for the jury to be determined in view of all the circumstances,—such as the haste required in getting aboard the train, the condition of the ground or approaches, and the character of the cars and the absence of any suitable means for mounting them. *Boyle v. Chicago, R. I. & P. R. Co.* (1896) 136 Iowa, 765, 9 N. W. 360.

Where the evidence clearly shows that there were only two ways of crossing the uncovered gearing which caused the injury, the jury cannot be asked to determine whether the plaintiff could not have availed himself of some other way of crossing which would have rendered the accident impossible. *Rodgers v. The Cotton Cotton Co.* (1893) 23 Ont. Rep.

But this doctrine does not inure to the advantage of a servant in any case in which his conduct was intrinsically so rash that no prudent person would have done what he did.⁴

The necessity contemplated by the law is a reasonable and practical one.⁵ It is therefore a misdirection to charge a jury in language which will lead them to suppose that negligence is inferable, unless the act in question was absolutely necessary. It is enough for him to show that the act was reasonable under the circumstances.⁶

358. Act done in an emergency.— The fact that, at the time when the injury was received, no emergency existed which demanded unusually prompt action is, like the absence of necessity, often mentioned by the courts as a subsidiary ground for declining to allow the servant to recover.¹ On the other hand the existence of an emergency is sometimes treated as a differentiating or confirmatory element, either absolutely precluding a court from declaring the servant negligent, as a matter of law, or tending to support the conclusion that he was free from negligence.²

In some of the cases which involve this evidential element the

⁴ A brakeman was guilty, as a matter of law, of contributory negligence precluding recovery for injuries from falling from the deadwood of a freight car and being run over by the car in attempting to walk along the deadwood, which was about 4 inches wide, while the train was in motion, without having anything to hold on to, even if such action was necessary to the successful uncoupling of the car from the tender of an engine. *Dooner v. Delaware & H. Canal Co.* (1895) 171 Pa. 581, 33 Atl. 115.

An employee riding upon a freight elevator and injured by his heel catching under a beam while projecting from the platform is not relieved from the imputation of contributory negligence by the fact that the goods upon the elevator were so arranged that there was not space enough at the edge for his feet to be placed wholly upon the platform, since in such case the position is so manifestly dangerous to a casual observer that he should not have taken it at all. *Hofmann v. Moss Engraving Co.* (1893) 4 Misc. 160, 23 N. Y. Supp. 787.

British Columbia Mills Co. v. Scott 18 5: 24 Can. S. C. 702. In an action for injuries caused by the fact that the lever designed to arrest by its fall the downward movement of the hammer of

a drop press did not fall as the servant anticipated when he removed the fastening by which he had kept it in an upright position, for the purpose of obtaining a more rapid movement of the hammer, it was held that if this mode of dealing with the lever was partially or entirely the cause of its not having fallen, the fact that the servant could not have earned ordinary wages if he had not so fastened it would not relieve him of the charge of negligence in having operated the press in an improper manner. *Ebert v. Hartley* (1899) 72 Conn. 453, 44 Atl. 723.

⁵ *Wilkinson v. Graves* (Q. B. D.; 1893) 9 Times L. R. 464.

⁶ See, for example, *Kellen v. Calumet Wooden Co.* (1900) 177 Mass. 128, 58 N. E. 182; *Turner v. Missouri P. R. Co.* (1893) 52 Mo. App. 648; *Southern R. Co. v. Arnold* (1897) 114 Ala. 183, 21 So. 954; *Cook v. Bullion Beck & C. Min. Co.* (1895) 12 Utah, 51, 41 Pac. 557.

⁷ In determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed to all the circumstances of the particular occasion. *Kane v. Northern C. R. Co.* (1888) 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16.

emergency is one produced by the necessity of doing a certain piece of work with unusual promptitude.³

In other cases the essence of the situation to be considered is that the servant was confronted by a serious danger; that he had not sufficient time to deliberate upon the comparative safety to the alternative courses of action open to him for the purpose of avoiding injury; and that the alarm or nervous excitement produced by the conjuncture impaired his reasoning faculties to such a degree that it was unjust to gauge the quality of his conduct by the ordinary standards. It is well settled that a servant who is suddenly exposed to great and imminent danger is not expected to act with that degree of prudence which would otherwise be obligatory. Or, as the doctrine is also expressed, a servant is not necessarily chargeable with negligence because he failed to select the best means of escape in an emergency.⁴

³The fact that when a brakeman undertook to make a dangerous coupling the cars had to be moved quickly to make way for an expected train has been mentioned as one of the facts tending to disprove negligence. *Lauchess v. Connecticut River R. Co.* (1883) 136 Mass. 1.

In deciding whether a brakeman, injured while attempting to couple cars, used due care and diligence, the jury may consider the fact that he was, on a sudden emergency, required to make the coupling in a hurry. *St. Louis, I. M. & S. R. Co. v. Higgins* (1890) 53 Ark. 458, 14 S. W. 651.

Evidence that a brakeman was injured while coupling a moving to a stationary car at a point on the road where the business of the company required coupling of cars to be frequently made, and where the road was defective; that the accident occurred in the night while he was obliged to carry a lantern, and at a time when it was necessary that he should act with promptness; and that he was not familiar with the condition of the track at that point,—is sufficient to sustain a finding that he was not chargeable with contributory negligence in going between the cars in attempting to make the coupling. *Horan v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 329, 56 N. W. 507.

In a case where a brakeman slipped on the dangerous surface formed by the accumulation of ice and snow on the end gate of a coal car which was lying at a slope of about 30 degrees, and there was no evidence that he knew the condition of the gate before the time when he was

about to step on it from the adjacent car, it was held not to be error to instruct the jury that the defendant would not be liable if the gate was defective, and could have been removed and fastened. Whether the brakeman was justified in incurring unusual risk in attempting to pass over it while he was in the position described, depends upon the haste required in the performance of the duty in which he was engaged. *McDermott v. Iowa Falls S. C. R. Co.* (1892) 85 Iowa, 180, 52 W. 181.

Whether the attempt of a special fireman in the employ of a railway company to get on a moving train while the discharge of his duty in endeavoring to arrest trespassers on such train constitutes negligence is a question of fact for the determination of the jury; and the fact that his companions made the same attempt under like circumstances indicates that the undertaking was not apparently perilous as to make it one which no reasonable man would refrain from attempting to perform upon. *Chicago, R. I. & P. R. Co. v. Kinnare* (1900) 91 Ill. App. 508, affirmed in (1901) 190 Ill. 1, 60 N. E. 100. See also cases cited in § 410, *supra*, and *post*.

⁴*Baltzer v. Chicago, M. & N. R. Co.* (1892) 83 Wis. 459, 53 N. W. 885; *Wiley City Coal Co. v. Healey* (1876) Ill. 126; *Chicago & G. T. R. Co. v. Kinnare* (1898) 76 Ill. App. 394; *St. Louis v. East Tennessee V. & G. R. Co.* (1892) 92 Ga. 658, 18 S. E. 999; *Cornett v. R. Co.* (1901) 47 C. C. A. 552, 108 F. 100 (train had jumped from engine, escape impending collision); *Detroux*

If the evidence adduced by the plaintiff tends to show that the alarm and confusing circumstances may have been such that a man of

Texas & P.R.Co. (1898) 50 La. Ann. 466, 23 So. 461 (similar facts); *Louisville & V. R. Co. v. Raina* (1893) 15 Ky. L. Rep. 423, 23 S. W. 505 (similar facts); *St. Louis, I. M. & S. R. Co. v. Touhey* (1899) 67 Ark. 209, 54 S. W. 577 (similar facts); *Haney v. Pittsburgh, C. C. & St. L. R. Co.* (1893) 38 W. Va. 570, 18 S. E. 748 (section hand jumped off hand car to avoid collision with train); *Chicago, R. I. & P. R. Co. v. Dignan* (1870) 56 Ill. 487 (trackman hurriedly jumped off a track to escape a train which had come upon him unexpectedly, and in the excitement of the moment stepped onto the ends of the ties of an adjoining track without looking to see whether any cars were approaching); *Richmond & D. R. Co. v. Farmer* (1892) 97 Ala. 141, 12 So. 86 (section foreman, while intently watching to see how a frog which he had been repairing worked under an engine which was passing over it, was suddenly surprised by another engine, and stepped in the wrong direction); *Houston & T. C. R. Co. v. Rodican* (1897) 15 Tex. Civ. App. 556, 40 S. W. 535 (section hand jumped on track in front of car when he discovered a train approaching it); *Bowen v. Chicago, B. & K. C. R. Co.* (1888) 95 Mo. 268, 8 S. W. 230 (tracklayer jumped off a train when bridge gave way); *Louisville & N. R. Co. v. Shirell* (1892) 13 Ky. L. Rep. 902, 18 S. W. 944 (servant trying to remove driftwood which had lodged against a bridge jumped into the river, when he saw that it was about to carry away the bridge); *Richmond & D. R. Co. v. Brown* (1893) 89 Va. 749, 17 S. E. 132 (servant took refuge close to a depot platform, when he was suddenly surprised by cars backing down on him); *Gumz v. Chicago, St. P. & M. R. Co.* (1881) 52 Wis. 672, 10 N. W. 11 (similar facts, the place of refuge being the side of a coal house); *Lake Erie & W. R. Co. v. McHenry* (1894) 10 Ind. App. 525, 37 N. E. 186 (switchman, while coupling, involuntarily jerked his hand backwards, so that it was caught between the deadwoods, as the approaching car gave a sudden lurch forward); *South West Improv. Co. v. Smith* (1888) 85 Va. 306, 7 S. E. 365 ("door boy" in a mine, without a signal, attempted to open the door to prevent the possible consequences to himself, of a collision between it and a train of loaded coal cars which, having been accidentally set

in motion, suddenly came down); *St. Paul Cord Combining Min. Co. v. McDonald* (1890) 14 Colo. 191, 23 Pac. 346 (miner, while ascending an incline leading out of a mine, was met unexpectedly by cars and tried to cross the track to get out of their way); *Johnson v. Steam Gauge & Lantern Co.* (1893) 72 Hun. 535, 25 N. Y. Supp. 689 (servant used a defective fire escape).

In *Cathull v. Chicago, M. & St. P. R. Co.* (1879) 47 Wis. 634, 32 Am. Rep. 796, 3 N. W. 376, the court allowed the action to be maintained where an engineer stayed at his post when a collision was imminent. It was held that, as there was no time for deliberation, and the engineer was not bound to jump off from a mere apprehension of uncertain danger,—there being some slight chance of averting the accident,—a special finding that he could have got off in time to save himself after reversing the lever did not necessarily require the inference that he was negligent.

In *Dickson v. Omaha & St. L. R. Co.* (1894) 124 Mo. 140, 25 L. R. A. 320, 27 S. W. 476, an engineer was held not to have been negligent, as a matter of law, in remaining on his engine after the front pair of small wheels of his engine was derailed and he had reversed his engine and put on air brakes. See also *Knapp v. Sioux City & P. R. Co.* (1884) 65 Iowa, 91, 54 Am. Rep. 1, 21 N. W. 198, to a similar effect.

In *Gumz v. Chicago, St. P. & M. R. Co.* (1881) 52 Wis. 672, 10 N. W. 11, the action was held maintainable, where a section man, thinking a train which was coming up behind the hand car on which he was, might be stopped in time to avoid a collision, remained on the car.

In none of the four cases last cited was the instinctive impulse to save human life treated as a distinct element. Accordingly, although the facts involved are similar to some of the situations discussed in § 360, *infra*, the decisions seem to be more correctly referred to the general principle now under review, than to the special rule which takes account of that impulse.

A laborer on a work train was not negligent, as matter of law, because he left the caboose in severely cold weather, to walk to the nearest village, when he found that the caboose did not afford adequate shelter and that the company had not provided any means of taking

ordinary prudence might have acted in the same manner as plaintiff did, the instructions to the jury should advert in appropriate language

him back to the place from which he started. *Schumaker v. St. Paul & D. R. Co.* (1891) 46 Minn. 39, 12 L. R. A. 257, 48 N. W. 559.

A street-railway employee having his leg crushed between a bank or wall of rock and the side of a motor upon which he was riding while being carried home from work, with his leg slightly projecting over the side, is not deprived of the right to recover on the ground that he might have saved himself by stepping up on the platform, where he realized his danger so suddenly that it would have required the exercise of practically instantaneous action and judgment. *Denver & B. P. Rapid-Transit Co. v. Dwyer* (1894) 20 Colo. 132, 36 Pac. 1106, Reversing (1893) 3 Colo. App. 408, 33 Pac. 815.

Failure of a railroad employee to escape from in front of a train of cars after learning of his danger is not such contributory negligence as will bar recovery, where he did not learn of his danger in time to give him a reasonable chance to escape, and his failure to do so was because of fright occasioned by the sudden approach of the train. *Southern R. Co. v. Pugh* (1896) 97 Tenn. 624, 37 S. W. 555. The right of a railway section foreman to recover for injuries due to the alleged negligence of an engineer in failing to observe a signal flag placed on a bridge upon which he was working does not depend upon the infallibility of his judgment in selecting the means of escape; and he may recover if he exercised due care in such selection, although it was possible for him to escape from the bridge in safety by different means. *Peoria, D. & E. R. Co. v. Rice* (1893) 144 Ill. 227, 33 N. E. 951. A servant caught on a bridge by a train is not, as matter of law, guilty of such contributory negligence as will prevent recovery, in starting to run toward the end of the bridge which he is rightfully upon, on seeing a train approaching, instead of getting down between the ties and climbing upon the timbers which constitute the frame of the bridge and holding on there while the cars pass above him, which was the only way to escape. *Olsen v. Andrews* (1897) 168 Mass. 261, 47 N. E. 90. It is not negligence to run on a railway track to escape a frightened team. *Moore v. Central R. Co.* (1878) 47 Iowa. 689.

A railroad employee who has been

caught between a car and a platform through the negligence of a vice principal cannot be charged with contributory negligence, although a reflection by him to have the car moved is not well judged. *White v. H. & T. C. R. Co.* (1898) Tex. Civ. App. S. W. 382.

In an action by a repairer employed by one railroad company, against another railroad company, whose trains he had a right to stop, he may be held negligent, as matter of fact, because he attempted to remove his car from the track, after seeing the signal to stop was disregarded by conductor of a backing train. *R. Northern C. R. Co.* (1878) 15 Hun.

Where a foreman and his crew were moving several loaded cars, grown somewhat awkward in appearance, and began to be fearful of injury to themselves; and the foreman told one of the crew to move and give him room, as he might have to stop any time, and the latter said he would get off right away, and in getting off the ground he was killed, the jury are justified in finding that he was contributorily negligent. *St. Louis, I. M. & S. R. Co. v. Touhey* (1899) 67 Ark. 209, 34 S. W. 577. Compare *Gulf, C. & S. F. R. Co. v. Knott* (1896) 14 Tex. Civ. App. 36 S. W. 491 (member of wrecked train jumped off of derailed car which suddenly turned over while it was being moved).

A quarryman is not chargeable with contributory negligence because, confronted with imminent peril from a blast of which he had not been warned in reasonable time to enable him to reach a place of safety, he sought refuge in an engine house, where he was injured, when it is not shown that he would not have been struck had he stayed outside. *Bellerive Stone Co. v. Mooney* (1897) 60 N. J. L. 321, 38 S. W. 835. Affirmed in (1898) 61 N. J. L. 39 L. R. A. 834, 39 Atl. 764.

An instruction to find for the defendant is erroneous, where it appears the accident happened to the servant owing to his being confused by the sudden rush of steam from an exhaust of the existence of which he had no knowledge, and the simultaneous opening of machinery near him. *Brown Hoisting & Conveying Mfg. Co.* (1899) 89 Ill. App. 113.

to these elements.⁵ If there is no such evidence, it is proper to charge that, in determining whether the servant used such means to extricate himself from his perilous position as a prudent man would have used, the jury are not authorized to take into consideration the question whether his excitement prevented him from thinking of the proper means of extricating himself.⁶

As the doctrine just stated is not applicable unless the impairment of the servant's mental faculties was excusable under the circumstances, he cannot recover, if he was not in any actual danger;⁷ nor

A member of a ship's crew, who jumps overboard to escape the dangerous consequences which he apprehends from a collision which has just taken place, is not necessarily negligent. *The City of Norfolk* (1893) 55 Fed. 98; *Killian v. Hyde* (1894) 63 Fed. 172.

For other similar decisions as to persons not in the employment of the defendant, see *Shearm. & Redf. Neg.* § 89.

It is not easy to reconcile the above-cited decisions with one in which it was held that a section hand, aiding to lift a hand car off the track to avoid a coming train, who, from excitement, failed to heed a sudden order by the boss to "stand clear and let her go," and continued in his endeavor, was guilty of contributory negligence barring a recovery for injury from collision with the train. *International & G. N. R. Co. v. Hester* (1888) 72 Tex. 40, 11 S. W. 1041. The court seems to have considered itself justified in setting aside a verdict for the plaintiff for the reason that he had abundance of time, after the order was given, to get out of the way, and that it was his own fault if he did not hear that order. The decision seems to be a clear invasion of the province of the jury,—especially as there was evidence that the servant was somewhat deaf. Apparently, none of the cases collected in this section were brought to the attention of the court.

⁵In a case of this description it was held proper to refuse an unqualified charge in the following words: "If the plaintiff was notified or had knowledge of the approaching train, and was also notified by the person under whose charge he was working to get out of the way of the approaching train, and plaintiff had time and opportunity to do so and did not, then defendant is not liable." It was laid down that, in view of the testimony, the case could not properly be made to rest upon the three facts of notice, time, and opportunity to es-

cape. *Frankson v. Chicago, R. I. & P. R. Co.* (1873) 36 Iowa, 377.

Where an engineer was killed in jumping from his engine to escape a collision, it was held error to charge a jury that he had a right to do so, and "that the fact that he jumped was proof that he thought jumping the safest course." Whether his act was a prudent one was declared to be a question for the jury, to be determined with reference to the degree of safety with which the jump could be made, and the imminence of the danger which threatened him at the time. *Central R. & Btg. Co. v. Roach* (1880) 64 Ga. 635.

To give an unqualified charge to the effect that an employer who negligently places an employee in sudden and imminent peril cannot excuse himself from liability on the ground that the employee, when in such sudden and imminent peril, lost his presence of mind, and failed to use ordinary care and caution to escape, is erroneous in a case where there is evidence tending to show that the injured servant had been ordered away from the place of danger before the accident occurred, and that he would have escaped if he had obeyed the order with reasonable promptitude. But such a charge is not objectionable, if the jury are also informed that the legal consequence of their inferring from the evidence that it was in the servant's power to have avoided injury by complying with such an order will be that the action cannot be maintained. *Dingee v. Lurue* (1900) 98 Va. 247, 35 S. E. 794.

⁶*Atchison, T. & S. F. R. Co. v. Van Belle* (1901) Tex. Civ. App. 64 S. W. 397.

⁷*Gulf, C. & S. F. R. Co. v. Knott* (1896) 14 Tex. Civ. App. 158, 36 S. W. 491; *Briggs v. Newport News & M. Valley Co.* (1894) 15 Ky. L. Rep. 618, 24 S. W. 1069. The latter case is certainly a rather strong application of the rule in the text, as it was that of a minor

if the danger was one of an ordinary type, not differing appreciably in magnitude from those frequently encountered by the servant in the course of his employment.⁸ Nor will the mere fact that the servant was alarmed, and sought to place himself where he might be able to readily escape from the apprehended danger, if the necessity should arise, excuse him if he failed to use reasonable care in attempting to reach the desired position.⁹

The doctrine does not inure to the advantage of a servant injured by his own antecedent negligence, created the emergency which required for sudden and dangerous action.¹⁰ But the mere fact that there

employee who was injured by jumping from a hand car on the approach of a coming freight train. The court decided the case on the broad ground that if, owing to his weakness of mind and physique, his head was affected by his position on the car, it was unavoidable, or a result which the employer was not bound to anticipate.

⁸ In *Gaffney v. New York & N. E. R. Co.* (1887) 15 R. I. 456, 7 Atl. 284, where a brakeman, while attempting to climb a car, was struck by a pile of lumber, it was urged that the piling of the lumber near the track made an unusual risk, which was misleading and confusing, and so presented a complication of circumstances which warranted the verdict of the jury in determining the question of the plaintiff's negligence. The court said: "We do not see any such complication. The plaintiff, knowing the lumber pile was near the track, jumped upon a moving train supposing he could escape it, and failed. As much as this could be said in almost every case of pure accident. We do not see that the company did anything to mislead or confuse him, or that he could have been misled or confused, except, possibly, that he may have thought the train was not going as fast as it really was going and that he had time to climb its side before reaching the pile. He was not ordered to get upon the train, and his place as head brakeman was on the car next to the engine, and not on the rear car. His getting upon the car, therefore, under the circumstances, was an act of his own choosing."

The mere fact that a brakeman was responding to a signal for brakes is no excuse for his swinging his body so far out from a side ladder that it comes into collision with the side of a bridge. *Hlick v. Flint & P. M. R. Co.* (1888) 67 Mich. 632, 35 N. W. 708.

⁹ An experienced railroad laborer, in a closed car having a door on the side, who, becoming alarmed by the rapid speed of the train over a road known to him to be very uneven, leaves a safe position nearer the door, so as to be able to get out in case of accident, and is crushed between the stove and the door through a passage of 2 or 3 inches without support or protection, might have gone on the other side of the stove in safety, and is thus injured by the open door by a sudden jolt. *Taylor v. Richmond & D. R. Co.* (1899) 109 N. C. 233, 13 S. E. 736.

¹⁰ A servant who brought himself into the perilous position by his disobedience to a rule (see §§ 366 *et seq.*) cannot recover. *Baltzer v. Chgo. & N. W. R. Co.* (1892) 83 Wis. 459, 53 N. W. 885.

A brakeman who, after setting the brakes on a car so tight as to cause it to stop, attempts to mount the car by stepping on the journal, and taking hold of a standard on the side of the car, no other means being provided for getting onto it, cannot recover for injuries caused by the standard flying round in his hand, inasmuch as the emergency which existed was one of his own creation. *Quirquet v. Atlantic S. R. Co.* (1900) 111 Ga. 315, 36 S. E. 599.

Recovery has been denied, where a section hand was injured while attempting to remove a hand car from the track immediately in front of an approaching train, which he would have observed he had watched for it, as he had been warned to do. *Nelling v. Chgo. & N. W. R. Co.* (1896) 38 Iowa 63 N. W. 568. On the second day of this case (98 Iowa, 559, 67 N. W. 100) the court did not lay any stress

taken by the servant to preserve himself from injury was adopted in contravention of the express orders of his superior will not prevent his recovering.¹⁴

359. Act done under the influence of bodily pain.—Culpability cannot be predicated, as a matter of law, with respect to an act which was the result of a convulsive movement resulting from severe bodily pain, although such an act would otherwise have been negligent.¹

360. Act done in attempting to save the life of another person.—In the United States it is now a well-established doctrine that, as a leading case on the subject succinctly puts it, "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons."¹ An essentially similar view has been adopted in England and Scotland.²

the failure to keep a lookout, and decided against the plaintiff on the simple ground that the time for removing the car was so short that it was clearly negligent to attempt to get it off.

An instruction on the theory of sudden exigency or emergency is properly refused, where the evidence is that a fireman was sent to ascertain the extent and nature of trouble with telephone wires, caused by a charge of electricity transmitted from the wires of an electric street railway company; that of his own volition, he ascended the railway company's pole, and was killed by contact with a charged wire; and that the same work could have been done by ascending the telephone company's pole 30 feet distant, where he would have avoided contact with the wires of the railway company. *Jackson & S. Street R. Co. v. Simmons* (1901) 107 Tenn. 392, 64 S. W. 705.

"Where a baggage master upon a train in imminent danger of collision jumps therefrom, it is no defense to an action for injuries sustained, that the conductor ordered him not to jump. When a collision is inevitable, such action becomes one of reasonable precaution." *Georgia R. & Bkg. Co. v. Rhodes* (1876) 56 Ga. 645.

"A brakeman is not guilty of contributory negligence, as a matter of law, precluding recovery for injuries to his foot by being jammed by a defective drawhead, in placing his foot on the drawhead to save himself from falling from the platform of the car as he let go of the ladder by which he was holding, in consequence of an injury to his finger, caused by the defective drawhead.

Baltimore & P. R. Co. v. Elliott (1896) 9 App. D. C. 341. A brakeman who is struck and hurt by a coupling link which breaks while he is attempting to make a coupling is not guilty of negligence, where through a natural impulse he throws himself forward upon another track upon which he falls fainting, without the ability to get off the track before he is struck by a car thereon. *Louisville & N. R. Co. v. Thornton* (1898) 117 Ala. 274. So, 778. In *Flott v. Johnson Engineering & Foundry Co.* (1897) 19 App. Div. 136, 45 N. Y. Supp. 980, where a servant was working in a shallow pit underneath the cable of a street car line, and was injured through placing his hand on a rail while a car was passing, the court held that, in view of the fact that the movement of the servant was involuntary, caused by the cable wire striking him on the head, an instruction to the effect that he could not recover if the injury resulted from his not keeping quiet after being warned of the approach of the car was too broad. On the former appeal (1896) 10 App. Div. 308, 41 N. Y. Supp. 792, the rationale of the decision was different.

¹ *Eckert v. Long Island R. Co.* (1871) 43 N. Y. 502, 3 Am. Rep. 721.

In *Central R. Co. v. Crosby* (1885) 74 Ga. 737, 58 Am. Rep. 463, an instruction that if an engineer, remaining on his locomotive, when a collision was imminent, believed, and had reason to believe, that in the emergency, by sanding the track or by otherwise working the engine, he could prevent the collision and thus save life, and that it was necessary to that end that he remain at his post, his widow was entitled to recover;

It will be observed that in many of the cases the circumstances involved have been such that a secondary result of success in the effort made by the injured person to save life would necessarily have been the preservation of some part of the master's property. His effort has the effect that preservation is sometimes referred to as a distinct

but if not so necessary, and he knew it, or ought to have known it, then she could not recover, was held proper when read in connection with the entire charge. "Courts," it was said, "should place themselves in the position of the engineer at the moment of such imminent danger, demanding such instantaneous decision and action, and should not scan closely the grounds of hope he may have had to save others, though risking himself in the effort. . . .

We hold, with that court, that it must be clear from the facts, that the engineer could not, with any degree of probability, be of service at his post, before courts should hold it want of common care for him to brave danger and stand at his post."

Similarly it has been held that a motorman on an electric car is not negligent in remaining at his post, and endeavoring to avert a collision with another car. *Gamble v. Akron, H. & C. R. Co.* (1900) 63 Ohio St. 352, 59 N. E. 99.

An employee in a steel works who undertakes to stop a stream of molten iron which has unexpectedly begun to flow through the tap hole of a cupola under circumstances when other employees are thereby put in peril is not debarred from recovery. *Maryland Steel Co. v. Harney* (1898) 88 Md. 482, 42 L. R. A. 842, 42 Atl. 60.

The contributory negligence of a quarryman injured by a blast which was fired while he was operating a derrick upon which another employee was at work, in failing to abandon the latter and seek a place of safety as soon as he was warned of the anticipated blast, is for the jury upon evidence that it was a part of his duty to lower his fellow employee to the ground as soon as the warnings for blasts were given. *Belleville Stone Co. v. Mooney* (1897) 60 N. J. L. 323, 38 Atl. 835, Affirmed in (1898) 61 N. J. L. 253, 39 L. R. A. 834, 39 Atl. 764.

See also cases cited in note 3, *infra*.

In the following cases this doctrine was applied in an action against a stranger: *Louisville & N. R. Co. v. Orr* (1898) 121 Ala. 489, 26 So. 35; *Becker v. Louisville & N. R. Co.* (1901) 22 Ky.

L. Rep. 1893, 53 L. R. A. 267, 61 S. W. 997; *Lynch v. Sampson* (1879) Mass. 500, 30 Am. Rep. 692, 1881; *Waltosh, St. L. & P. R. Co.* (1883) Mo. 567, 53 Am. Rep. 594, 61 State (1893) 137 N. Y. 1, 19 L. E. 365, 33 N. E. 142; *Soon v. H. W. Mfg. Co.* (1897) 16 App. Div. 2, N. Y. Supp. 641; *Peaslee v. Longwood* (1891) 48 Ohio St. 1, L. R. A. 190, 28 N. E. 172; *P. & T. Co. v. P. R. Co.* (1883) 41 La. 862, 6 So. 690; *Walters v. D. & S. Co.* (1893) 12 App. Div. 145, 54 Pac. 960.

In a leading case it was laid by Lord Esher, *arguendo*, that a servant going to show that the servant injured in doing an act which was directed to the preservation of life or the protection of his master's property was not to negative contributory negligence. *Thomas v. Quartermaine* (1887) 18 Q. B. Div. 685, 690, 56 L. J. Q. B. 340, 57 L. T. N. S. 537, 35 Week. 555, 51 J. P. 516.

A finding by a trial judge that a servant was no contributory negligence would be set aside where the evidence was to the effect that the plaintiff's duty as an "underviewer" in one part of a mine, having reason to suppose that the life of a fellow workman in another part of the mine was in danger from poisonous gases, had gone, without ordering his rescue; that, although he was most overcome by the gas, while on his way to the place where the other man was lying, he had persisted in his attempt to save him; and that, on finding him quite dead, he had then carried the body to the shaft, and succumbed to the poisonous gases. *Shuck v. Norwegian, etc., Titanic Co.* (B. D.; 1884) 1 Times L. R. 117. The grounds of defense were (1) that at the time of his death the "underviewer" had been a volunteer, and not a servant acting within the scope of his duty, and (2) that he had been guilty of contributory negligence. *Day, J.*, was of opinion that the defendant's master had an implied order, in case of danger to life, to assist as much as possible, and do anything by which they might

tional motive, the operation of which tends to absolve him from the imputation of negligence.²

bank their assistance would be of real value in saving the lives of their fellow workmen. Hawkins, J. (now one of the Lords Justices), admitted that this principle would have protected the plaintiff if he had not been warned to wait before going to find the imperiled workman, and finally relied upon the theory that it was negligence to go on after he had been nearly overcome by the gas. He declined to appeal, ask, I for on the ground that the case was one upon which there was no authority, was refused.

It cannot be held, as a matter of law, that if a person is exposed to danger by the fault of another, he has failed to exercise reasonable care and prudence for his own safety merely because he has paid regard to the safety of a fellow workman as well as his own, and so brought himself into further peril which he might have escaped if he had thought of nobody but himself. *Withers v. Keveland Canal & Coking Coal Co.* (1897) 24 Sc. Sess. Cas. 4th series, 1001. (This statement of the effect of the decision is extracted from the opinion of Lord Kinnear.) There the injured person was working with a companion on a stationary wagon at the foot of an incline, when he saw a loaded wagon approaching at a high rate of speed. He jumped off, and, in the hurry and confusion of the moment, tried to stop the wagon by inserting a prop between the spokes of the wheel, the result being that he was crushed under the wagon. Lord Young said: "I do not speak about interposing to save property, although that might raise a question worthy of consideration, but to save life or limb I think there is such a duty as the law will take account of, and I hold that, if he [the plaintiff] performed such a duty, it cannot be pleaded that he voluntarily exposed himself to danger in turning back on the spur of the moment to save his companion, and that, instead of doing so, he ought to have allowed his companion to take his chance of being killed." Lord McLaren and Lord Moncrieff were for allowing the case to go to the jury, as, for aught that appeared, it might be within the scope of the principle that, if a person who is exposed to imminent danger through the fault of another takes reasonable means to save himself, he does not lose his right to compensation because he has not taken the best possible means, or because he

may have lost time in endeavoring to save a fellow creature and been thereby unable to avoid being hurt. Lord Macdonnell, Lord Alton, and Lord Trayner dissented on the ground that the risk was voluntarily incurred.

In *Woods v. United Mine R. Co.* (1886) 13 Sc. Sess. Cas. 4th series, 1118, as 23 Sc. L. Rep. 798, it was held to be always a question for the jury, whether a person is negligent in trying to save the life of another.

Negligence is not inferable, as matter of law, where an engineer stops at his post and tries to stop the train, when he suddenly discovers that it is running onto an open switch. *Pennsylvania R. Co. v. Ream* (1881) 89 Ind. 453, 46 Am. Rep. 173. On that there is a dangerous obstruction on the track. *Atchafalpa, P. & S. F. R. Co. v. Houn* (1885) 57 Kan. 154, 45 Pac. 376, disapproving of an instruction to the effect that, if the engineer could have saved his life by jumping off, it was his duty to do so. *Compton C. R. Co. v. Chicago, M. & St. P. R. Co.* (1879) 47 Wis. 634, 32 Am. Rep. 796, 3 N. W. 376; *Dickson v. Omaha & St. L. R. Co.* (1894) 124 Mo. 110, 25 L. R. A. 320, 27 S. W. 476, as stated in § 358, note 4, *supra*.

A servant is not guilty of contributory negligence in attempting to throw from the train, in order to protect himself and the property and other employees of the employer, a box containing sticks of dynamite which has caught fire from the engine. *Schwartz v. Shall* (1898) 45 W. Va. 405, 31 S. E. 944.

A trackman is not, as matter of law, guilty of contributory negligence precluding recovery for injuries from being struck by a hand car as it was thrown from the track by an engine, in remaining on the track until the engine was close to him, in an effort to remove the hand car from the track in order that it might not jeopardize the safety of the approaching train and the lives of the persons thereon. *Dailley v. Burlington & M. River R. Co.* (1899) 58 Neb. 396, 78 N. W. 722; *Walker v. Shelton* (1898) 59 Kan. 774, Appx. 52 Pac. 441; *Omaha & R. Valley R. Co. v. Krauenbuhl* (1896) 48 Neb. 553, 67 N. W. 447.

It is a question for the jury whether a watchman overtaken by a train on a trestle was guilty of contributory negligence in running a race with the train for the next cage, instead of abandoning

What degree of imprudence constitutes rashness within the meaning of the qualifying clause in the doctrine, as above stated, is a question which it is not easy to determine. But it seems very doubtful whether any court would ever take upon itself to declare that a person who had risked his own life to save that of another had overstepped the permissible limits of venturesome action, unless the evidence was such as to indicate a degree of temerity not distinguishable from deliberate self-destruction. The present writer has no hesitancy in expressing the opinion that culpability should not, at all events, be inferred, as a matter of law, in any case where it is possible to infer upon the facts that there was some chance, however small it might be, of accomplishing the object aimed at without injury to life or limb. It has been expressly held that every reasonable allowance should be made for the disturbing mental effects of the excitement induced by such conjunctures as those contemplated by the doctrine. A person should not be held culpable merely for the reason that the risk he incurred proved to be actually greater than he had anticipated.⁵

The doctrine thus applied does not inure to the benefit of a servant if the dangerous predicament of the person whose life he

was saving himself by getting out on one of the water platforms at the side of the trestle, as he might have done, where there would have been some danger to the train in leaving the tricycle on the track, and the possible rate at which the tricycle could be propelled was nearly equal to that at which the train was supposed to run under the schedule. *Louisville & N. R. Co. v. Serbert* (1900) 21 Ky. L. Rep. 1603, 55 S. W. 892.

Where there is no satisfactory evidence to show the probable or possible effect of a collision between the hand car on which the servant was and the approaching train which ultimately struck it, or that the train was really in danger of being wrecked, it is not error to refuse to give an unqualified instruction to the effect that exposure of life by an employee to save life is neither wrongful nor negligent, if attempted within the scope of his duty. *Condiff v. Kansas City, Ft. S. & G. R. Co.* (1891) 45 Kan. 256, 25 Pac. 562 (verdict for defendant upheld).

In one case it was held that a railroad employee was guilty of such contributory negligence as would prevent a recovery, by continuing to drive a rail back into position after seeing a train approaching at the rate of 30 or 40 miles an hour, although the train would have

been wrecked if he had not continued to do so. *Raulston v. East Tennessee, V. & G. Co.* (1894) 94 Ga. 536, 20 S. E. 12. In this case reference was made to the cases cited in this section. The court simply decided that the servant could not recover because there was nothing to prevent him from seeing the train and getting off the car sooner than he did, and refused to attach any controlling importance to the testimony of a witness, that the train would have been wrecked if the car had not been replaced.

In another case it was held that an employee was guilty of such contributory negligence as would prevent a recovery for an injury received in attempting to remove a railroad tie from the track immediately in front of a moving train, although the engine which struck the train asked for its removal. *Girard Lumber Co.* (1893) 91 N. W. 496, 65 N. W. 173. There the tie was about 80 feet away, while the platform was 20 feet from the track when the plaintiff started to take hold of the tie. The court's position was that, in the face of such manifest and imminent danger, self preservation was an absolute paramount duty.

But it may fairly be doubted whether either of these rulings would be sustained in most jurisdictions.

⁵ *Pennsylvania Co. v. Lang*

to save was the direct result of an act of antecedent negligence on the part of the servant himself.⁶

361. Act done in attempting to preserve the employer's property.—

The courts have sometimes allowed the action to be maintained upon the theory that, when a servant is suddenly confronted by an emergency in which his master's property is threatened with destruction or serious injury, the fact that he attempted to preserve that property, and in doing so exposed himself to greater risks than would have been encountered by a prudent person who was thinking only of his own safety, will not necessarily render him chargeable with contributory negligence.¹

This doctrine, however, does not afford any protection to a servant whose conduct was essentially rash. It does not justify him in going into a place in which he will be exposed to an imminent peril which may at any moment eventuate in disaster.² Nor does it serve as an excuse where the damage with which the property was threatened was comparatively slight, when considered with relation to the extremely

(1891) 48 Ohio St. 316, 13 L. R. A. 190, 28 N. E. 172.

¹As, where a railroad section boss took his wife as a passenger upon a hand car in violation of the rules of the company, and was injured while endeavoring to save her upon a collision of such car with an engine. *Mischke v. Chicago, B. & Q. R. Co.* (1894) 56 Ill. App. 472. Or where an employee was killed, while attempting to rescue another employee who was assisting him from a dangerous position in which he had been placed because of a defective belt, and the evidence showed that the injury would not have happened but for the negligence of such employees in attempting to place the belt on a pulley without instructions and without its being in the line of their duty. *Sann v. H. W. Johns Mfg. Co.* (1897) 16 App. Div. 252, 44 N. Y. Supp. 641.

Compare cases cited in § 358, note 10, *supra*.

²Culpability is not predicable, as a matter of law, where a section man, who is helping to remove a hand car from the track when a train is approaching, is injured through miscalculating the time necessary to complete the process. *Winowski v. Winona & W. R. Co.* (1900) 80 Minn. 245, 83 N. W. 159; *Pennsylvania Co. v. McAffrey* (1894) 139 Ind. 430, 29 L. R. A. 104, 38 N. E. 67.

In *Schall v. Cole* (1884) 107 Pa. 1, where a governor belt broke and the

engine ran away, and the plaintiff was injured in consequence of his adopting a wrong course in making a hurried attempt to preserve the machinery, it was held proper to refuse a charge to the effect that, if the plaintiff conceived it to be his duty to save his machine from damage, and in so doing caused the injury, his mistaken conception of duty did not relieve him from the consequences of his contributory negligence in doing an act which aggravated the danger of the situation.

A complaint in an action for injuries to plaintiff's decedent, causing his death, is not demurrable where it alleges that it was the duty of the deceased to take care of its cars in a certain yard; that, seeing an unattended car upon a track in such yard approaching another car, so that it would collide with the latter unless it was arrested, the deceased, in order to prevent such collision, and "without fault or negligence on his part," undertook to climb upon the top of the approaching car by an outside ladder thereon; and that, while he was so climbing, the two cars collided, causing the injury. *Kellen v. Chicago, M. & St. P. R. Co.* (1880) 50 Wis. 381, 7 N. W. 291.

See also cases cited in § 360, notes 2, 3, *supra*.

³*Maltbie v. Belden* (1901) 167 N. Y. 307, 54 L. R. A. 52, 60 N. E. 645, Reversing (1899) 45 App. Div. 384, 60 N. Y. Supp. 824, where the servant took

dangerous nature of the course of action pursued with a view to stop it.³ It is also conceded that less indulgence should be shown to a servant whose dangerous course of action was prompted merely by a desire to preserve his master's property, than to a servant whose compelling motive was his solicitude for the safety of human beings.

D. COMMISSION OF ACTS SPECIFICALLY FORBIDDEN.

362. Unlawful acts.—There can be no question that, where a servant's injury was proximately caused by the fact that he was violating a statute or municipal ordinance, the meaning and effect of which is perfectly clear, he cannot recover damages.¹ This doctrine is applied regardless of the fact that the employer may have directed his servants to violate the law,² or may have sanctioned the growth and continuance of a custom which amounts to a contravention of the

a path which led him past a burning tree.

¹A yard brakeman cannot recover of a railroad company for an injury received in falling from a freight car loaded with coal, while attempting to stop the car from running down a track and jumping possibly off the end of the car by jumping under the brake beam at the forward end of the car and pressing it down with his feet, holding himself to the car with one hand and pulling up the brake chain with the other, the excuse for the act being that the brake staff was so bent that it could not be operated—there being no rule of the company or direction from any of its officers, requiring such a service of the brakeman. *Judkins v. Main C. R. Co.* (1888) 80 Me. 417, 14 Atl. 735.

²*Condiff v. Kansas City, Ft. S. & G. R. Co.* (1891) 45 Kan. 256, 25 Pac. 562.

³This rule has been applied where the servant was violating a statutory provision requiring all trains to stop at a certain distance from a crossing where two railroad lines intersect each other on the same level. *Chicago & N. W. R. Co. v. Snyder* (1886) 117 Ill. 376. Or a statutory provision which prohibited miners from carrying a drill with them on the hoisting cage. *Illinois Fuel Co. v. Parsons* (1890) 38 Ill. App. 182. Or an ordinance prohibiting trains from running at more than a certain speed. *Lake Shore & M. S. R. Co. v. Parker* (1890) 131 Ill. 557, 23 N. E. 237; *Illinois C. R. Co. v. Murphy* (1893) 52 Ill. App. 65. Or where a miner used an

iron rod for tamping charges of black powder, knowing that it was dangerous to do so. *Shanklin v. Turangunbrietary Gold Min. Co.* (1889) 3 Q. B. 441, 14 L. J. 147.

Where a statute (carriages regulated by act of 1884) required that "drivers as well as their employers should see that vehicles were provided with adequate brakes and efficient breeching, it was held that a driver could not recover for an injury caused by the absence of such safeguards. *Patterson v. Stevens* (1891) 11 New So. Wales L. R. (L.) 83.

It has been held that a railroad engineer who was voluntarily engaged in the transportation of Confederate troops, for the purpose of making a contribution to the government of the United States, cannot recover for injuries caused by the carelessness of other employees engaged in the same illegal employment. The court said that it is only where both parties have been engaged in the same illegal transaction that the maxim "*In pari delicto potior est conditio defendentis*" applies. *Wallace v. Georgia* (1868) 38 Ga. 199, 95 Am. Dec. 3.

Under a statute declaring it to be the duty of the "owner, agent, or operator" of a mine, to put catches on the cage at the top of a shaft, the fact that the "pit boss" saw that such catches were put on was held to be such contributory negligence as would bar recovery for his death, caused by the failure of the catches. *Beaucoup Coal Co. v. Cooper* (1888) 111 Ill. App. 313.

²*Missouri, K. & T. R. Co. v. Ro*

This rule is perhaps subject to a qualification in the servant's favor, where the act which he was ordered to do was one which was not obviously, and to his own knowledge, within the statutory prohibition. Under such circumstances it has been held that he may recover, although his compliance with the orders given may have rendered him, as a matter of fact, a participant in the breach of the statute.⁴

As to the right of action for injuries received on Sundays, see § 326, notes 2, 3, *supra*.

363. Acts done in contravention of orders.—(See also § 342.)—According to nearly all the decisions, contributory negligence should be inferred, as a matter of law, whenever the injury resulted from the servant's noncompliance with a specific order given by the master or his representative, even though such an inference might not be a necessary one if the order were not a factor in the case. This doctrine is applicable whether the order related to the position which the servant was to take at a given time or place,¹ or to the manner in

(1898; Tex. Civ. App.) 46 S. W. 270 ordinance fixing the rate at which trains were to be run).

It may be mentioned in this connection that, in an action against a third person, recovery has been denied where the work for which the servant was engaged could not be lawfully executed unless a license was first granted by the proper authorities, and the servant's employer had failed to procure such a license. *Banks v. Highland Street R. Co.* (1884) 136 Mass. 485, holding that where an employee of a telegraph company, to which a municipality has not issued any license to run its wires through the streets, is injured by a street car running against a wire which he was stretching, he cannot maintain an action against the railway company, unless the driver was guilty of wanton recklessness.

¹*Coal & Min. Co. v. Clay* (1894) 51 Ohio St. 542, *sub nom.* *Consolidated Coal & Min. Co. v. Floyd*, 25 L. R. A. 848, 38 N. E. 610 (holding it error to instruct a jury that a miner could recover, although he had transgressed a statute imposing upon miners the duty of propping the roof of the drift where he was working); *Voshesky v. Hillside Coal & I. Co.* (1897) 21 App. Div. 168, 47 N. Y. Supp. 386 (miner transgressed statute prohibiting all persons from riding on loaded cars).

²*Campbell v. Calderbank Steel & Coal Co.* (1898) 25 Se. Sess. Cas. 4th series, 753. There the servant had violated a

clause of the English explosive act of 1875, but the court considered that the inference of fault was rebutted by the fact that he was new to the work, and knew nothing about the clause in question. The consideration thus relied on, however, seems to be insufficient to overcome the effect of the general presumption entertained with regard to a servant's knowledge of the contents of a public statute.

³*O'Brien v. Staples Coal Co.* (1896) 165 Mass. 435, 43 N. E. 181 (servant went into vicinity of apparatus and was caught by it while working in its accustomed manner); *Rome & D. R. Co. v. Chastain* (1889) 88 Ala. 591, 7 So. 94 (brakeman attempted to couple certain cars in violation of conductor's order); *Mendota Light & Heat Co. v. Laferty* (1900) 92 Ill. App. 74 (workman asphyxiated by reason of his having removed the cap from the end of a gas main on which some alterations were to be made); *Knickerbocker Ice Co. v. De Haas* (1890) 37 Ill. App. 195 (servant rode on a scraper, and was kicked by vicious horse); *Lindberg v. Brotherton Iron Min. Co.* (1893) 97 Mich. 443, 56 N. W. 846 (employee in mine worked at pump, while the men at the windlass were raising and lowering buckets above him).

Where defendant's conductor, before removing new cars from the yard where manufactured, examined the cars and found no person about them, and the proper signal was then given, the rail-

which an act incident to his duties was to be done,² or to the

road company is not liable for the death of an employee of the car company, who had crawled under one of the new cars for the purpose of completing some repairs, in violation of a direction of the employer. *Cooper v. Lake Shore & M. S. R. Co.* (1887) 66 Mich. 448, 33 N. W. 541.

A brakeman who at the time of his employment knows that he will be required to couple cars provided with a Miller hook to those provided with a common drawhead, and is instructed not to stand between the cars while making such coupling, and is warned just before attempting to make a coupling that it is to be of that kind, is guilty of such contributory negligence as will prevent a recovery for his death, where he stands between the cars while making the coupling. *Coffman v. Chicago, R. I. & P. R. Co.* (1894) 90 Iowa, 462, 57 N. W. 955.

For a servant to take a position on the platform of a car in violation of orders is negligence. *Smithwick v. Hall & U. Co.* (1890) 59 Conn. 261, 12 L. R. A. 279, 21 Atl. 924. A track repairer who rides on the pilot of an engine instead of in the box car provided for his transportation is negligent. *Lehigh Valley R. Co. v. Greiner* (1886) 113 Pa. 600, 6 Atl. 246.

A brakeman killed in a collision when another train ran into the rear of that on which he was stationed, while it was awaiting orders at a junction, is guilty of contributory negligence, where the deceased was on the front platform of the caboose, and not at the rear end or on the track behind the train where his duties as a flagman required him to be. *Wabash R. Co. v. Zerwick* (1897) 74 Ill. App. 670.

A brakeman who, of his own accord and in disobedience of orders, leaves the brake which he is told to operate, and attempts to reach another one by passing over a coal car, is guilty of negligence which will prevent his recovering damages if he is thrown off that car by a sudden jolt. *Louisville & N. R. Co. v. Woods* (1894) 105 Ala. 561, 17 So. 41.

A track hand ordered to walk with a red light backwards and forwards over the track between certain points, at one of which a red light was placed because of a crack in the embankment due to a heavy rain, who stops a train, and in response to an inquiry says the track is all right until the red light is reached, and without invitation gets on the en-

gine and rides until it plunges down a chasm where a washout occurred, by which he is killed,—is the author of his own misfortune, where he has no opportunity to pass the place in pursuance of his orders several times before the accident occurred. *Shenandoah Va. Co. v. Lucado* (1889) 86 Va. 330, 10 E. 422.

An indemnity which, under an accident allowance scheme of a railroad company, is to be paid "in the event of the death of the insured from an accident in the discharge of duties in the company's service," is not payable where the insured was killed while en route to a yard, in direct contravention of the company's orders, for the purpose of reaching the office where he was to receive the check which it was necessary to obtain before his hours of work began. *Vickery v. Great Eastern Ry. Co.* (1896) 14 Times L. R. 562 (Hawkins, J., sitting alone).

A servant who has reported a dangerous spot in the roof of a mine while working, and, contrary to orders, continues working without waiting for the repairs which soon came, cannot recover for injuries caused by the fall of the roof. *Knight v. Cooper* (1892) 36 W. Va. 232, 14 S. E. 999. A servant in a mine who disobeys a prohibition as to touching the hoisting bucket up an incline and is injured by the breaking of a rope, cannot recover. *Putnide v. L. & N. R. Co.* (1889) 20 Nev. 303, 21 Pac. 67. A servant who fails to follow his instructions to stand at one side instead of in front of an engine wheel, and is injured in consequence of such failure while the wheel bursts, cannot recover. *See Foster* (1906), 33 L. R. App. 138, 8 S. cases cited in § 337, *supra*.

² *Cahill v. Hilton* (1887) 100 N. E. 512, 13 N. E. 339 (servant was running a belt while the machinery was in motion); *Marnin v. Kitson Mack* (1893) 159 Mass. 156, 34 N. E. 1 (servant did not wait to procure a new piece in putting a heavy piece of machinery on an elevator); *Gardner v. Michigan C. R. Co.* (1886) 58 Mich. 26 N. W. 301 (switchman tried to couple cars in motion); *Murphy v. C. & S. F. R. Co.* (1889) 73 Tex. 125, 12 S. W. 125 (fireman mounted on tender at the end approaching bridge); *Richmond & D. R. Co. v. Risher* (1887 Va. 335, 12 S. E. 786 (brakeman attempted to uncouple cars from a train

which he was or was not to undertake,³ or to the purpose for which an appliance was to be used, or to the precautions to be adopted while the work was going on.³

Minors, as well as adults, are within the scope of this doctrine.⁶

train, and caught his foot in a frog); *Robinson v. West Virginia & P. R. Co.* (1895) 40 W. Va. 583, 21 S. E. 727 (train was run at excessive speed over a certain curve, and was derailed); *Leon v. Lehigh Valley R. Co.* (1900) 196 Pa. 610, 46 Atl. 937 (derailment caused by running an engine in excess of the speed prescribed by a special notice on the bulletin board informing engineers that a certain piece of track was dangerous); *Princeton v. Merchants' Cotton Co.* (1900) Rap. Jud. Quebec, 19 C. S. 62 (employee, while shoveling coal from a pile, the top of which was frozen, permitted the frozen crust to remain); *Georgia P. R. Co. v. Mapp* (1888) 80 Ga. 631, 6 S. E. 24 (servant engaged in unloading cars on a siding started cars with a crowbar). A railroad company is not liable where a brakeman started to make a switch without orders, when his duties required him to do it only when ordered, and was killed by the starting of the cars before he was ready. *Kentucky C. R. Co. v. Jamieson* (1892) 14 Ky. L. Rep. 345, 20 S. W. 258. Rehearing Denied in (1892) 14 Ky. L. Rep. 347.

Negligence is inferable where the evidence is that an engineer ran his train onto a siding, with orders to allow three sections of train running in the opposite direction to pass; that he went to sleep and was awakened by a train which proved to be the second section, but which the indicator on the caboose showed to be the third; that the passing section whistled and also carried lights to indicate that another section was following; that the engineer whistled, thus showing that he understood the signal; and that the conductor of the stationary train, seeing the indicator on the caboose and assuming it to give correct information, ordered the engineer to proceed, which he did. Under such circumstances the engineer was guilty both of a breach of specific orders from the train dispatcher, and of a violation of his duty to keep a proper lookout and make sure that the track was clear. *Galeston, H. & S. A. R. Co. v. Brown* (1901; Tex.) 63 S. W. 305, Reversing (1900; Tex. Civ. App.) 59 S. W. 930.

³*Chidinsky v. Hoopes & T. Co.* (1894) 1 Marv. (Del.) 273, 40 Atl.

1127. Negligence is inferred where a servant, in disobedience of orders, undertakes work outside the proper scope of his employment. *Indiana Natural & Illumination Gas Co. v. Marshall* (1898) 22 Ind. App. 121, 52 N. E. 232.

⁴A workman injured in leaving a ship, by the fall of a ladder insecurely placed, cannot recover where he has been told not to use it. *The Privateer* (1883) 14 Fed. 872. Compare the more general principle stated in § 342, *supra*.

⁵*Munn v. Wolff Mfg. Co.* (1900) 94 Ill. App. 122 (omission to put on goggles while working with an emery wheel).

No action can be maintained where a servant, departing from his instructions, undertakes, in conjunction with a co-servant, to lower a heavy stone by means of the handles of a derrick, the result being that the one operated by the co-servant came off and threw the whole weight on that operated by the plaintiff, jerking it out of his hand and causing it to revolve rapidly and strike him. *Lehman v. Bagley* (1898) 82 Ill. App. 197.

A car repairer cannot recover for injuries caused by his failure to comply with the instructions he had received with regard to setting out signal flags. *Chicago, B. & Q. R. Co. v. McGraw* (1896) 22 Colo. 363, 45 Pac. 383.

Where, in an action by an employee against his employer for injuries resulting from his being knocked off a bench or path on the face of a cliff where he was at work, and falling 75 feet to the bank below, it is claimed that he was guilty of contributory negligence in not following the instructions of the foreman to have a rope tied around him to prevent falling, and he denies that such instructions were given him, the question of his contributory negligence should be submitted to the jury. *Di Vito v. Cragg* (1901) 165 N. Y. 378, 59 N. E. 141. Reversing (1898) 35 App. Div. 155, 55 N. Y. Supp. 64.

⁶*Card v. Wilkins* (1898) 61 N. J. L. 296, 39 Atl. 676 (boy of twelve years of age was explicitly forbidden to do a particular act in connection with a machine on which he was working); *Pennsylvania Coal Co. v. Nee* (1888; Pa.) 12 Cent. Rep. 524, 13 Atl. 841 (boy employed to keep culm in motion down a

But presumably cases may arise in which a child's mental incapacity to understand an order, or the danger involved in disobeying it, or physical incapacity to carry it out, would be material in the connection.

The mere fact that the servant was not warned that the proposed act was dangerous does not render the doing of that act any the less culpable.⁷

If the evidence is conflicting as to whether the servant actually disobeyed an order the meaning of which is not open to dispute, the case must be submitted to the jury.⁸ But if the question of the servant's disobedience depends simply upon whether the order bears one or other of two meanings, its proper scope is for the court to determine.⁹

In cases where the essence of the negligence imputed to the servant is that he was in a position where he should not have been, his conduct is often viewed rather as an act of omission than of commission, and the inability to recover is put upon the ground that his presence

on the chute in a coal breaker did not enter into the place prescribed); *McMullen v. Union News Co.* (1891) 144 Pa. 332, 22 Atl. 706 (newsboy attempted to get off moving train); *Robertson v. Cornwallison* (1888) 34 Fed. 716, and the case cited in the next note.

An errand boy twelve years of age and of more than ordinary intelligence, employed in the fourth story of a factory, who, when sent down on an errand not relating to freight, leans upon a chain which hangs across the entrance to the shaft of the freight elevator to look for the elevator, upon which he has no right to ride, and is injured by the giving away of the chain,—is guilty of contributory negligence relieving the owner of the building, who had charge of the elevator, from liability for a defect in the hook on which the chain was fastened. *Knorr v. Hall Steam Power Co.* (1893) 69 Hun, 231, 23 N. Y. Supp. 490.

⁷ *Bergeron v. Tooke* (1896) Rap. Jud. Quebec, 9 C. S. 506 (girl in factory combed her hair before the signal was given to cease work, and, while she was stooping to pick up her comb, her hair caught in an unguarded shaft).

⁸ *Stringham v. Stewart* (1885) 100 N. Y. 516, 3 N. E. 575.

⁹ A railroad company is not liable for the death of an engineer in a collision occasioned by the misconstruction and consequent disobedience, by himself and

the train conductor, of orders which, taken in connection with the general rules well known to both, are plain, and not misleading. *Norfolk & W. R. Co.* (1892) 88 Vt. 14, 14 S. E. 535.

The designation "middle brakeman" and the general location implied in, are not construed as confining a brakeman exclusively to one part of the train. Hence, the mere fact that he was not in the middle of the train at the time of the accident will not prevent the maintenance of an action for his death resulting from collision. *An v. New York, L. E. & Co.* (1886) 29 Fed. 72 (jury directed for plaintiff on this point).

An engineer, is not prohibited from running at a greater rate of speed than 25 miles an hour by an order to run at 25 miles an hour on the whole trip, including stops. *Houston & T. C. Ry. v. Higgins* (1900) 22 Tex. Civ. App. 55, 35 S. W. 744.

A direction by a freight conductor to a brakeman, to ride on top of the engine to give his assistance in going down a grade, does not make the brakeman disobedient in going upon the engine at a place where there are no hills to be descended, so as to prevent a recovery for his death caused by the derailment of the engine. *Texas & P. R. Co. v. Munnell* (1898) 148 Tex. Civ. App. 353, 40 S. W. 183.

the place where the accident occurred is a circumstance which necessarily implies that he was absent from his post of duty, and therefore culpable.¹⁰ Compare § 337, *supra*.

The fact that an order forbidding the act which caused the injury was given at some antecedent time will, of course, cease to be a controlling element, if it appears that, before the accident occurred, the servant had received permission, express or implied, to do that act.¹¹ Compare § 366, subd. (9), *infra*.

In one case the position has been taken that the mere fact that a servant who is ordered by his master to do something does not do it in the particular manner specified will not exonerate the master from liability for an injury to the servant, received in the performance of the act commanded. The question in this case, as in those in which no direct order is given, is declared to be simply whether the way selected by the servant was more dangerous than one which might have been adopted.¹² This suggested qualification of the rule seems to be devoid of any rational foundation, as it is certainly opposed to the weight of authority.

The fact that the act which was the immediate cause of the injury was done in violation of an order given by one superior employee, at some time anterior to the accident, does not necessarily show that the servant was negligent, if it is also proved that the act was done in compliance with the directions of another superior employee under whose control he was working at the time when the accident occurred.¹³ On the other hand a servant whose injury resulted from

¹⁰ *Daniel v. Chesapeake & O. R. Co.* (1892) 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. 162; *Phillips v. Chicago, M. & St. P. R. Co.* (1885) 64 Wis. 475, 25 N. W. 544; *Connors v. Burlington, C. R. & M. R. Co.* (1887) 71 Iowa, 490, 60 Am. Rep. 814, 32 N. W. 465.

¹¹ *Chilinsky v. Hoopes & T. Co.* (1894) 1 Mary. (Del.) 273, 40 Atl. 1127 (servant was tying, when injured, to put a belt on a shafting).

¹² *Citizens' Gaslight & Heating Co. v. O'Brien* (1886) 118 Ill. 174, 8 N. E. 310, disapproving an instruction which left the jury to infer that the failure of the servant to follow the precise directions of his master was negligence, as a matter of law.

¹³ Where there is no general rule of a railroad company forbidding employees to go between the rails to uncouple cars, the company is not entitled to an instruction that a brakeman is negligent who couples cars in this manner, after

being told by the yard master not to do so, as it was unsafe, where it is in evidence that some brakeman coupled from outside the rails and others from inside, and that the injured servant went between the cars while they were slowly moving, under the conductor's direction, because the coupling-pin stuck, and he was unable to pull it out while standing outside the track. *Hannah v. Connecticut River R. Co.* (1891) 154 Mass. 529, 28 N. E. 682. After referring to the point mentioned in § 357, note 1, *supra*, the court proceeded thus: "It does not appear what authority the yard master had over the plaintiff, or whether he had any. If he had none, then what he said to the plaintiff was, in effect, nothing more than a caution addressed by one fellow servant to another. Perhaps the real significance, in either aspect, would lie in its effect upon the question whether the plaintiff did or did not use due care; but in the present case the

his doing an act which had not only been forbidden by his representative, but which he himself also knew to be essential and dangerous, cannot recover on the theory that the act was done in obedience with a subsequent order given by another employee to whom corrections he was bound to conform.¹⁴

364. Doing acts against which the servant has been warned. A considerable number of cases have been decided upon the theory that the injured servant's disregard of a warning received from his employer or his employer's representative rendered him contributorily negligent, as a matter of law. In all these cases the warning is viewed as an expression of the employer's opinion as to the course of conduct to which it related was not a proper one. Legally, therefore, it is equivalent to an implied direction not to pursue that course of conduct, whether it amounts, as in some instances, to a mere caution regarding the danger involved in such conduct.

error lay in assuming what was not shown to exist,—namely, that the plaintiff was bound to obey the directions of the yardmaster. Further, if we assume that the plaintiff was bound to obey the directions of the yardmaster, and that what was said by the yardmaster to the plaintiff was a direction not to go between the rails in removing the coupling pin, still there was no evidence of any rules established by the defendant road forbidding it, and the plaintiff was afterwards told by Campbell, the conductor of the train which the plaintiff was helping to make up, and under whose immediate control he was at the time, that he wanted the cars cut off in between; and the plaintiff may well have understood that, even if what was said by Campbell was not an order to go in between the cars, he was authorized to cut them apart by going in between them, in such mode as appeared to him, in the exercise of ordinary care, to be necessary." *Hannah v. Connecticut River R. Co.* (1891) 154 Mass. 529, 534, 28 N. E. 682.

"An employee in a lumber mill who piles lumber on a dock when he knows it is unsafe, from his own observation, and after he has been told by the vice principal of his employer not to work at such place, assumes the risk of an injury by the falling of the dock, although he is directed to work there by a foreman who is a vice principal in giving the direction." *Soderstrom v. Holland-Emery Lumber Co.* (1897) 114 Mich. 83, 72 N. W. 13.

¹⁴The warning may be said to have

been of this description in deciding recovery where a brakeman had been warned that some of the head bridges on his employer's line were too low to admit of his standing on the top of the cars, remained on the top of a brake, where he was at a higher elevation than if he was standing. *Deritt v. Pacific R. Co.* (1888) 18 Mo. 302. Or where an engineer got out of his cab, although he knew that telegraph poles are located close to the track, and he has been warned to keep his head inside the cab. *Freich v. Ogden City R. Co.* (1887) 18 Utah, 186, 26 Pac. 295. Or where an employee, when directed to clean the windows of a factory, selected the dangerous method of suspending himself by rope and tackle on the outside of the building, at a high elevation, without direction from his employer, and without warning of the danger, and was killed by the breaking of the rope. *Tracy v. Chino Valley Beet-Sugar Co.* (1888) 18 Fed. 270. Or where a brakeman took to couple moving cars. *McIntosh v. Illinois C. R. Co.* (1874) 29 Ill. 615. Or where an employee, instead of riding in the gondola prepared for the workmen, seated himself at the rear end of the tender, with his head hanging over the side, and thereby injured. *Lehigh Valley R. Co. v. Giviner* (1886) 113 Pa. 600, 6 A. 341. Or where an employee sat on a platform car, when there was abundance of room within the sides of the car, with his head hanging over the side, and was injured by coming in contact with

or, as in other instances, to something scarcely, if at all, distinguishable from an actual prohibition.²

the guard. *St. Louis & S. E. R. Co. v. Barker* (1883) 41 Ark. 542. Or where an employee was injured by the derailment of a truck which was being pushed forward by the engine of a construction train on which he was being carried to his home from work. *Reese v. Wheeling & E. G. R. Co.* (1896) 42 W. Va. 333, 26 S. E. 204.

A fireman is, as matter of law, guilty of contributory negligence in remaining on the side of an engine which is running upon a track partly laid on made ground, precluding recovery for his death due to the giving way of such ground and the falling of the engine upon him, where he was present when the superintendent directing the construction of the track warned the crew to be careful, as he did not know whether an engine had been over the track; and the engineer told him to remain on the other side of the engine. *Viles v. Minneapolis, St. P. & Ste. M. R. Co.* (1895) 107 Mich. 238, 65 N. W. 103.

A request for a charge that plaintiff was guilty of contributory negligence, if he was warned that the position under the scaffold was a dangerous place to be in, and in spite thereof took the position wherein he was hurt, is properly refused, for the reason that it fails to state that the warning had reference to the place of injury. *Coates v. Chapman* (1900) 195 Pa. 109, 45 Atl. 676.

Warnings of this kind are illustrated in decisions where an employee for whom a caboose was provided, took his seat upon the side of a flat car with his legs hanging over, although his superiors had warned him not to ride on a flat car at all. *St. Louis & S. E. R. Co. v. Schumacher* (1894) 152 U. S. 77, 38 L. ed. 361, 14 Sup. Ct. Rep. 479. Or where a brakeman was injured in attempting to make a coupling with a straight link, against the use of which he had been warned, instead of a crooked link, which was furnished to him for the purpose. *St. Louis, I. M. & S. R. Co. v. Higgins* (1884) 44 Ark. 293. Or where a trackman went into a cut before the passage of a given train, contrary to a warning of his superior, and was injured by the loose dirt at the side of the cut giving way when he stepped thereon, to avoid the approaching train. *Stiles v. Richmond & F. R. Co.* (1896) 118 N. C. 1084, 24 S. E. 740. Or where a sec-

tion hand failed to look out for a train after he had been warned to do so. *Nelling v. Chicago, St. P. & K. O. R. Co.* (1895) 98 Iowa, 554, 63 N. W. 368, 67 N. W. 404 (see further, as to this case, § 358, note 10, *supra*). Or where a servant, after being warned against doing so, rode on an elevator used for hoisting the materials for a building under construction. *McGonigle v. Kane* (1894) 20 Colo. 292, 38 Pac. 367. Or where an employee in a brickyard, while operating a car drawn by a cable used to haul clay out of a clay pit, was injured by the cable tearing up a board from the track, while he was riding on the front of the car, facing to the rear, with his back to the cable, though cautioned by the foreman to turn around, and mind the cable. *Youngbluth v. Stephens* (1899) 104 Wis. 343, 80 N. W. 443. Or where an employee in a papermill was killed by the falling of an oil barrel upon him through an elevator shaft, by reason of his leaving out of place a bar to the entrance of the shaft, although he knew that the barrel was near the mouth of the shaft, and had been warned not to leave the bar out. *Freeman v. Glens Falls Paper Mill Co.* (1893) 70 Hun, 530, 24 N. Y. Supp. 403. Or where an employee was injured while standing in the hold of a vessel under an open hatchway, through which freight was being lowered or lifted, after having been warned by an officer of the vessel against standing in such a position. *McCarthy v. Lehigh Valley Transp. Co.* (1892) 48 Minn. 533, 51 N. W. 480; *Miller v. Narassa Gunno Co.* (1890) 125 N. C. 323, 34 S. E. 497. Or where a fireman disregarded a warning against allowing the wires which he was handling to come into contact with one which was carrying a current of electricity. *Tri-City R. Co. v. Killen* (1900) 92 Ill. App. 57. Or where a servant who knew the danger of applying fire to powder, voluntarily and knowingly lighted a fire in proximity to powder, over the protest and warning of his employer. *Dunne v. Ponce* (1895) 98 Ky. 261, 32 S. W. 737.

A miner is guilty of contributory negligence precluding recovery for his death from smoke, which could have been avoided if the fan had been kept in operation, if he voluntarily remains in the mine, where he has been warned of the effect and cautioned to leave, and knows

The fact that a fellow workman had warned the injured servant to the danger which caused the injury is manifestly a circumstance which it is proper to consider, as bearing upon the question of negligence in exposing himself to that danger.³ But the question of disobedience to an implied command proceeding from a master authorized to control the servant's actions is necessarily left to the cases which involve this situation. Accordingly, evidence that a warning was disregarded does not require the peremptory conclusion that the injured servant was negligent.⁴

Where the servant, at the time of the accident, was not only doing something which he had been warned not to do, but also failing to exercise proper vigilance while engaged in the work, his fault is plainly barred on two distinct grounds.⁵

365. Negligence usually inferred, as matter of law, where violation of a rule is proved.—The accepted doctrine is that, if the evidence clearly shows that the injury complained of was caused by the servant's violation of a rule promulgated for the protection of the class of employees to which he belonged, under such circumstances as attending the accident, a court is justified in declaring him to be, as a matter of law, guilty of contributory negligence, provided that the rule in question was valid and reasonable; that its observance under the given circumstances was possible without infringing upon any other rule or duty of paramount obligation; that its contents were known to him, either actually or constructively; that it had not been neither abrogated, nor suspended, nor waived at the time when the injury was received; and that he was chargeable with notice of the fact that the condition which the rule was framed to meet existed at the time when the injury was received.

The duty of the servant to comply with the rules which the master has published for his guidance may be referred to the broad principle that the rules, if reasonable, may be assumed to indicate the method of work which experience has shown to be calculated to furnish the best chance of safety, under the circumstances, both to the servant himself and to his fellow employees; and that a breach of those

that those in charge of the fan may not know the location of the fire, and may act under a misapprehension. *Hughes v. Oregon Improv. Co.* (1898) 20 Wash. 294, 55 Pac. 119.

A jury is correctly instructed that a servant cannot recover if he used an appliance, without necessity, in a manner against which he had been directly warned by the master. *Carlson v. Barstow* (1897) 68 Minn. 400, 71 N. W. 398.

³ See *Southern P. Co. v. Selby* 152 U. S. 156, 38 L. ed. 306, 14 Ct. Rep. 530; *Mochler v. B. & O. R. Co.* (1892) 131 N. Y. 606, 30 N. E. 100.

⁴ *Hannah v. Connecticut River R. Co.* (1891) 154 Mass. 529, 28 N. E. 363. See § 363, note 13, *supra*.

⁵ *Barstow v. Old Colony R. Co.* 143 Mass. 535, 10 N. E. 255 (employee while walking on track, did not look for train).

must, by consequence, charge him with that culpability which the law infers from the doing of a certain act in an unnecessarily dangerous manner.¹ But the duty may be, and more commonly is, referred to the conception that an agreement on his part to obey the rules may be implied from his having entered or remained in the employment with a knowledge of their provisions.²

In cases where a rule is alleged to have been violated the evidence will sometimes show that, even if the rule be left out of account, the servant's conduct was negligent. The action may then be successfully defended, although the rule was waived or was for some other reason not binding on the servant.³ But the master's position is necessarily less advantageous, for if the rule is not an element, the question of the servant's contributory negligence must usually be left to the jury, while disobedience to a known rule, conceded to be reasonable and

¹Such is possibly the conception underlying statements like these: "Where a servant wilfully encounters dangers which have been pointed out to him, and has not avail himself of the rules and regulations which the master has provided to avoid and avert such danger, the master is not responsible for an injury occasioned thereby." *Davis v. Vicksburg Coal & Coke Co.* (1890) 34 W. Va. 500, 12 S. E. 539. "It would be most unreasonable and unjust, after imposing upon the master the duty of promulgating a rule for securing the safety of his servant, to permit the servant to recover from the master damages for injuries which the observance of the rule would have prevented. As the master is bound at his peril to make the rules, the servant should be equally bound at his peril to obey them. In such case the disaster is brought upon the servant by his own voluntary act, and he, and not the master who has discharged his duty, should bear the consequences. So it has been uniformly ruled." *Francis v. Kansas City, St. J. & C. B. R. Co.* (1892) 110 Mo. 387, 19 S. W. 935. "If the employee knowingly and intentionally disobeys a reasonable rule or regulation established for his safety, unless he does so under the influence of fear produced by the appearance of sudden danger, and the act of disobedience is the proximate cause of the injury complained of, he cannot recover." *Gulf, W. T. & P. R. Co. v. Rynn* (1888) 69 Tex. 665, 7 S. W. 83.

²See *Pennsylvania Co. v. Whitcomb* (1887) 111 Ind. 212, 12 N. E. 380. Compare also the language used in *Rich-*

mond & D. R. Co. v. Rosh (1894) 71 Miss. 987, 15 So. 133, to the effect that "for injury sustained through its violation an employee who knew the rule and contracted with reference to it cannot recover."

The implied contract to obey the rules is frequently converted into an express one by exacting from the servant a promise to obey the rules. See, for example, *Richmond & D. R. Co. v. Finley* (1894) 12 C. C. A. 595, 25 U. S. App. 16, 63 Fed. 228; *Loose v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 420, 56 N. W. 519; *Chicago & A. R. Co. v. Stevens* (1901) 189 Ill. 226, 59 N. E. 577; *Shoridan v. Long Island R. Co.* (1899) 40 App. Div. 381, 57 N. Y. Supp. 1075; *Lehigh Valley R. Co. v. Snyder* (1893) 56 N. J. L. 326, 28 Atl. 376; *Chicago & A. R. Co. v. Myers* (1900) 95 Ill. App. 578. Such a contract is often evidenced by a written instrument, in which the servant had acknowledged the receipt of a copy of the rules, and stated that he had read the same and would be governed thereby. See, for example, *Fluhrer v. Lake Shore & M. S. R. Co.* (1899) 121 Mich. 212, 80 N. W. 23.

³See, for example, *Wright v. Southern P. Co.* (1896) 14 Utah, 383, 46 Pac. 374; *Spatulding v. Chicago, St. P. & K. C. R. Co.* (1896) 98 Iowa, 205, 67 N. W. 227; *Louisville & N. R. Co. v. Hiltner* (1900) 21 Ky. L. Rep. 1826, 56 S. W. 654 (this judgment was reversed on rehearing (1900) 22 Ky. L. Rep. 1141, 60 S. W. 2, but the reversal does not affect the decision, as an authority for the statement in the text).

expressed in definite terms, is, as already stated, negligence, a matter of law.⁴ Proof having been given of the servant's knowledge of a valid and existing rule, and of its violation by him, the question left open for submission to the jury is whether or not negligence was the proximate cause of the injury, or concurring with the negligence of the master in producing the injury.⁵ This question is, however, subject to a necessary modification in cases where the rule alleged to be violated is couched in terms which require that the quality of the plaintiff's acts should be measured by the standard of the general law of negligence;⁶ or where the rule is subject to a certain qualification, under circumstances the existence of which must be determined as a question of fact.⁷

⁴ *Georgia P. R. Co. v. Propst* (1887) 83 Ala. 518, 3 So. 764; *Gleason v. Detroit, H. & M. R. Co.* (1896) 19 C. C. A. 636, 43 U. S. App. 89, 73 Fed. 47; and cases cited *passim* in the ensuing notes.

Lake Erie & W. R. Co. v. Craig (1897) 25 C. C. A. 585, 47 U. S. App. 647, 80 Fed. 488, disapproving an instruction which proceeded on the theory that the contract to observe the rule did not make the case different from what it would be if treated as controlled by general principles, unaffected by contract. Where a rule peremptorily requires that brakemen before making a coupling shall know that their signals are understood and obeyed by the engineer, a brakeman who is injured by a sudden and unexpected increase in the speed of the engine cannot excuse his violation of the rule on the ground that, at the time he prepared to make the coupling, the speed was not such as to endanger a person who used ordinary care. *Deeds v. Chicago, R. I. & P. R. Co.* (1888) 74 Iowa, 154, 37 N. W. 124. It is not necessary that a plea setting up the defense that a servant caused his injury by disobeying a rule should aver that he "negligently" violated the rule. *Louisville & N. R. Co. v. Mothershead* (1895) 110 Ala. 143, 20 So. 67.

A verdict for the plaintiff should be set aside where evidence, not contradicted except by witnesses who contradicted themselves, shows that the injury was caused by the plaintiff's violation of a rule. *Southern P. Co. v. Ryan* (1895; Tex. Civ. App.) 29 S. W. 527.

⁵ Whether certain conduct on the part of a servant is negligence as being a violation of rules is a question of fact where the rules relied upon do not com-

mand the doing or not doing of a particular act or acts, but simply impose upon him in general terms the duty of using for the exercise of judgment and diligence. *Lake Shore & M. R. Co. v. Parker* (1890) 131 Ill. 231, N. E. 237, affirming (1889) 73 Ill. 405. Where a rule simply forbids the coupling of cars while they are moving at a dangerous rate, it is for the jury to say whether the rule was violated under the circumstances in evidence. *D. T. & Ft. W. R. Co. v. Smock* (1888) 18 Colo. 456, 48 Pac. 641. A locomotive engineer of a freight train is not, as a matter of law, guilty of such extreme negligence as will preclude a recovery for injuries sustained by the master of a culvert, on the ground that he violated the rules of the company, requiring conductors and engineers, when passing between stations by short cuts, to stop in case of high water which will cause damage, to proceed with great care, and to stop to examine bridges, culverts or other places liable to be damaged by high water, unless the engineer knew that the storm was so unusual as to call for the extra precaution demanded by such a case. *Crouse v. Chicago & N. W. R. Co.* (1899) 102 Wis. 196, 78 N. W. 778.

⁷ Whether the servant committed an infraction of a rule forbidding him to enter between cars in making a couple, except under favorable conditions, is a question for the jury where the evidence is that he was an experienced brakeman, familiar with the master's track; that he attempted to couple cars moving at about 4 miles an hour; that it was dark, and he was alone on the track when the

The fact that a fellow employee who had the right to control the plaintiff observed, prior to the time when the act which caused the injury was done, that the plaintiff was not provided with the necessary appliances for doing that act in the manner prescribed by a rule, and nevertheless suffered him to proceed without those appliances, is no excuse for a violation of that rule.⁸

Where a rule is reasonable and susceptible of two constructions, a servant who in good faith attaches a certain meaning to it, and receives an injury in consequence, is not precluded from recovery, as a matter of law.⁹

The breach of a rule will preclude a minor from maintaining an action, where he may be presumed to have the capacity for comprehending the meaning of the rule and the danger resulting from his disobedience.¹⁰ See § 348, *supra*.

The rule alleged to have been violated is admissible in evidence, without first proving that the employee had knowledge thereof, since such knowledge may be shown after its admission.¹¹ But where there is an entire absence of evidence on the question whether the plaintiff violated a certain rule, it is proper to exclude testimony as to the contents of that rule.¹²

Wherever the evidence tends to show that the injured servant violated a rule, the master is entitled to have the jury instructed that there can be no recovery if they find that the accident would not have happened if the rule had been observed.¹³ Under such circumstances, it is not sufficient merely to tell the jury not to find for plaintiff if

while doing the uncoupling; that, as he started to go from between the cars, he stepped into a hole, and was injured; that (according to plaintiff's witnesses) the hole was outside of the rail, and some distance from a certain switch, and had been excavated by sectionmen who had been working there; and that (according to defendant's witnesses) the hole was a necessary excavation, to enable the switch to work properly, and had existed for a long time. *Jarris v. Flint & P. M. R. Co.* (1901) 128 Mich. 61, 87 N. W. 136.

Where a rule forbids employees to jump from engines moving at a high rate of speed, it is a question whether the speed at which it was actually moving (here about 5 miles an hour) was within the purview of the rule, so as to charge the plaintiff with negligence. *Cobb v. Chicago, St. P. M. & O. R. Co.* (1894) 87 Wis. 273, 58 N. W. 408.

⁸ *Port Royal & W. C. R. Co. v. Davis*

(1894) 95 Ga. 202, 22 S. E. 833, where a conductor failed to stop a brakeman who, to his knowledge, was attempting to couple cars without a stick.

⁹ *Texas & P. R. Co. v. Lighty* (1895) 88 Tex. 691, 32 S. W. 515.

¹⁰ *E. N. Flooring Carpet Co. v. O'Keefe* (1897) 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900 (where a boy of fifteen was denied a remedy for an injury received in consequence of his disobedience of a rule forbidding the cleaning of machinery while it was in motion); *Cullen v. National Sheet Metal Roofing Co.* (1889) 114 N. Y. 45, 20 N. E. 831 (where a boy of seventeen had his hand crushed in consequence of his disobeying a rule forbidding him to put it between the dies of a stamping-press).

¹¹ *Binon v. Georgia Southern & F. R. Co.* (1900) 111 Ga. 878, 36 S. E. 938.

¹² *Lake Erie & W. R. Co. v. Mugg* (1892) 132 Ind. 168, 31 N. E. 564.

¹³ *McCreary v. Ohio River R. Co.*

they believed he could have escaped injury by the use of ordinary care.¹⁴

Where a complaint alleges that a railroad company was guilty of a breach of duty in failing to provide cars that could be coupled by hand, an answer that the contract between the employee and the company embraced a rule that the company would not assume any liability on account of injuries received in coupling by hand presents at least a prima facie defense which demands a replication from the plaintiff.¹⁵

It is not necessary to plead rules of the company or any usage to the manner of the performance of duty in order to authorize their introduction in evidence. These rules and usages are mere evidence bearing upon the question of negligence of the defendant or its employees, and the care and diligence of the plaintiff.¹⁶

A special finding that the plaintiff used proper care to avoid injury to himself is inconsistent with other findings to the effect that he injured himself while doing his work in a manner forbidden by a rule.

The question of contributory negligence, so far as it is dependent on the construction and meaning of the rules alleged to have been violated, is discussed in § 215, *ante*.

That the violation of a rule is no bar to an action, unless the injury was proximately caused by such violation, see §§ 323, 324, *supra*.

365a. Decisions illustrative of this principle.—In accordance with the general principle enunciated in the preceding section the servant has been held guilty of contributory negligence on the ground that the cause of the injury complained of was his violation of rules relating to the various acts and situations indicated in the following paragraphs. In the notes, it will be merely necessary to specify the particular rule infringed, the implication, in the absence of any statement to the contrary, being that the action was declared not maintainable.

(1) Rules regulating the operation of trains.¹

(1901) 49 W. Va. 301, 38 S. E. 534; *Bonner v. Moore* (1893) 3 Tex. Civ. App. 416, 22 S. W. 272. ¹ *Lake Shore & M. S. R. Co. v. Cormick* (1881) 74 Ind. 440.

² Rule requiring trainmen to observe schedule time in starting their trains. *Louisville & N. R. Co. v. Hiltner* (1900) 21 Ky. L. Rep. 1826, 56 S. W. 654, Judgment Reversed on Rehearing in (1900) 22 Ky. L. Rep. 1141, 60 S. W. 2, but not on this point. *Wescott v. New York & N. E. R.* (1891) 153 Mass. 460, 27 N. E. 1. *Georgia R. & Bkg. Co. v. McBride* (1859) 59 Ga. 73.

³ *Pennsylvania Co. v. Whitcomb* (1887) 111 Ind. 212, 12 N. E. 380. ⁴ A railroad engineer who knows that the conductor of his train has received a notice that there are no further orders for his train, and that the rules of the company require the train to remain at the station where it is until the

⁵ *Henry v. Sioux City & P. R. Co.* (1885) 66 Iowa, 52, 23 N. W. 260; *Alcorn v. Chicago & A. R. Co.* (1891; Mo.) 16 S. W. 229.

rival of a train from the opposite direction, and that there will probably be a collision if he starts his train, is guilty of such contributory negligence as will prevent a recovery for his death, by obeying a signal of the conductor to start the train, where one of the rules provides that the conductor shall have charge and control of all persons employed on the train except where his directions conflict with the rules, or involve risk or hazard, in which case the engineer will be held equally accountable. *York v. Chicago, M. & St. P. R. Co.* (1896) 98 Iowa, 544, 67 N. W. 574.

Rule requiring trainmen to run in strict accordance with their written orders. *Louisville, N. A. & C. R. Co. v. Heck* (1898) 151 Ind. 292, 50 N. E. 988.

Rule specifying the distance at which one train should follow another. *Louisville & N. R. Co. v. Hiltner* (1900) 22 Ky. L. Rep. 1141, 60 S. W. 2, Reversing on Rehearing (1900) 21 Ky. L. Rep. 1826, 56 S. W. 654.

Rule regulating the operation of trains where a double track was exchanged for a single one. *Wert v. Keim* (1888; Pa.) 12 Cent. Rep. 381, 13 Atl. 548.

Rule fixing the maximum rate of speed at which trains may be run between stations. *Sutherland v. Troy & B. R. Co.* (1891) 125 N. Y. 737, 26 N. E. 609, second appeal before supreme court (1893) 74 Hun, 162, 26 N. Y. Supp. 237 (collision caused through train's reaching a point where it would not have been if the proper speed had been kept); *Conger v. Flint & P. M. R. Co.* (1891) 86 Mich. 76, 48 N. W. 695; *Lyon v. Detroit, L. & L. M. R. Co.* (1875) 31 Mich. 429; *Gulf, C. & S. F. R. Co. v. John* (1895) 9 Tex. Civ. App. 342, 29 S. W. 558.

Rule prescribing the speed at which trains shall approach bridges. *Norfolk & W. R. Co. v. Williams* (1892) 89 Va. 165, 15 S. E. 522.

Rule prescribing slackened speed in running trains over bridge. *Rittenhouse v. Wilmington Street R. Co.* (1897) 120 N. C. 544, 26 S. E. 922.

Rule requiring engineer to approach stations at a certain speed. *Louisville & N. R. Co. v. Seanton* (1901) 22 Ky. L. Rep. 1400, 60 S. W. 643.

Rule requiring engineers to have their trains under control when approaching stations. *Merritt v. Great Northern R. Co.* (1900) 81 Minn. 496, 84 N. W. 321 (injured engineer ran train at 25 miles an hour).

Rule requiring engineers to know ab-

solutely what trains had passed at a certain station. *Fritz v. Missouri, K. & T. R. Co.* (1895; Tex. Civ. App.) 30 S. W. 85 (result of disobedience was a premature starting of the train and a collision).

Rule forbidding the operation of an engine by a fireman unless the engineer is on it. *Barry v. Hannibal & St. J. R. Co.* (1888) 98 Mo. 62, 11 S. W. 308.

Rule by which an engineer is required to approach stations with great care, and is not entitled to notice that a preceding train is late. *Illinois C. R. Co. v. Neer* (1887) 26 Ill. App. 356.

Rule requiring engineer to keep his train under control and prepared to stop in case the track is obstructed. *Dickson v. Omaha & St. L. R. Co.* (1894) 124 Mo. 140, 25 L. R. A. 320, 27 S. W. 476.

Rule requiring engineers to run at a slower rate of speed than that specified by the time card if the track was not in good repair. *Illinois C. R. Co. v. Patterson* (1879) 93 Ill. 290.

Rule requiring engineer to stand, instead of sitting, while his engine is passing "close places." *Louisville & N. R. Co. v. Stutts* (1894) 105 Ala. 368, 17 So. 29.

Rule requiring engineers to slacken speed when approaching switches. *Memphis & C. R. Co. v. Thomas* (1875) 51 Miss. 637; *East Tennessee, V. & G. R. Co. v. Kane* (1893) 92 Ga. 187, 22 L. R. A. 315, 18 S. E. 18; *Savannah, F. & W. R. Co. v. Folks* (1886) 76 Ga. 527.

Rule requiring that, in case a train stops, the following train should be flagged. *Smith v. New York C. & H. R. R. Co.* (1895) 88 Hun, 468, 34 N. Y. Supp. 881.

Rule prescribing that, in case of a train stopping between stations, the flagman shall go back $\frac{1}{2}$ mile, and that the conductor shall require this to be done. *Frounfelker v. Delaware, L. & W. R. Co.* (1900) 48 App. Div. 206, 62 N. Y. Supp. 840 (error to refuse instruction that if conductor failed to see that flagman went back the proper distance, and this caused the collision with a following train, by which he was killed, there could be no recovery).

Rule requiring the sounding of a whistle and a certain rate of speed when a train is running round a curve in an obscure place. *Southern P. Co. v. Ryan* (1895; Tex. Civ. App.) 29 S. W. 527.

Rule prescribing that, when a train stops between stations, the engineer shall blow the whistle as a signal to the brakeman to take position, so as to prevent collision with another train.

- (2) Rules regulating the manner in which switching is to be done.
 (3) Rules regulating the operation of coupling cars.³

Culpepper v. International & G. N. R. Co. (1897) 90 Tex. 627, 40 S. W. 386.

Rule requiring employees to keep a constant lookout for signal lights on trains. *Ward v. Chesapeake & O. R. Co.* (1894) 39 W. Va. 40, 19 S. E. 389 (failure to look out led to a collision with the second section of a train).

Rule that imperfect display or absence of signal shall be regarded as a danger signal. *Chicago & W. I. R. Co. v. Flynn* (1895) 154 Ill. 448, 40 N. E. 332.

Rule forbidding engineers to maintain more than a specified head of steam. *Illinois C. R. Co. v. Houck* (1874) 72 Ill. 285.

Rule prescribing that the yard masters shall direct the movements of all trains and engines while at their stations. *Galveston, H. & S. A. R. Co. v. Adams* (1900) 94 Tex. 100, 58 S. W. 831. Affirming (1900; Tex. Civ. App.) 55 S. W. 803. There, however, the question whether the action of the servant was negligent was held to be for the jury, as it appeared that defendant's train had not reached the station, and had not been placed in charge of the yard master.

Rule forbidding the use of a stick to set up brakes. *Leahy v. Southern P. R. Co.* (1884) 65 Cal. 150, 3 Pac. 622 (in this case the defendant failed to prove its allegation that a stick had been used).

²Rule forbidding flying switches. *Pilkinton v. Gulf, C. & S. F. R. Co.* (1888) 70 Tex. 226, 7 S. W. 805.

Rule requiring that trains running in one particular direction shall be run onto sidings at the end where they are approached. *West v. Southern P. Co.* (1898) 29 C. C. A. 219, 56 U. S. App. 323, 85 Fed. 392 (brakeman fell into an open culvert while a train was being backed into a siding).

Rule prohibiting the shifting of cars down grade without the control of the engine. *Richmond & D. R. Co. v. Dudley* (1893) 90 Va. 304, 18 S. E. 274.

³Rule requiring the use of coupling stick. *Norfolk & W. R. Co. v. Briggs* (1892; Va.) 14 S. E. 753; *Richmond & D. R. Co. v. Rush* (1894) 71 Miss. 987, 15 So. 133; *Richmond & D. R. Co. v. Finley* (1894) 12 C. C. A. 595, 25 U. S. App. 16, 63 Fed. 228; *Stoan v. Georgia P. R. Co.* (1890) 86 Ga. 15, 12 S. E. 179; *Richmond & D. R. Co. v. Pannill* (1893) 89 Va. 552, 16 S. E. 748; *Horan*

v. Chicago, St. P. M. & O. R. Co. 89 Iowa, 328, 56 N. W. 597; *R. & D. R. Co. v. Free* (1893) 97 N.

12 So. 294; *Central R. & Blue Mtsby* (1892) 90 Ga. 630, 16

953; *Zumwalt v. Chicago & A.* (1889) 35 Mo. App. 667; *Bird v.*

(1897) 100 Ga. 616, 28 S. E. 1

Nichols v. Chicago & W. M. R. (1900) 125 Mich. 394, 84 N. W.

White v. Louisville, N. O. & T. (1894) 72 Miss. 12, 16 So. 218.

Rule requiring brakemen to stick in making couplings, and to go between the cars. *Holmes v. Ball* (1900) 44 C. C. A. 163, 10

745.
 Rule prohibiting coupling by when it is practicable to use a pin for guiding the link. *Glas Detroit, G. H. & M. R. Co.* (189 C. C. A. 636, 43 U. S. App. 89, 7

647.

Rule prohibiting the coupling of coupling of cars when in *Baltzer v. Chicago, M. & N. R.* (1892) 83 Wis. 459, 53 N. W. 88.

Tennessee, V. & G. R. Co. v. (1890) 89 Tenn. 114, 14 S. W.

Darracott v. Chesapeake & O. R. (1887) 83 Va. 288, 2 S. E. 511; *S. v. Hannibal & St. J. R. Co.* (1891

Mo. 74, 16 S. W. 924; *Richmond R. Co. v. Thomason* (1892) 99 Ala

12 So. 273; *Alabama G. S. R. Co. Ritchie* (1895) 111 Ala. 297, 18

Johnson v. Chesapeake & O. R. (1893) 38 W. Va. 206, 18 S. E.

Lockwood v. Chicago & N. W. R. (1882) 55 Wis. 50, 12 N. W. 401

son v. Detroit, G. H. & M. R. Co. 19 C. C. A. 636, 43 U. S. App. 8

Fed. 647 (in this case the act of plaintiff was especially culpable, as

he had had an opportunity of seeing the cars while they were at rest).

ville & N. R. Co. v. Rangan (1898) Tenn. 128, 33 S. W. 1050; *C. & Michigan C. R. Co.* (1890) 84 N.

564, 11 L. R. A. 402, 47 N. W. 837

covery denied although the accident directly caused by the brakeman's catching in an unblocked switch,

there was a statute requiring the (ing of switching); *Craig v. Lake & W. R. Co.* (1896) 35 Ohio L. J.

Reversed in *Lake Erie & W. R. Co. Craig* (1896) 19 C. C. A. 631, 37 U.

App. 654, 73 Fed. 642; *Flutier v. Shore & M. S. R. Co.* (1899) 121 M.

(4) Rules regulating the operation of hand cars.¹

(5) Rules regulating the setting of signal flags by employees working on railway tracks.²

212, 80 N. W. 23; *Sanders v. McGhee* (1897) 114 Ala. 373, 21 So. 1006; *Sedgwick v. Illinois C. R. Co.* (1888) 76 Iowa, 340, 41 N. W. 35; *Ford v. Chicago, R. I. & P. R. Co.* (1894) 91 Iowa, 179, 24 L. R. A. 657, 59 N. W. 5; *Lake Shore & M. S. R. Co. v. McCormick* (1881) 74 Ind. 440; *Shorter v. Southern R. Co.* (1898) 121 Ala. 158, 25 So. 853; *Chicago & A. R. Co. v. Myers* (1901) 95 Ill. App. 578.

A rule of a railroad company prohibiting employees from "entering between cars in motion" is not violated by an employee's entering between cars while at rest for the purpose of uncoupling them, and remaining between them for a short distance after they are put in motion. *Galveston, H. & S. A. R. Co. v. Pitts* (1897; Tex. Civ. App.) 42 S. W. 255.

Rule forbidding employees to go between cars except when they are moving slowly. *Missouri, K. & T. R. Co. v. Wood* (1896; Tex. Civ. App.) 35 S. W. 579.

Rule forbidding employees to go between cars when a locomotive is attached to them. *Richmond & D. R. Co. v. Rush* (1894) 71 Miss. 987, 15 So. 133; *Richmond & D. R. Co. v. Finley* (1894) 42 C. C. A. 595, 25 U. S. App. 16, 63 Fed. 228; *Richmond & D. R. Co. v. Pamill* (1893) 89 Va. 552, 16 S. E. 748.

Rule forbidding an employee to go on the track in front of a moving car for the purpose of coupling it to another. *Prior v. Louisville & N. R. Co.* (1889) 90 Ala. 32, 8 So. 55.

Rule requiring brakemen, before entering upon the track in front of a moving train, to look and see that the track is clear. *Loranger v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 80, 62 N. W. 137 (brakeman, while walking sideways, and attempting to reverse a crooked link, stumbles against a pile of ashes lately dumped on the track).

Rule requiring employees coupling a car with a projecting load to stoop below the body of the car. *Northern C. R. Co. v. Huxson* (1882) 101 Pa. 1, 47 Am. Rep. 690.

Rule requiring an employee when coupling cars to know that the signal which he has given to the engineer has been understood and obeyed before he

places himself in a position of danger relying upon such obedience. *Strong v. Iowa C. R. Co.* (1895) 91 Iowa, 389, 62 N. W. 799; *Doody v. Chicago, R. I. & P. R. Co.* (1888) 74 Iowa, 154, 37 N. W. 124.

¹ Rules requiring section men to guard their hand cars by flags or other precautions against the approach of special and wild trains. *Louisville & N. R. Co. v. Matke* (1893) 103 Ala. 160, 15 So. 511; *Kansas & A. Valley R. Co. v. Day* (1895) 16 C. C. A. 604, 36 U. S. App. 23, 70 Fed. 24 (held to be a clear case of "special danger" requiring compliance with a rule prescribing the use of a flag where such danger existed, the collision between the hand car and the train having occurred at a place where there was a sharp curve lined with timber which obscured the view, and on a heavy downward grade, and where, on account of a strong wind which was blowing towards the train, the sound of an engine whistle could not be heard at any great distance); *McGrath v. New York & N. E. R. Co.* (1885) 15 R. I. 95, 22 Atl. 927. Failure of trackmen running a hand car around a curve, to follow oral instructions and a general custom to flag all curves regardless of the grade is in law equivalent to a disobedience of the rules of the company, although the printed rule merely requires them to flag all curves in "going up grades." *Southern P. Co. v. Ryan* (1895; Tex. Civ. App.) 29 S. W. 527.

Rule forbidding anyone but employees to ride on hand cars. *Mischke v. Chicago, B. & Q. R. Co.* (1894) 56 Ill. App. 472 (section men allowed his wife to ride upon his car).

² Rule requiring car repairers or car inspectors to put out signal flags while at work. *Alabama G. S. R. Co. v. Roach* (1895) 110 Ala. 266, 20 So. 132; *Central R. & Bk. Co. v. Kitchens* (1889) 83 Ga. 83, 9 S. E. 827; *Illinois C. R. Co. v. Winslow* (1894) 56 Ill. App. 462; *Mueller v. Delaware, L. & W. R. Co.* (1900) 55 App. Div. 636, 66 N. Y. Supp. 882; *Hulien v. Chicago & N. W. R. Co.* (1900) 107 Wis. 122, 82 N. W. 110.

Rule requiring track repairers to place a green flag at a reasonable distance from the point where they are working. *Bruen v. Uhlmann* (1899) 44

(6) Rules regulating the manner of getting onto or off of rail cars.⁶

(7) Rules prescribing the particular places in which servants should or should not be.⁷

App. Div. 629, 60 N. Y. Supp. 222. Denying rehearing of (1898) 30 App. Div. 453, 51 N. Y. Supp. 958.

Rule prescribing that, when two men went to repair a car without a flag, and both were required to do the work, they should call for a third man. *Renfro v. Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302.

Rule requiring employees to display a blue flag upon a car before placing themselves in a position of danger under it. *Sheridan v. Long Island R. Co.* (1899) 40 App. Div. 381, 57 N. Y. Supp. 1075.

⁶ Rule prohibiting employees from getting on or off cars or trains while in motion. *San Antonio & A. P. R. Co. v. Wallace* (1890) 76 Tex. 636, 13 S. W. 565; *Gulf, W. T. & P. R. Co. v. Ryan* (1888) 69 Tex. 665, 7 S. W. 83; *Francis v. Kansas City, St. J. & C. B. R. Co.* (1892) 110 Mo. 387, 19 S. W. 935; *Elgin, J. & E. R. Co. v. Docherty* (1895) 66 Ill. App. 17; *Overby v. Chesapeake & O. R. Co.* (1893) 37 W. Va. 524, 16 S. E. 813. And from hanging upon or leaning out beyond the sides of moving cars. *Mohr v. Lehigh Valley R. Co.* (1900) 55 App. Div. 176, 66 N. Y. Supp. 899.

Rule forbidding employees to step on the front of approaching engines or cars. *Gleason v. Detroit, G. H. & M. R. Co.* (1896) 19 C. C. A. 636, 43 U. S. App. 89, 73 Fed. 647; *Elgin, J. & E. R. Co. v. Docherty* (1895) 66 Ill. App. 17.

Rule forbidding employees to jump on or off trains or engines while moving at a high speed. *Gleason v. Detroit, G. H. & M. R. Co.* (1896) 19 C. C. A. 636, 43 U. S. App. 89, 73 Fed. 647.

⁷ Rule forbidding trainmen to be on the pilot of a moving locomotive. *Louisville & N. R. Co. v. Wilson* (1890) 88 Tenn. 316, 12 S. W. 720.

Rule forbidding any employees except those specified to travel on the engine. *Abend v. Terre Haute & I. R. Co.* (1884) 111 Ill. 202, 53 Am. Rep. 616; *Hurlbut v. Wabash R. Co.* (1895) 130 Mo. 657, 31 S. W. 1051; *O'Neill v. Keokuk & D. M. R. Co.* (1877) 45 Iowa, 546; *Chatanooga Southern R. Co. v. Myers* (1900) 112 Ga. 237, 37 S. E. 439; *Central R. Co. v. Mitchell* (1879) 63 Ga. 173; *Shenandoah Valley R. Co. v. Lucido* (1889) 80 Va. 390, 10 S. E. 422;

Martin v. Kansas City, M. & B. R. Co. (1900) 77 Miss. 720, 27 So. 646.

There can be no recovery for the death of an engine hostler who rides on the engine while going to a place to which he is sent by the company, in violation of a rule of this tenor, and is killed by collision in which none of the cars on the train are overturned or thrown off the track, although while on the engine it is shown how the injector works, in the direction of the engineer. *McGee v. Western New York & P. R. Co.* (1897) 77 Hun, 69, 28 N. Y. Supp. 298.

Rule requiring brakemen to be at the posts while their train is running. *Sprong v. Boston & A. R. Co.* (1871) N. Y. 56, (1871) 60 Barb. 30.

Rule requiring trainmen to be on top of the car while the train is in motion. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* (1888) 69 Fed. 647 (plaintiff injured by striking a coal chute while on the side of a car).

Rule requiring a conductor to be in position on the front of the leading car in a train which is being backed. *Creery v. Ohio River R. Co.* (1901) W. Va. 301, 38 S. E. 534.

Evidence that it was customary for a conductor, and sometimes his duty, to be on top of a box car, will not excuse for violating a rule which prohibited him from taking such a position on a train which was passing through a trestle bridge, where it is also in evidence that his duty only required him to be in position when it became necessary to assist in braking, coupling, and signaling, or in making switches at stations. *San Antonio & A. P. R. Co. v. Wallace* (1890) 76 Tex. 636, 13 S. W. 565. Where the rules of a railroad company provided that brakemen should be in the direction of the conductor at all times when on duty, and should remain at their post of duty at all times unless excused by the conductor, and further provided that conductors on freight trains should require their brakemen to be on top of the cars when ascending or descending grades, it cannot be held, as a matter of law, that a brakeman violated his duty by being in the caboose with the knowledge and acquiescence of the conductor, when the train was sta-

(8) Rules requiring that appliances shall be inspected or tested by employees.* The validity and effect of rules requiring a servant to inspect appliances is discussed in § 230 *ante*, § 116, *post*.)

(9) Rules requiring employees to report the existence of dangerous conditions.⁹

(10) Rules regulating the conduct of employee in establishments where dangerous machinery is used.¹⁰

(11) Rules regulating work in mines.¹¹

ing up a grade. *Tullis v. Lake Erie & W. R. Co.* (1901) 44 C. C. A. 597, 105 Fed. 554.

Rule requiring brakeman to be on the ground as a flagman while a portion of the train is backing to couple on to a detached portion. *Terre Haute & I. R. Co. v. Mansberger* (1895) 12 C. C. A. 574, 24 U. S. App. 551, 65 Fed. 196. Rehearing Denied in (1895) 14 C. C. A. 306, 24 U. S. App. 687, 67 Fed. 67.

Rule forbidding employees to walk between the rails. *Chicago, B. & Q. R. Co. v. Maney* (1894) 55 Ill. App. 588.

Rule directing fireman not to stand between the apron of the chute and the cab while his engine was taking coal. *Illinois C. R. Co. v. Zerwick* (1899) 88 Ill. App. 651.

*Rule requiring brakemen, before a train starts, to test the hand brakes and see that they are in good condition. *Tatroy v. New York, L. E. & W. R. Co.* (1892) 132 N. Y. 570, 30 N. E. 391, Reversing (1890) 57 Hun. 67, 10 N. Y. Supp. 382.

Rule requiring brakemen to frequently examine the brakes and coupling and running gear of cars, and to know that they are in good order. *Louisville, E. & St. L. Consol. R. Co. v. Fitz* (1892) 133 Ind. 265, 32 N. E. 881 (here, however, the servant's knowledge of the rule was not shown).

Rule requiring brakemen to inspect coupling apparatus. *Louisville & N. R. Co. v. Reagan* (1896) 96 Tenn. 128, 33 S. W. 1050; *Alabama G. & S. R. Co. v. Carroll* (1898) 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 772.

Rule requiring a brakeman to examine the cars and satisfy himself as far as he reasonably can that they are in good order. *Karrer v. Detroit, G. H. & M. R. Co.* (1889) 76 Mich. 400, 43 N. W. 370 (case of defective drawhead which the plaintiff could have at once observed if

he had taken the trouble to look at the car when it was approaching).

Rule prohibiting going between cars to make a coupling "unless the draw-head and other coupling appliances are known to be in good order." *St. Louis, I. M. & S. R. Co. v. Rice* (1888) 51 Ark. 467, 4 L. R. A. 173, 11 S. W. 699.

If, by the rules of a railroad company, the duty of inspecting foreign cars is thrown upon the conductor, he cannot recover for injuries caused by a failure to make such an inspection. *Ft. Wayne, C. & L. R. Co. v. Gruff* (1892) 132 Ind. 13, 31 N. E. 460.

See also next note.

*Rule requiring brakemen to test brakes and either report the defects found therein or themselves make the proper repairs. *Beall v. Pittsburgh, C. & St. L. R. Co.* (1893) 38 W. Va. 525, 18 S. E. 729.

Rule requiring miners to report dangerous places in tunnels. *Davis v. Nuttallburg Coal & Coke Co.* (1890) 34 W. Va. 500, 12 S. E. 529.

*Rule forbidding servants to wipe machinery while it is in motion. *Shannon v. Androscoggin Mills* (1876) 66 Me. 429; *E. S. Higgins Carpet Co. v. O'Keefe* (1897) 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900.

Rule requiring cotton loom to be fanned for cleansing purposes while it is in motion. *Gideon v. Enoree Mfg. Co.* (1894) 44 S. C. 412, 22 S. E. 598.

Rule forbidding employees working a stamping press to place their hands between the dies. *Cullen v. National Sheet Metal Roofing Co.* (1889) 114 N. Y. 45, 20 N. E. 831.

Rule forbidding factory employees to make their toilet before the closing hour, or near the machines. *Tooke v. Bergeron* (1897) 27 Can. S. C. 567 (girl's hair caught in shuttling).

*Rule forbidding miners to remain in

(12) Rules regulating personal habits of servants.¹²

366. Limits of the doctrine that a servant violating a rule cannot recover.—The fact that the injured servant, at or before the time of the accident, violated a rule, will not prevent recovery, as a matter of law, unless all the evidential elements adverted to in the statement of the doctrine set forth at the beginning of § 362, *supra*, are established. That is to say, the rule, as such, becomes an indecisive factor in the following predicaments:

(1) Where the notification addressed to the servant was not in the proper sense of the word, a rule.¹

(2) Where there was no actual violation of the rule.²

(3) Where the violation of the rule was not the efficient cause of the injury.³

(4) Where the rule violated was unreasonable, and therefore not binding upon him.⁴

their working places when they are unable to find a sufficient supply of timber for props. *Heaney v. Glasgow Iron & Steel Co.* (1898) 25 Sc. Sess. Cass. 4th series, 963.

See also note 9, *supra*.

Where a special rule framed by a mine owner under the power conferred by 35 & 36 Vict. chap. 76, forbade persons "employed in or about the works" to go up or down the pit contrary to the direction of the banksman or hooker on, it was held that the prohibition was applicable to miners for a reasonable time after they had discharged themselves, as they had a right to do in the given instance, at a moment's notice. They were, therefore, declared to be guilty of a violation of the rule in having quitted the pit without permission an hour after they had determined their contract, and three hours before the end of the shift in which they were employed. *Higham v. Wright* (1877) L. R. 2 C. P. Div. 397, 46 L. J. M. C. 223, 37 L. T. N. S. 187, 10 Mining Rep. 24.

¹² Rules forbidding the use of intoxicating liquors. *Gulf, W. T. & P. R. Co. v. Ryan* (1888) 69 Tex. 645, 7 S. W. 83; *Western & A. R. Co. v. Bussey* (1894) 95 Ga. 584, 23 S. E. 207.

See also note 10, *supra*.

¹ It was urged in one case that a rule of a railroad company printed on a timetable, warning employees against certain risks, with a notice that they will have no claim for injuries received in consequence of taking such risks, was merely advising. But the contention was rejected. *Ford v. Chicago, R. I. & P. R.*

Co. (1894) 91 Iowa, 179, 24 L. R. 657, 59 N. W. 5. A direction was binding on a servant who had signed receipt, stating that he had received, understood, and would obey, the direction in which such direction was contained. *Illinois C. R. Co. v. Zerwick* (1900) Ill. App. 651.

² If a servant does everything which he reasonably can, under the circumstances, in order to carry out the direction, for example, is not barred because an engineer failed to have his train under control at a point where it was required by the rules of the company to stop, should have it under control, if he repeatedly signaled the brakemen to apply the brakes, and they did not respond. *Louisville & N. R. Co. v. McFarland* (1898) 121 Ala. 650, 26 S. E. 143. First Appeal (1895) 110 Ala. 143, 13 So. 67.

³ See §§ 323, 324, *supra*.

⁴ See § 228, *ante*.

In *Louisville & N. R. Co. v. Farley* (1893) 94 Ky. 220, 21 S. W. 866, it was said, *arguendo*, that a written agreement by which the plaintiff stipulated that he would observe a rule requiring him to use a coupling stick was not binding on him, unless such an implement was a fact indispensable, or at least deemed necessary for security of brakes against the danger incident to coupling cars, since the defendant had otherwise no right to require the plaintiff to use the stick, or to make habitual use of it a condition of his right to maintain an action for personal injury received while

(5) Where the rule could not have been observed without violating another rule or duty of paramount obligation.⁵

(6) Where the rule violated was not applicable to an employee of the class to which the injured servant belonged, or to such circumstances as those which accompanied the accident.⁶

he was engaged in coupling cars. In *Horan v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 328, 56 N. W. 507, the court expressed a doubt whether, in view of the ordinary practice of coupling by hand, a rule requiring coupling sticks to be used ought to be held obligatory.

Whether the engineer of a freight train complied with a rule of the company requiring him to apply for and to get orders or a clearance card before leaving a particular station, where he applied for and received orders three quarters of an hour before leaving the station and acted upon such orders without making further application, is a question for the jury, where he had found by calculation, after getting his orders to pass a passenger train between certain stations, that he would not have time to reach the only point at which he could pass the other train and at the same time comply with a standing rule requiring freight trains to reach passing points ten minutes before passenger trains were due. *Baltimore & O. R. Co. v. Camp* (1900) 44 C. C. A. 451, 105 Fed. 212.

Where a conductor was required by the rules to remain in the middle of his train, so as to be able to command the crew and regulate the speed on descending grades, it was held that, while reasonable observance of such a rule was obligatory, he had a general duty as well, and a certain discretion to exercise in an emergency. The court accordingly refused to say, as a matter of law, that he was negligent in going forward to the engine cab to warn the engineer that there was a possibility of meeting at a certain point the engines of an iron company which were sometimes outside their proper limits. *Somersett & C. R. Co. v. Galbraith* (1885) 109 Pa. 32, 1 Atl. 371.

In an action by a foreman in railroad yards to recover for an injury received while attempting to release a set brake on a freight car being switched, by reason of a defect in the brake, a rule of the company for the government of "freight brakemen," requiring them to examine the brakes for themselves before using them, is irrelevant. *New Orleans*

& N. E. R. Co. v. Clements (1900) 40 C. C. A. 465, 100 Fed. 415. Where a freight train had parted, and in backing the engine to find the lost cars a brakeman riding on the engine was injured in a collision with the cars, the fact that no flagman was sent back as required by a rule of the company does not prevent the brakeman from recovering, as the duty of sending the flagman rested on the engineer, who was then the superior officer in charge of the engine. *Southern R. Co. v. Barr* (1900) 21 Ky. L. Rep. 1615, 55 S. W. 900.

A freight conductor stopping for a few moments at a watering station need not comply with a rule of the company admonishing such conductors not to take any chances in supposing that nothing is following them, where the trainmen, without objection from the officers of the company, have construed such rule as not applying in such a case, but only in case of a break-down or accident necessitating considerable delay. *Texas & P. R. Co. v. Johnson* (1896) Tex. Civ. App. 34 S. W. 186, Rehearing Denied in (1896) 14 Tex. Civ. App. 566, 37 S. W. 973, Which has Writ of Error Denied in (1897) 90 Tex. 304, 38 S. W. 520.

A rule having reference to the switching of cars on grades is inadmissible in evidence where the accident occurred on a level track. *Henry v. Sioux City & P. R. Co.* (1885) 66 Iowa, 52, 23 N. W. 260.

In *Texas & N. O. R. Co. v. Tutman* (1895) 10 Tex. Civ. App. 434, 31 S. W. 333, the admission of certain rules was objected to by appellant on the ground that they had no application to such work as was being done at the time deceased was killed. Most of them, from their own terms, appeared to have no such application; and all of the witnesses testified that none of them had reference to the work in which the injury was received. The court said: "The purpose in thus introducing the rules may have been: First, to show the absence, as alleged, of any provision such as ought to have been made to guard against such casualties as that in which deceased lost his life; or, second, to show

(7) Where the servant was not chargeable with notice of the contents of the rule.⁷

that one or more of the rules did apply, and had been violated by the servants of appellant, and that they were thus guilty of negligence; or, third, to develop that, if none of the rules applied specifically to the situation existing when Tatman was killed, still provision was made for others, wherein the risk was similar, which, by proper care and foresight, ought to have been made to apply to such states of fact as that in question. If none of the rules made such provision against the risk imposed upon Tatman as the company, in the exercise of ordinary care, should have made, the omission could be made to appear by production of the rules, though the more direct and simpler mode of showing the absence of a rule is usually found in the testimony of those acquainted with the subject. On the other hand, if, when the rules were in evidence, any of them appeared to relate to such a situation as that under investigation, it was competent for either party to show that in fact it did not so apply, or that it was adequate or inadequate for the purpose. And if, by any of the rules, safeguards were provided against the dangers arising from conditions similar to those existing when Tatman was killed, which could have been extended so as to apply to the latter, this was a fact for the jury to consider in determining what could and what should have been done by the company to protect its employees, when engaged as Tatman was when killed. We think, therefore, it was proper to inquire into all of the rules which bore upon the issues, as suggested, but in the trial below many of them were dwelt upon which seem to us to throw no light upon the questions under investigation."

⁷ See §§ 226, 227, *ante*; and the following cases: *Louisville, E. & St. L. Consol. R. Co. v. Utz* (1892) 133 Ind. 265, 32 N. E. 881; *Memphis & C. R. Co. v. Graham* (1891) 94 Ala. 545, 10 So. 283; *Conners v. Burlington, C. R. & N. R. Co.* (1893) 87 Iowa, 147, 53 N. W. 1002; *Gulf, C. & S. F. R. Co. v. Kizziah* (1893) 4 Tex. Civ. App. 356, 22 S. W. 110, 11 S. W. 242 (no attention had been paid to servant's repeated requests for a copy of the rules).

In New York it has been held that an employee who has expressly agreed in a written application for work to be

bound by his master's rules cannot recover for an injury caused by a violation of one of them, irrespective of whether he actually knew of that rule. *Sheridan v. Long Island R. Co.* (1890) 40 App. Div. 381, 57 N. Y. Sup. 100, citing a Massachusetts case to the effect that an employee in a theatrical company, who signs a contract stipulating that she will conform to all the rules of the company, accepts its rules whether she knows of them or not. *100 Mass. 173* (1890) 173 Mass. 82, 53 N. E. 100 (action for wrongful discharge).

On the other hand, in *Brown v. Erie & N. R. Co.* (1896) 111 Mo. 19 So. 1001, it was held that a servant charging contributory negligence on the ground of the violation of a rule was not sufficient unless it avers that the servant had actual knowledge of the rule. The court took the position that "negligence in not pursuing an inquiry having notice of the fact that rules had been promulgated is merely a cause of any injury which he might receive by reason of his violating those rules while its contents were unknown to him. But this position is scarcely correct. It is inconsistent with the general principle which, for juridical purposes, assimilates knowledge which has been actually acquired and knowledge which ought to have been acquired. So, it has been held that a written contract by which a servant stipulates to obey not only the rules of which a copy is furnished him when the contract is signed, but also such reasonable regulations as the employer's superintendence should make, is not binding as to any new regulations which are brought to his notice." *Valley R. Co. v. Snyder* (1893) 56 Mo. 326, 28 Atl. 376 (action for wrongful discharge).

It has been held that a nonsuit cannot be granted where the evidence was that the ear repairer injured was a foreigner, slightly acquainted with English language; that he had been in defendant's service two years, and was informed of the rule violated; that his fellow servant was familiar with the rule; and that the company had posted its rules on the backs of its time-books which were kept for distribution to employees. *Moeller v. Delaware,*

(8) Where the circumstances were such as to estop the employer from asserting that the rule violated was still in force, as, where the appliances themselves were of such a character or in such a condition that it was impossible to do the work properly, and at the same time comply with the rule;⁸ or where the rule had been habitually disregarded, and that disregard was known to and acquiesced in by him.⁹

(9) Where the act in question was done in obedience to the order

W. R. Co. (1900) 55 App. Div. 636, 66 N. Y. Supp. 882.

A rule requiring, in case of a train stopping between stations, that the flag man go back $\frac{1}{2}$ mile, and that the conductor require this to be done, will be presumed to be known by the conductor, where it has been printed on the back of the time-tables, and provision has been made for distributing time-tables, when issued, to all conductors, and it is impossible for them to safely run trains without them. *Frounfelker v. Delaware, L. & W. R. Co.* (1900) 48 App. Div. 206, 62 N. Y. Supp. 840.

A rule requiring the use of coupling sticks to couple cars is no protection to the master, where the sticks furnished are such that a coupling could not be made without going between the cars. *Memphis & C. R. Co. v. Graham* (1891) 94 Ala. 545, 10 So. 283. There, however, the principle was also affirmed that the fact that, ordinarily, freight or box cars having no platform cannot be uncoupled without going between them is no defense to an employee who failed to use a platform. A brakeman is not guilty of negligence in coupling cars without using a stick, although the rules of the railroad company require it, when the cars and coupling are in such a position and condition that the stick would be useless. *Berrigan v. New York, L. E. & W. R. Co.* (1891) 37 N. Y. S. R. 414, 14 N. Y. Supp. 26. Reversed in 1892) 131 N. Y. 582, 30 N. E. 57, but not as to this point.

In *Holmes v. Southern P. Co.* (1898) 120 Cal. 357, 52 Pac. 652, the court approved the refusal of an instruction, to the effect that the fact that a rule may be impracticable, and not observed, does not excuse an employee who is injured owing to his not having complied with it.

See §§ 232, 233, *ante*, and the following cases: *Wright v. Southern P. Co.*

(1896) 14 Utah, 383, 46 Pac. 374; *Newport News & W. Valley Co. v. Campbell* (1891) 15 Ky. L. Rep. 714, 25 S. W. Vol. I. M. & S.—61.

267; *Galveston, H. & S. A. R. Co. v. Shinkard* (1897) 17 Tex. Civ. App. 585, 11 S. W. 35; *Chicago & A. R. Co. v. Myerck* (1901) 95 Ill. App. 578.

The mere fact that the officials of a company knew that employees were in the habit of violating a rule is no excuse for its violation by one of them. See *Chattanooga Southern R. Co. v. Myers* (1900) 112 Ga. 237, 37 S. E. 439, where it was held that a railway servant who rode on an engine was exercising a mere permissive privilege, which he enjoyed with all the concomitant perils.

But in *Louisville & V. R. Co. v. Foley* (1893) 94 Ky. 220, 21 S. W. 866, one of the circumstances commented upon as tending to negative contributory negligence was that, although a coupling stick was delivered to the plaintiff at the time he signed an undertaking to use it, the conductor who delivered it told him that the written undertaking was required as a mere form. It was also proved that the coupling stick had been generally discarded by railway employees, and not used at all by brakemen on the defendant's trains.

Where there is a conflict in the evidence as to whether the nonobservance of the rule violated was so general as to raise the presumption that such nonobservance was known to the company, it is error to direct a verdict for the defendant. *Binion v. Georgia Southern & F. R. Co.* (1900) 111 Ga. 878, 36 S. E. 938.

Where a rule of a railroad company forbade employees jumping on or off moving trains, the fact that there was evidence, in an action for injuries to a brakeman who jumped on a car being backed onto another track and attached to the engine, that it was customary for brakemen to jump on detached cars in transferring them, to protect them from collision with other cars, was insufficient to show that the company had waived the rule, since such evidence did not establish a custom for brakemen to jump on cars attached to and controlled by an

of a superior employee, whose authority in the premises was of an extent that the effect of the order was to supersede the *ad hanc vicem*. Whether the order in any particular instance was an excuse for infringing the rule depends partly upon the matter of the rule and partly upon the views held by the court regard to the doctrine of vice principalship.

The accepted doctrine in the majority of the American courts is that the mere possession of that authority to manage a train, which conductors, and sometimes engineers, are invested, does not imply the possession of authority to make or unmake rules for the control of employees.¹⁰ Sometimes, however, a rule conferring

authority on an engine. *Mohr v. Lehigh Valley R. Co.* (1900) 55 App. Div. 176, 66 N. Y. Supp. 899.

An unqualified instruction that if there was a custom on defendant's road to do the work in question as plaintiff did, and it was in conflict with plaintiff's agreement, it was a waiver by defendant of plaintiff's agreement not to couple cars in that manner, was erroneous, since the custom was not such a waiver, unless it was so universal and notorious that the defendant must be presumed to have known and assented thereto. *Nichols v. Chicago & W. M. R. Co.* (1904) 125 Mich. 394, 84 N. W. 470.

The question as to whether a rule of an employer respecting the conduct of employees has been waived by the master is primarily for the jury. *Tollis v. Lake Erie & W. R. Co.* (1901) 44 C. C. A. 597, 105 Fed. 554.

¹⁰ *Oreby v. Chesapeake & O. R. Co.* (1893) 37 W. Va. 524, 16 S. E. 813.

In *Russell v. Richmond & D. R. Co.* (1891) 47 Fed. 204, the court declined to say that the disregard of their duty by conductors could render obsolete a regulation of the company, or that a conductor so far represents the company as to be authorized to rescind rules made by the corporation for his guidance, and for that of the train hands. In *Atchison, T. & S. F. R. Co. v. Reesman* (1894) 23 L. R. A. 768, 9 C. C. A. 20, 19 U. S. App. 596, 60 Fed. 370, the court refused to concur with the doctrine that, "if the plaintiff [a brakeman] disobeyed the rules of the company, and such disobedience contributed directly to the injury, he may nevertheless recover, and cannot be held guilty of contributory negligence providing that such disobedience was with the knowledge and consent of the conductor

of the train; or, in other words, that if the conductor failed to enforce the rules of the company, the employee could not be held to have negligently disregarded them, and, in such manner be barred from recovering damages for injuries which would not have resulted but for such disobedience."

In *Richmond & D. R. Co. v. Russell* (1894) 12 C. C. A. 595, 25 U. S. App. 16, 63 Fed. 228, an instruction was given that an engineer in temporary charge of a train, in the absence of a regular conductor, had power to waive the forbidding couplings to be made without coupling sticks, was held correct by the court saying: "There is too great a tendency to clothe subordinate employees with the power and duty of vice principals, and then to conclude that they resent the master in every respect as fully as if he were present." Be this as it may, whatever may be the authority of a person, himself an employee on a train over other employees on the same train, he and they are bound to respect and obey the rules and regulations of their common master, whose orders press equally on each of them coming with the like sanction, and each of them must accept that the other cannot rescind the rule. The learned judge has invested the substituted conductor with all the powers held by the head engineer of the railroad system. If the engineer, accidentally and temporarily in charge of a train, could rescind a rule or suspend a fixed rule of the company impressed in the most permanent manner upon a very large class of employees, the class engaged, or likely to be engaged, upon to engage, in coupling cars, as part of the contract and a condition precedent to their employment, he could revoke all rules, and govern himself to control his train at his own will, at

special power upon a conductor may reasonably be construed as conferring by implication a power to relax another rule dealing with the same subject-matter as the former.¹¹

That rules requiring trainmen to run trains in strict accordance with schedule time may be superseded by special orders from a train dispatcher, which change the times for starting from the stations, specify altered meeting places, etc., is a doctrine necessarily implied in all the cases which treat train dispatchers as vice principals in regard to the operation of trains. See chapter XXXI, *post*.¹²

the risk and responsibility of his employer. Granting that, within the scope of his agency, he represents his employer, it can scarcely be supposed that it is within the scope of the agency of an engineer, or even of a conductor, to rescind the standing rules of the company, or to cancel a contract made by his employer with one of his servants antecedent to and as a condition for his employment. When the plaintiff in the action below followed the suggestion of the engineer, he knew the risk he was taking, knew that he had contracted not to take it under any circumstances, knew that the engineer could not make him take it, and he assumed the risk himself. . . . In consideration that the company would employ and would continue to employ him, he bound himself to obey this rule, and assumed all results, not only of disobedience, but also of the infraction of the rule. When, therefore, the engineer on the engine attached to the train suggested to him to go between the cars to couple, he knew that under no circumstances,—even an order from a superior,—could this be done without an assumption of risk by himself; and he knew, also, that he had waived in advance any liability of the company for this infraction of the rule. He had dealt with his master immediately, and had from him his instructions in writing. He had no right to permit the suggestion of a subordinate to reverse or annul his master's express direction, a direction for the government of his conduct under all circumstances."

"Thus, in a case where the defense was that the plaintiff (a brakeman) had violated a rule forbidding him to ride on an engine, it appeared that a rule instructed conductors of freight trains to 'require all of their brakemen to be on top of the train . . . while descending or ascending grades.' The evidence showed that the night was intensely cold, and tended to prove that the con-

ductor had directed plaintiff on this occasion to ride in the cab of the engine. It was held that, under the rule, the conductor had authority to direct the plaintiff in respect to his duties in being on top of the train, and that plaintiff could not be charged with contributory negligence for riding in the cab while ascending a grade, if he did so in obedience to directions of the conductor. *Hurlbut v. Wabash R. Co.* (1890) 130 Mo. 657, 31 S. W. 1051.

The fact that a brakeman in uncoupling cars in violation of a rule requiring the use of a coupling stick was acting under the order of the conductor, who had "the right to control or direct his services," within the meaning of Miss. Const. 1890, § 193, will not enable him to recover, since he was under no obligation to obey an order to violate a rule binding on all employees, including the conductor. *Rickard v. D. R. Co. v. Rush* (1894) 71 Miss. 987, 15 So. 133. The court accordingly held that it was error either to instruct the jury that the company was liable, notwithstanding the existence of the rule, if the conductor knew of and acquiesced in plaintiff's violation thereof and occasioned the injury by negligently signaling the train to start, since, even if the conductor is the superior officer of the brakeman, he could not dispense with any general rule; or to instruct them that the company was liable if the conductor ordered plaintiff to go between the cars to uncouple, having first taken from him his coupling stick, and, without knowing that he had come out, negligently signaled the engineer to move, thus causing injury.

"The mere fact that a train is a 'wild' train not running on schedule time does not justify an inference that the conductor is relieved from the rules regulating the running of trains, and is under the control of some agent or dispatcher of the company. *Northern P. R. Co. v.*

An unqualified direction issued by such a functionary is binding upon trainmen whose conduct is regulated by a rule requiring them to run in strict accordance with their written instructions, and to certify running their train as directed, notwithstanding a verbal statement made by a telegraph operator, which, if true, indicates compliance with those instructions is not unlikely to lead to an accident.¹³ But an order issued by him does not supersede any standing rules which trainmen can observe without disregarding his instructions.¹⁴ Nor can the right to rely implicitly upon the propriety of a special order for a train despatcher be extended to cases in which the circumstances are such that a prudent man would feel bound to seek some further information as to the reason why the regular course of the business has been in this instance departed from.¹⁵

A superintendent, being of still higher rank than a train despatcher, necessarily has power to regulate the movements of rolling stock upon the road under his management.¹⁶

Poirier (1897) 167 V. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741.

¹³ In a case where an operator had told the engineer of an extra freight train that there was a work train on the track over which he was about to run, as directed by the despatcher, it was held that the engineer was not negligent in proceeding on the assumption that the track was clear. It was accordingly held that the company could not absolve itself from the charge of having failed to notify the crew of the freight train as to the presence of the work train on the track by the plea that the employees in control of the latter train were the parties whose negligence was responsible for a subsequent collision between the two trains,—especially when there was another rule of such a tenor that those employees were justified in supposing that an order had previously been sent to the freight train to report at some designated place for instructions. *Louisville, V. A. & C. R. Co. v. Heck* (1898) 151 Ind. 292, 50 N. E. 988.

¹⁴ The fact that an engineer is under instructions to make certain time does not relieve him from the obligation to obey a standing rule as to the care to be observed in approaching stations. *Illinois C. R. Co. v. Neer* (1887) 26 Ill. App. 356. In a case where one train ran against another which was standing at a station, and killed the conductor of the latter train, and the question was whether the engineer of the former train was negligent, it was held that a special

order by a train despatcher to run between two stations does not relieve the engineer of a freight train of his duty of observing, at any intermediate stations, a rule requiring that all such trains "approach all stations under full control." *Enright v. Toledo, A. & W. R. Co.* (1892) 93 Mich. 409, 53 N. W. 536.

¹⁵ In *Westcott v. New York, A. & N. H. R. Co.* (1891) 153 Mass. 460, 27 N. E. 100, it was held that the conductor of a train was not negligent in starting the train, when he knew that, under the rules, he had no right to do so until the arrival of a freight train, without inquiring of the despatcher on that section of the road whether he had received any special information which would make it safe to leave the station. The court said that even supposing that it was only his duty to obey the orders of the despatcher, even if they were in violation of the rules of the road, this particular order was so obviously wrong, and so likely to involve such dreadful consequences, that it was manifestly negligent to act upon it without inquiring the reason for it.

¹⁶ In an action under the Alabama statute (see chapter XXXVIII, § 1, to recover for the death of a section man on a railroad, who was killed by a train which struck and derailed a hand car upon which he was riding) his men before daylight on a dark, rainy morning, it was shown that

In Illinois the position was recently taken that the order of a yard master superseded a rule which declared that inferior servants must run carefully through a certain yard, expecting to find the main track occupied.¹⁷ It seems safe to say that this ruling could not be treated as good law in any state except those which, like Illinois itself, have adopted the doctrine that all superior servants are also principals in regard to the exercise of their functions of control. See chapter XXVIII, *post*.

The question whether a servant's violation of a rule is or is not contributory negligence, as a matter of law, where he is acting upon a command to protect him against that particular peril which the rule violated was intended to avert has evoked a conflict of opinion.¹⁸

If the company prohibited the running of a hand car after dark without special permission. But the evidence left it in doubt whether the deceased had knowledge of such rule. It was also shown that deceased usually went to work with his men about daylight, and that the evening before he received a telegram from the track superintendent, directing him to take his men in the morning to work at a particular place, to reach which with the hand car required about 1 hour and 20 minutes. Under these circumstances it was held that the question whether the message required the deceased to go upon the track with his hand car at such an early hour as he did should have been submitted to the jury, as having a material bearing upon the question whether he was negligent. *Wether v. Campbell* (1900) 42 C. C. A. 94, 101 Fed. 936. Doubtless the same conclusion would have been arrived at under the doctrines of the common law.

Plaintiff, an engineer of such train, was told by the yard master, who had authority to discharge him, and whom he was bound to obey, to "hurry up" through the yard, and in obeying this order he was injured by a collision. It was held that it could not be said, as a matter of law, that plaintiff contributed to his injury by disobeying the rule, since the fact that he had disobeyed it might be accounted for by the fact that the master gave other and different commands. *Norris v. Illinois C. R. Co.* (1900) 88 Ill. App. 614.

In one case it has been laid down that a car inspector is not, as matter of law, guilty of contributory negligence in going under a car without putting up a signal required by a rule of the company, where the yard foreman, who has control of the movement of cars, has

promised that no car will be sent back on the track on which stands the train which he is inspecting. *Canon v. Chicago, M. & St. P. R. Co.* (1897) 101 Iowa 612, 70 N. W. 755.

In another case it was held that the promise of a foreman of car repairs to protect a car repairer from the company, and precludes it from taking advantage of the latter's failure to set out a flag as a rule required. *Haines v. Western, M. & P. R. Co.* (1888) 80 Mo. 588. Where the court said: "It being conceded, as it must be, that the company owed a duty to the men under the car to provide for their safety, and it is that the foreman had no authority in an emergency to use any other means than those adopted by the company, such as the red flags, and nothing more than red flags, was the means by which the men were to be protected."

If for any reason the company, in a given case, have failed to give the warning, can it be proved that the injured man would be restricted to the use of the red flags? Or if the company had had the red flag set out, and the man was injured, in consequence of its insufficiency to give the warning, that the company would not be liable to the injured party? Has it discharged its duty by simply adopting a means of protection ordinarily sufficient, when the person in charge of the work knows that, in the particular case, it is not a sufficient warning? If the foreman has authority in such an emergency, that authority results from his general authority to perform the duty of the company in protecting the employees under his control in the performance of a dangerous work for the company, and he was authorized to make the promise to the plaintiff for the company, and undertook to set out the red flags in his possession,

the plaintiff's injury, the company is liable. It is a violation of the duty of the company to the plaintiff, and the plaintiff is entitled to recover damages. The plaintiff's injury was caused by the negligence of the company, and the plaintiff is entitled to recover damages. The plaintiff's injury was caused by the negligence of the company, and the plaintiff is entitled to recover damages.

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But in view of the fact that the duty of a servant to obey a rule always be referred either to an express or an implied contract. § 362, *supra*), it is difficult to see on what ground the servant ever be exculpated under such circumstances, except in those cases where the coemployee was invested with authority to suspend the obligation of the rule. See preceding paragraph.

Considered as a statement of an absolute duty, a rule is binding only as between the master and the servant themselves. Hence, the failure of a servant to observe a rule of his master is not necessarily contributory negligence, as a matter of law, where the servant is injured by the act of a stranger.¹⁹

367. Doctrine that violation of a rule does not imply negligence as a matter of law.—In New York and Texas, views have been expressed which are more or less at variance with the doctrine that established is a legal inference when the servant's act is once proved to have constituted an infraction of a valid rule of which he had not

or to adopt any other means necessary to secure the safety of the men, thereby absolving them from the duty of setting out the flag, or setting the watch."

On the other hand the view has been taken that a car repairer who goes under a car standing upon the track to repair it, without displaying signals required by the rules of the company, and relying upon another employee to protect him from moving engines, is guilty of negligence which will defeat recovery for injuries sustained. *Illinois C. R. Co. v. Windsor* (1894) 56 Ill. App. 462. And that the violation of such a rule is not excused by the fact that the car repairer agreed with a conductor that the latter should not permit any of the cars in the train to come upon the repair track. *Johnson v. Cleveland, L. & W. R. Co.* (1896) 11 Ohio C. C. 553.

¹⁹ *San Antonio & A. P. R. Co. v. Way* (1894) 9 Tex. Civ. App. 214, 29 S. W. 205 (action by motorman of street railway against a railway company by whose train his car was struck).

In a recent New York case the supreme court laid it down that the doctrine finally settled in that state is that the failure to perform a duty imposed by statute or by rule may be shown, but that such failure is not conclusive evidence of negligence. It was therefore held that the nonobservance by an engineer of a rule of the railroad company requiring a headlight upon the tender when running backwards was not conclusive evidence of his contributory negligence requiring a nonsuit in an action

by him for injuries from the presence of another locomotive on the track at a point where he had a right, under the rules of the company, to assume the track would be clear. *Gross v. Pennsylvania, P. & B. R. Co.* (1894) 4 N. Y. S. R. 808, 16 N. Y. Supp. 616.

The authority cited was *K. v. Knickerbocker Ice Co.* (1881) 84 N. Y. 488, where a municipal ordinance was infringed,—a case which has frequently been followed in later decisions, generally. *Shearn & Redf. Neg. § 1*.

In Texas the position has been taken that, in the absence of a statutory limitation, a trial court is forbidden to charge the jury that any particular act or omission constitutes negligence; this principle has been declared to justify a refusal to give an instruction which, in effect, included the proposition that it was negligence *per se* to run a train at a greater speed than that permitted by the rules of the company.

Worth & D. C. R. Co. v. D. (1893) 2 Tex. Civ. App. 150, 21 S. W. 137. Citing *Missouri P. R. Co. v.* (1888) 70 Tex. 496, 7 S. W. 857.

In *Hogan v. Missouri, K. & T. R.* (1895) 88 Tex. 679, 32 S. W. 1015 contributory negligence of a servant in obeying an order to meet a train which order is alleged to have been perfect and in violation of the rule and custom of the defendant company, held to have been properly submitted to the jury.

In *Galveston, H. & S. A. R. Co. v. Oms* (1900) 94 Tex. 100, 58 S. W. 8

It can scarcely be doubted, however, that, even if the numerous authorities on the other side are left out of account, these views are erroneous. The decisive consideration which is altogether ignored in the decisions cited is that every breach of a rule represents a breach of a contractual obligation which has either been expressly assumed by the servant, or is implied from the fact of his having accepted or continued in the given employment with notice of the existence of the rule so violated. Whether the infraction of a statutory duty is or is not negligence *per se* is a question which this consideration renders wholly immaterial.² The servant's agreement is that, whatever may have been, apart from the rule, the standard of proper care under the circumstances, the rule itself is to define that standard, as between the servant and his master, as long as the former remains at work. That this is really the prevailing view even in the two states above mentioned is abundantly evident from numerous decisions in which recovery has been denied, as a matter of law, for the reason that the injury was caused by the violation of a rule.³

it was held to be for the jury to say whether negligence was predicable of the action of a conductor who, at a point on the line where, under the company's rules, a yard master had control of the train, took upon himself to ask an engineer employed by another company to assist him to getting the train up a grade on which it was stalled. In the court of appeals (1900) 55 S. W. 803, the case was said to be for the jury because it was an open question whether the yard master had really assumed control of the train.

That the violation of a rule by an employee is not negligence *per se* has also been laid down in *Gulcreston, H. & S. A. R. Co. v. Sweeney* (1896) 14 Tex. Civ. App. 216, 36 S. W. 800.

In this connection a fact should be noted, which, singularly enough, seems to have escaped the supreme court of New York in the decision cited in note 1, *viz.*, that the principle relied upon was enunciated with regard to the right of action under statutes and ordinances creating duties in general terms, and had no reference to cases in which an obligation was expressly imposed upon one person for the benefit of another. The position that it is necessary to take

the opinion of a jury as to the proper inference to be drawn from a breach of the latter kind of obligation is, to say the least, rather an extraordinary one.

² *LaCroy v. New York, L. E. & W. R. Co.* (1892) 132 N. Y. 570, 30 N. E. 391; *Sutherland v. Troy & B. R. Co.* (1891) 125 N. Y. 737, 26 N. E. 609; *McGuicken v. Western New York & P. R. Co.* (1894) 77 Hun. 69, 28 N. Y. Supp. 298; *Smith v. New York C. & H. R. R. Co.* (1895) 88 Hun. 468, 34 N. Y. Supp. 881; *Froundfelker v. Delaware, L. & W. R. Co.* (1900) 48 App. Div. 206, 62 N. Y. Supp. 849; *Mohr v. Lehigh Valley R. Co.* (1900) 55 App. Div. 176, 66 N. Y. Supp. 809; *Gulf, W. T. & P. R. Co. v. Rood* (1888) 69 Tex. 665, 7 S. W. 83; *Trans & P. R. Co. v. Leighty* (1895) 88 Tex. 604, 32 S. W. 515; *Culpepper v. International & G. N. R. Co.* (1897) 90 Tex. 627, 40 S. W. 386; *Pilkinton v. Gulf, C. & S. F. R. Co.* (1888) 70 Tex. 226, 7 S. W. 805; *San Antonio & A. P. R. Co. v. Wallace* (1890) 76 Tex. 639, 13 S. W. 565; *International & G. N. R. Co. v. Moore* (1893) 3 Tex. Civ. App. 416, 22 S. W. 272; *Southern P. Co. v. Ryon* (1895) Tex. Civ. App. 29 S. W. 527; *Fritz v. Missouri, K. & T. R. Co.* (1895) Tex. Civ. App. 30 S. W. 85.

CHAPTER XX.

VOLENTI NON FIT INJURIA.

368. Introductory.

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371. Relation of the maxim to the defense of contributory negligence.

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a. United Kingdom and British Colonies.

b. United States.

377. Doctrine that voluntary action is not inferable, as matter of law, where appreciation of an extraordinary risk is proved.

a. United Kingdom and British Colonies.

b. United States.

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a. No complaint, protest, or objection established by the evidence.

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384. Existence of risk contemporaneous with or subsequent to entry upon the employment.

385. Length of time which elapsed between the discovery of the risk and the occurrence of the accident.

386. Act rendered necessary by the arrangement of the plant.

As to the availability of the maxim as a defense to an action for breach of a statutory duty, see chapter xxxv., *post*.

368. Introductory.— It is well settled that, independently of the relation of master and servant, there may be a voluntary assumption of the risk of a known danger, which will debar one from recovering compensation in case of injury to person and property therefrom, even though he was in the exercise of due care.¹ Wherever there is no contractual relation between the plaintiff and defendant, it is evident that this defense must rest upon the general principle expressed in the maxim, *Volenti non fit injuria*, and cannot be founded upon the theory of an implied agreement, to which it has been usually referred in suits by a servant against his own employer. The absence of privity of contract necessarily entails the consequence that, as has been held in one case, there is no presumption that the servant of one person accepts, as an implied term of his contract, the hazards arising from the negligence of a stranger.²

Most of the cases in which the maxim has been discussed in connection with the kind of accidents to which workmen are liable have been actions in which the defendant was the plaintiff's master. But a more adequate conception of its meaning will be obtained by also utilizing the discussions in those cases where the person sued was a stranger. The citation of both lines of authorities indifferently is amply justified by the fact that, as the maxim is of universal application, the determination of the question whether it is or is not available cannot be affected by the mere fact that the relations of the parties to the action were for some purposes defined by a contract.³

A. MEANING AND EFFECT OF THE MAXIM.

369. Generally.— In the course of the judgment delivered by him in a leading English case, Lord Watson remarked: "The maxim, *Volenti non fit injuria*, originally borrowed from the civil law, has lost much of its literal significance. A free citizen of Rome who, in concert with another, permitted himself to be sold as a slave in order that he might share in the price, suffered a serious injury, but he was, in the strictest sense of the term, *volens*. The same can hardly be

¹ *Minor v. Connecticut River R. Co.* (1891) 153 Mass. 398, 26 N. E. 994. ² See the opinion of Bowen, L. J., in *Thomas v. Quartermaine* (1887) L. R.

³ *Bruce v. New York, L. E. & W. R.* 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. C. (1891) 124 N. Y. 59, 11 L. R. A. 310, 57 L. T. N. S. 537, 35 Week. Rep. 483, 26 N. E. 324 (said of an express messenger who had brought suit against a railway company).

said of a slater who is injured by a fall from the roof of a house, although he, too, may be *volens* in the sense of English law."¹

The modification of meaning thus adverted to by this distinguished jurist is not the result of any change of opinion as to the true meaning of the Latin words. These must always have borne virtually the same significance as that indicated by the various translations and paraphrases collected in the note below.² The nature and extent of the alteration which the scope of the maxim has undergone in modern times seems rather to consist essentially in this,—that, whereas it was originally applied in cases where the person against whom it was invoked had deliberately become a consenting party to some transaction which restricted or took away substantive or remedial rights already existing or accrued, and had either actually expressed an intention to accept the consequences of that transaction, or had joined in some formal proceeding which created an equally binding obligation, it is now construed in such a sense that it may operate as a bar to an action in many instances in which the consent and the intention of the person concerned are alike a mere matter of implication, or, at least, inferred, or less forced, from a certain course of conduct, and in which the rights affected are inchoate and dependent for their genesis upon future events of an essentially contingent description.³ The doctrine

¹ *Smith v. Baker* (1891) A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392. *Gerald v. Connecticut River Paper Co.* (1891) 155 Mass. 155, 29 N. E. 40.

The maxim is available as a defense under the French law as administered in the Province of Quebec. *Richelieu & O. Nav. Co. v. St. Jean* (1883) 28 L. C. J. (Q. B.) 91, citing Larombiere on Obligations. "No one can maintain an action for a wrong, where he has consented or contributed to the act of which he complains." *Curtis, J., in Byram v. B. & O. R. Co.* (1852) 1 Curt. C. C. 100, Fed. Cas. 2,262.

"No one can maintain an action for a wrong, where he has consented or contributed to the act which occasions the wrong." *Mad River & L. E. R. Co. v. B. & O. R. Co.* (1856) 5 Ohio St. 541, 67 Am. Dec. 107. "No one can maintain an action for a wrong where he has consented to the act which occasions his loss." *Broom, L. J., in Broom v. Broom* (1855) 11 B. & C. 265.

"That to which a person assents is not deemed in law an injury." *Broom, L. J., in Broom v. Broom* (1855) 11 B. & C. 265. "He who consents to an act is not deemed in law to be wronged by it." *Cal. Civil Code* § 3515.

"Consent is generally a full and complete shield when that is complained of as a civil injury which was caused by the consent." [A man] is not injured by negligence which is partly caused by his own fault." *Cooley, Torts*, 2d ed. § 163, p. 187.

"One who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure." *Fitz-* ² It is noticeable that, in the *Smith v. Baker* case, the plaintiff was a slater, and the defendant was a contractor, and the injury was caused by the negligence of the defendant.

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that the maxim is admissible as a defense in cases of the latter descrip-
tion seems to be of comparatively recent growth, even in common law
jurisdictions.⁴

Not the least important result of this extension of the domain in
which the maxim may become a controlling factor is that it is now
frequently necessary to determine the applicability of the maxim with
reference to a question of fact, the solution of which is usually beset
with embarrassing difficulties. That question the earlier decisions,
as will be seen in the course of this chapter, evaded in a large measure
by the simple expedient of entertaining the rigid presumption that
consent should be always implied under certain circumstances. But
there has recently been a revolt, in England more especially (see

account the cases relating to actions for
personal injuries, all the decisions cited
by Mr. Broom to illustrate the maxim
deal with conditions of the kind to
which alone it seems to have been origi-
nally applicable. It is stated to be a
bar to actions in the following predic-
aments:

(1) Where it was proved in an action
for criminal conversation that the hus-
band had consented to his wife's adul-
tery.

(2) Where the plaintiff had express-
ly agreed to give up rights which might
otherwise have been asserted.

(3) Where the party aggrieved by the
resolution of a board of local commis-
sioners had concurred in that resolution.

(4) Where a person with full knowl-
edge of the facts had voluntarily paid
money which was not legally due.

(5) Where money had been paid un-
der illegal compulsion.

(6) Where money had been paid un-
der pressure of legal process.

The earliest reported decision in
which the conception of an implied in-
tention to accept the contingent risk of
injury from the existence of certain con-
ditions was distinctly relied upon seems
to be the so-called "Spring Gun Case,"
Bell v. Willer (1820) 3 Barn. & Ald.
304. The language of the opinions is
decidedly interesting in the present
connection, as it indicates the views held by
English judges not long before the doc-
trine of assumption of risks was intro-
duced in the law of master and servant
by *Priestley v. Fowler* (1837) 3 Mees. &
W. 1, Murph. & H. 305, 1 Jur. 987. The
phraseology of such a passage as this
from the opinion of Bayley, J., bears a
close resemblance to that which has
since become so familiar in employers'

liability cases: "It is sufficient for a
party generally to say, 'There are spring
guns in this wood,' and if another then
takes upon himself to go into the wood,
knowing that he is in the hazard of
meeting with the injury which the guns
are calculated to produce, it seems to
me that he does it at his own peril, and
must take the consequences of his own
act. The maxim of law, *Volenti non fit
injuria*, applies, for he voluntarily ex-
poses himself to the mischief which has
happened. He is told that if he goes in-
to the wood he will run a particular
risk, for that in those grounds there are
spring guns. Notwithstanding that
caution he says, 'I will go into the wood,
and I will run the risk of all consequen-
ces.' Has he, then, any right, after he
has been distinctly apprised of his dan-
ger, to bring an action against the owner
of the soil for the consequences of his
own imprudent and unlawful act? I
think not, for he had no right to enter
the wood, and in so doing, he became a
trespasser and a wrongdoer."

Readers of Sidney Smith's Essays will
recollect his amusing criticism upon the
doctrines propounded by the judges in
this case.

A recent American decision which is
scarcely less interesting and which in-
volves an almost equally preposterous,
if strictly logical, conclusion, is *Seanton
v. Widger* (1892) 156 Mass. 462, 465, 16
L. R. A. 395, 31 N. E. 642, where a vol-
untary spectator, present for the pur-
pose of witnessing a display of fireworks
in a public highway, was held to have
consented to take the risk of injury from
an explosion. Morton and Knowlton,
J.J., dissented on the ground that the
evidence did not show that the risk was
appreciated.

§ 277, *ante*), against this arbitrary method of determining a plaintiff's rights, and at the present time the law of the subject is in a transitional stage of its development. In some jurisdictions the action of the courts has, by dint of repeated adjudications, been defined with tolerable clearness. But in those in which the effect of the maxim has not been discussed at all, or has only been discussed in a cursory manner, it is at best a matter of mere conjecture which of the main opposing theories on the subject will be adopted when a categorical decision is called for. Such being the situation, it would be a futile and hopeless task to attempt to construct a consistent and symmetrical body of principles from the materials furnished by the reports. All that can be done is to exhibit the effect of the authorities in such a way as show the grounds upon which the opposing theories are rested by their respective advocates, and the results of those theories when applied to various groups of facts.

370. Relation of the maxim to the doctrine of a contractual assumption of risks.—According to many of the authorities, both the early and the more recent, the maxim is to be regarded as the embodiment of a comprehensive principle, of which the servant's contractual assumption of known risks is one special application.¹ In a strict

¹ *Skipp v. Eastern Counties R. Co.* (1853) 9 Exch. 223, 3 C. L. Rep. 185, 23 L. J. Exch. N. S. 23; *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497; *Louisville, N. O. & T. R. Co. v. Conroy* (1886) 63 Miss. 562, 56 Am. Rep. 835; *Deritt v. Pacific R. Co.* (1872) 50 Mo. 302; *Mandle v. Hill Mfg. Co.* (1894) 86 Mo. 400, 30 Atl. 16; *Fitzgerald v. Connecticut River Paper Co.* (1891) 155 Mass. 155, 29 N. E. 464; *Creswell v. Wilmington & N. R. Co.* (1899) 2 Penn. (Del.) 210, 43 Atl. 629; and the cases cited in § 370, note 4, *infra*.

"Before the employer's liability act there was this condition in the contract of hiring, that, if there was a defect in the premises or machinery, which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk. That is the doctrine which is embodied in the maxim, *Volenti non fit injuria*," *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283, per Lord Esher (p. 651 of Law Reports). See, however, note 2, *infra*, for some language used by this judge with which it seems difficult to reconcile this remark.

"In its application to questions between

the employer and the employed, the maxim, as now used, generally imports the workman had, either expressly or by implication, agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury. The question which has most frequently been considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that injury should befall him the risk was to be his, and not his master's," *Smith v. Baker* (1891) A. C. 325, 60 L. J. N. S. 683, 65 L. T. N. S. 467, 55 Week. Rep. 392, per Lord Esher (p. 355 of Law Reports).

"The doctrine of assumption of risk of his employment by an employee has usually been considered from the point of view of a contract, expressly or implied; but as applied to action for negligence against an employer it leads up to the broader principle expressed by the maxim, *Volenti non fit injuria*," *O'Malley v. South Boston Light Co.* (1893) 158 Mass. 135, 136, 137, 32 N. E. 1119. In a passage of the same judgment we find it laid down that, if a servant contracts to take the obvious risks of his work, he is not to be discharged from defective machinery, "his

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umption of " by an employ- dered from " ract, express- ad to action- just an employ- der principle- *Volenti non fit injuria* (1880) *Smith v. L. J. Q. B. S. 467, 55 J. P. 100*. In a later judgment we also a servant " "ous risks of an- minary, "his em-

logical point of view, however, the more exact conception of the relation between the two defenses seems to be rather that which was explained by Bowen, L. J., *viz.*, that the principle expressed by the maxim is quite distinct from the principle which is denoted by the statement that the servant had impliedly agreed to assume the risk in question, but that the former principle is no less applicable than the latter to cases in which the servant is suing his master for personal injuries, and will, under some circumstances, lead to precisely the same consequences.²

ployer owes him no duty in respect to such risks, and, if he is hurt from a cause included in the contract, the defect is not within the terms of the statute [*i. e.*, employers' liability], the maxim, *Volenti non fit injuria*, applies, and he cannot recover."

In many decisions, owing to the fact that the phraseology appropriate to the discussion of a contractual acceptance of risks must be essentially the same as that employed where the acceptance is discussed independently of a contract, it is often impossible to say with any confidence whether the court intended to rely on the maxim or an implied contract.

Thomas v. Quartermaine (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. The learned judge, after pointing out that the terms in which the employers' liability act of 1880 was couched rendered it impossible for a master sued under the act to rely upon the theory of an implied contract to assume the risk, thus proceeded to discuss the two available defenses which were independent of contract. These two defenses, that which rests on the doctrine, *Volenti non fit injuria*, and that which is popularly described as contributory negligence, are quite different, and both, in my opinion, are left open to an employer if sued under the employers' liability act of 1880. Neither of these is a defense that merely arises by implication out of the workman's contract of service. A confusion in applying the first of these two broad principles to the special case of master and servant has at times arisen out of the fact that by the contract of service the workman was deemed to have taken upon himself the ordinary risk of a business lawfully carried on upon his master's premises, and it has been assumed as an *a fortiori* case that he took upon himself such risks as were visible or

known. This is one way of putting such a defense, and may in many cases be sufficient; but there is another way of stating it, and another principle wholly independent of contract on which a similar defense arises. The law is full of instances where duties assume a double aspect, and may be viewed concurrently as arising by implication out of a contract, or as created by some wider principle of law which happens to take effect and to receive apt illustration in the particular instance of some particular contract. It is in most cases a barren and metaphysical inquiry to discuss whether such duties are best treated as arising by implication from the contract, or from the general law outside; and down to the employers' liability act, 1880, it may have been less important, in the case of visible and apparent risks, which explanation of the master's immunity was given. The employers' liability act of 1880 makes provision on this point necessary, and renders it important to remember that, quite apart from the relation of master and servant, and independent altogether of it, one man cannot sue another in respect of a danger or risk not unlawful in itself, that was visible, apparent, and voluntarily encountered by the injured person."

A similar point of view is indicated by Lord Esher's remarks in a later case: "Under the old law it would have been said: 'You (the servant) have entered into or continued in this employment where this thing of which you complain is open and palpable, and therefore it is an implied condition of your contract of service that you take upon yourself the risk of accidents therefrom, and consequently you have no remedy against your employer.' As between master and servant that was the way the immunity from liability was always stated. The maxim, *Volenti non fit injuria*, was not wanted as between master and servant. It was only wanted, if at all, where no such

As the phrase, "assumption of risks," has by force of usage acquired a meaning suggestive of the notion of an implied contract, it would seem to be advisable, in referring to the jurisdiction which exists when the maxim is applied, to describe it in language which bears a less specialized significance,—as, that the servant "took upon himself,"³ or "accepted,"⁴ or "voluntarily undertook,"⁵ or "voluntarily incurred,"⁶ or "voluntarily encountered,"⁷ the risk which the injury was due; or that he waived the right of action which he had acquired by that injury.⁸

371. Relation of the maxim to the defense of contributory negligence.—The older authorities construe the maxim as covering the defense of contributory negligence, as well as that of a contractual assumption of risks.¹ On the other hand, Lord Justice Bowen has expressed

relation as that of master and servant as existing." *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 67 L. J. Q. B. N. S. 7, 36 Week. Rep. 283 (p. 651 of Law Reports).

In *Knisley v. Pratt* (1896) 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986, the court distinguishes between the conception of an "implied contract" and "an independent act of waiver," the latter phrase, as the context shows, being intended to express the effect of the maxim. So also in *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312, it is laid down that "if the agent or employee of the company waive the omission of duty on the part of the company, he takes the risk upon himself, and if damaged, he must abide by the maxim, *Volenti non fit injuria*."

There is a somewhat singular confusion of expressions in the late case of *Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918, where Smith, L. J., after stating that the defendant's counsel purposely abstained from raising the defense that the injured servant had "contracted, or consented or undertaken" to run the risk in question, in order that they might raise the defense given by the maxim, put the question in a subsequent part of his opinion, where he was commenting on the finding of the jury that the servant knew of the danger: "How does that prove that he either contracted, or consented, or undertook to accept the risk?" The word italicised seems especially inappropriate, considering the basis on which the case was argued and decided.

¹ *Romer, J.*, in *Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918.

² Lord Watson in *Smith v. Western R. Co.* (1891) A. C. 325, 60 L. J. Q. B. N. S. 8, 467, 55 J. P. 660, 40 Week. Rep. 392 (p. 354 of Law Reports).

³ Lord Watson in *Smith v. Western R. Co.* (1891) A. C. 325, (p. 354 of Law Reports), 60 L. J. Q. B. N. S. 8, 467, 55 J. P. 660, 40 Week. Rep. 392.

⁴ Bowen, L. J., in *Wentworth v. Western R. Co.* (1889) 4 T. L. R. 504; Lindley, L. J., in *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. (p. 661 of Law Reports), 57 L. J. N. S. 7, 36 Week. Rep. 283.

⁵ Bowen, L. J., in *Thomas v. Birmingham R. Co.* (1887) L. R. 18 Q. B. Div. (p. 699 of Law Reports), 56 L. J. N. S. 340, 57 L. J. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516.

⁶ *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312; *Knisley v. Pratt* (1896) 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986.

⁷ *Griffiths v. Gidlow* (1878) 3 B. & N. 648, 27 L. J. Exch. N. S. 385, 28 L. J. Q. B. N. S. 139, 5 J. P. 172, 7 Week. Rep. 261; *Curtis v. Worth* (1856) 5 El. & Bl. 849, 25 Q. B. N. S. 121, 2 Jur. N. S. 116; *Ballard v. Ballard* (1852) 1 Curt. C. 100, Cas. No. 2,262. See also Broom, *Maxims*, *268.

The same view seems to have been adopted by Lord Watson in the passage quoted in § 370, note 1, *supra*.

In *Britton v. Great Western R. Co.* (1872) L. R. 7 Exch. 130, 41 L. J. Exch. N. S. 99, 27 L. T. N. S. 12, Week. Rep. 525, Channell, B. decided the servant was "*volens*" in the sense

opinion that the principle embodied by the maxim is outside the principle of contributory negligence altogether.³

Of these two theories the former is conceived by the present writer to be the correct one. The reasoning by which the latter was sustained is far from being satisfactory or convincing. In the first place, it presupposes the soundness of the doctrine that any evidence which suffices to show that the servant was *volens* necessarily involves the conclusion that there had not been any antecedent breach of duty on the master's part. This doctrine is not conceded by all the authorities to be correct. See § 371, *infra*. But even if its correctness be conceded, there is still a serious flaw in Lord Justice Bowen's exposition of principles. The finding of the jury with reference to which his theory was propounded merely negatived contributory negligence as regards the act which was the immediate cause of the injury. But manifestly this is not the only description of contributory negligence which constitutes a possible factor in the determination of the right of parties to such actions. Want of care may be shown, not only by a failure to observe the precautions appropriate to be taken at the moment when the injury was received, but by the fact that the plaintiff remained in a situation in which there was a probability of his being, sooner or later, injured, owing to the existence of a certain

being guilty of contributory negligence" based on negligence under the plea of "not guilty." It was said, and said as reported in the Law Journal only).

Compare also the statement that it is a fundamental principle in this branch of jurisprudence, that one who voluntarily incurs a known and immediate danger is guilty of contributory negligence. *Indianapolis & St. L. R. Co. v. Watson* (1887) 114 Ind. 20, 14 N. E. 221, 15 N. E. 824.

Thomas v. Quartermaine (1887) L. R. 18 Q. B. Div. 685, 697, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. His position is explained at length in the following passage: "Contributory negligence arises when there has been a breach of duty on the defendant's part, not where *ex hypothesi* there has been none. It rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence, accordingly, is not the true proximate cause of the injury. It is for this reason that, under the old form of pleading, the defense of contributory negligence was raised in actions

based on negligence under the plea of 'not guilty.' It was said, and said rightly, in *Webbin v. Ballard* (1886) L. R. 17 Q. B. Div. 122, 55 L. J. Q. B. N. S. 395, 54 L. T. N. S. 532, 34 Week. Rep. 455, 50 J. P. 597, that in an inquiry whether the plaintiff has been guilty of contributory negligence the plaintiff's knowledge of the danger is not conclusive. Obviously such knowledge may have even led him to exercise extraordinary care. But the doctrine of *Volenti non fit iniuria* stands outside the defense of contributory negligence, and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all. A confusion of ideas has frequently been created in accident cases by an assumption that negligence to the many who are ignorant may be properly treated as negligence as regards the one individual who knows and runs the risk, and by dealing with the case as if it turned only on a subsequent investigation into contributory negligence."

known peril, although he might be in the exercise of due care at the moment when an immediate necessity for avoiding that peril presented itself. See chapter XVIII., *ante*. If the probability of being thus injured is so great that a prudent man would have declined to expose himself to the danger, the supposed case is evidently one in which the person would be guilty of contributory negligence and charged with the legal consequences of that kind of culpability. Here we have a voluntary and deliberate action,—“intelligent choice,” in fact, to use the very words of Lord Justice Bowen,—and no sound reason can be suggested why the maxim should not be held applicable under such circumstances. With all deference, therefore, it is submitted that the distinguished judge has fallen into an error, and that his error is probably accounted for by his having failed to take into account all of the possible aspects under which the evidence before him might have been viewed.³

Other eminent authorities seem to have made a similar mistake. Thus, in a Massachusetts case we find the law laid down as follows: “Independently of any relation of master and servant, there may be a voluntary assumption of the risk of a known danger, which will debar one from recovering compensation in case of injury to person or property therefrom, even though he was in the exercise of due care. In other words, it may be consistent with due care to incur a known danger voluntarily and deliberately; and this may be so when the danger arises from the known or apprehended neglect or carelessness of others.” *Miner v. Connecticut River R. Co.* (1891) 153 Mass. 298, 26 N. E. 994. There the action was to recover damages for the death of a horse which was frightened by a moving locomotive while standing in a railway yard, and backed itself and a wagon over the edge of an unprotected embankment. The court held that where there is evidence that a plaintiff's employee knew and appreciated the danger which caused the injury complained of it is error to refuse a ruling that, if the jury should find, independently of any question of contributory negligence, that the plaintiff's employee with full knowledge voluntarily assumed the risk, or intentionally took it upon himself, the verdict should be for the defendant. “The principle,” said the court, “that one may be debarred from a recovery when he voluntarily assumes the risk is not identical with the principle on which the doctrine of contributory negligence rests, and in proper cases this ought to be explained

to the jury. One may, with full knowledge, open, undertake to do a thing which is attended with more or less peril; and he may, both in entering upon the undertaking and in carrying it out, use all the care he is capable of, whether or not he thereby assumes the risk may depend on other circumstances.” Here, it is apparent to the court, in considering the question, failed to take account of the possibility of contributory negligence which might be a result of the plaintiff's deliberation.

In his work on Negligence, Mr. Wharton lays it down that “the doctrine of assumption of the risk . . . necessarily excludes a consideration of the state of mind which is capable either of accepting or declining to accept the risk of an injury to another.” . . . “The doctrine of assumption of the risk, agreeing that an injury should be recovered from another.” As to the question of the alternatives here presented, submitted that the learned author conceives the situation. The theory, we take it, is that, in cases where a design can be proved, the question whether the actor was imprudent is wholly immaterial and does not appear as an element in the problem. A similar remark applies to the alternative. A plaintiff naturally asks what he considers to be the ground upon which to found his claim, and if he can establish a case of contributory negligence by the defendant, it would be a gratuitous piece of folly to insist upon a ground and allow the case to be fought out on a ground so vague to the standards which are available for determining what an act is negligent or not.

The theory which separates the defense given by the maxim from that of contributory negligence clearly finds no warrant in the words of the maxim themselves, for the idea underlying them is simply that of voluntary action which incapacitates the actor from maintaining a suit for damages in a court of law against some person who would otherwise be amenable to such suit. No other quality is predicated of the disabling action than that it should have followed an unconstrained exercise of the actor's will. Nor can such a theory be made to harmonize with any juristic concept of negligence; for a want of care, although it may, merely as a matter of abstract metaphysics, be predicated of an action induced by coercion, cannot, without doing violence to one of the fundamental doctrines of all systems of law, be recognized as a factor in the practical determination of legal rights, unless the negligent person was a free agent.

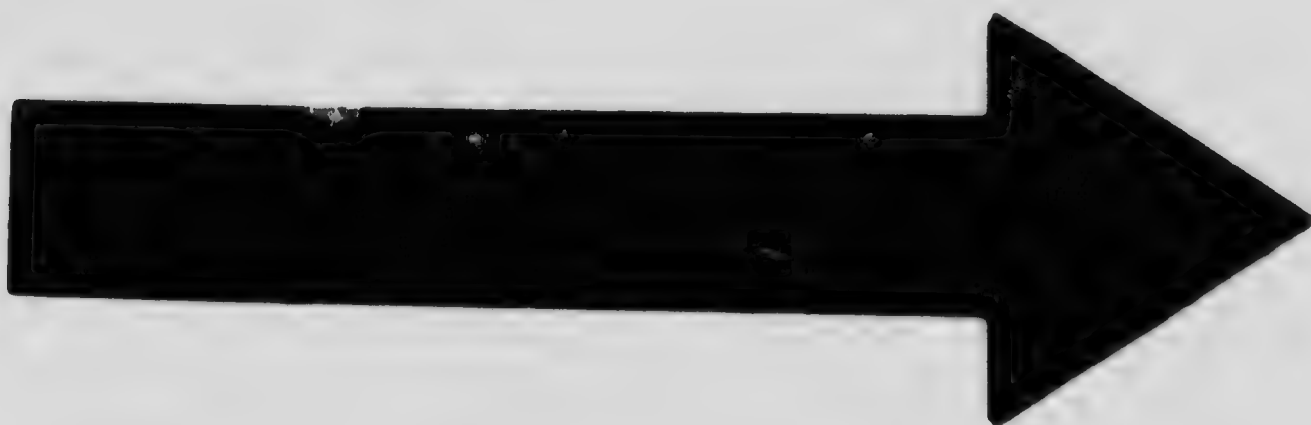
The conception entertained by Lord Justice Bowen and the other authorities just referred to seems to be that the maxim is applicable only in those cases in which deliberation precedes action, while contributory negligence implies action without deliberation.* A very little consideration, however, will show that the defenses cannot be differentiated upon this footing. A man may bestow the most anxious thought upon the solution of the question whether he will encounter a certain risk, and yet if his ultimate action in electing to expose himself to that risk would be pronounced imprudent by the average sense of the community, the law certainly charges him with the guilt of negligence. § 12.

The present writer ventures to think that the rationale of these two defenses, so far as the maxim is concerned, is simply this,—that, where the maxim is relied on, the plaintiff's mental condition prior to the adoption of the course of conduct which proved hurtful to him is the particular matter upon which his right of recovery is made to depend, while the plea of contributory negligence brings into the foreground the more special consideration that the course of conduct so adopted, or some particular act done after the plaintiff had committed himself to that course of conduct, was of such a character as to show that he was wanting in due care, and that this carelessness was the true proximate cause of the accident. In other words, the maxim

*This conception seems to be the basis of the following ruling: A plaintiff who not only carelessly seeks and remains in a place of danger, but comes within the scope of the maxim, *Aufdenberg v. St. Louis, I. M. & S. R. Co.* (1896) 132 Mo. 565, 34 S. W. 485 (a case of a passenger riding on top of a box car).

Such a case goes

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stops with the preliminary question whether the plaintiff's will be exercised freely and without constraint, while the defense of contributory negligence concerns itself rather with the subsequent question whether it was prudent for him to exercise his will in a certain manner. As, however, the law takes no account of a mental attitude except in so far as it may express itself in overt acts, it is evident that although the freedom of the will is the point emphasized by the maxim, the inquiry whether it is applicable in the premises requires to project the view forward to the same circumstances as those which suggest the farther inquiry whether the plaintiff was negligent. As to this the fact already alluded to, that, in the practical administration of justice, negligence can only be predicated of a voluntary act, and it will be apparent that, for the purpose of gauging the servant's rights, the defense that his action was voluntary, and the defense that it was negligent, should rather be regarded as the expression of two conceptions which are both comprehended under the maxim, than as referring to two distinct ideas, one of which does, and the other of which does not, lie within its scope. A circumstance which goes very strongly to support this view of its effect is that any state of facts which suggests its availability as a defense will usually be such that the plaintiff may rely either upon a general acceptance of the risks of the situation or upon the theory that the plaintiff, in continuing to expose himself to those risks, or in doing that particular thing from which his injury resulted, was guilty of contributory negligence.

372. Maxim not a defense unless the injured servant comprehended the risk.— That a master who seeks to escape liability to his servant on the ground that he assumed the risk as a part of his contract may lay a foundation for the defense by proving that he was not only aware of the conditions which caused his injury, but also understood the risk created by those conditions, is a familiar principle. See 271, *ante*. The same rule prevails where the plaintiff's assumption of the risk is referred directly to the maxim.¹

¹ "When, as is commonly the case, his [the servant's] acceptance or nonacceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it, unless he knew of its existence and appreciated, or had the means of appreciating, its danger." *Smith v. Baker* [1891] A. C. 325, 355, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392, per Lord Watson.

Before the servant can be charged with having voluntarily undertaken a dangerous business "plus the risk from

defective machinery," it must be shown that there was an assent to undertake the work, with full appreciation of the risk. *Ibid.*, per Lord Morris, p. 36 Law Reports.

"There may be a perception of the existence of the danger, without a comprehension of the risk." *Thomas v. Mermaine* (1887) L. R. 18 Q. B. D. 696 (p. 696 of Law Reports), 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516.

In *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N.

Where direct proof of the servant's knowledge is not obtainable, the problem for solution is whether the circumstances are such that constructive notice of the danger must be imputed to him. Primarily, of course, this question is one for the jury. The point to be determined is whether the servant ought, as a reasonably careful man, to have ascertained the nature and extent of the perils to which he was exposed. The circumstances to be considered as bearing upon this

7, 36 Week. Rep. 283, this sentence was objected to by Lord Esher on the ground that it implied that a dull man might recover where a man of intelligence might not, as both would know of the danger, but one would be imperfectly informed as to its nature and extent. This criticism seems to be unjust. The proper question under such circumstances must surely be, not merely whether the servant appreciated the risk, but whether he ought to have appreciated it, and this can be determined only by assuming a certain normal standard of intelligence amongst employees of the class to which the plaintiff belongs. Individual cases of defective understanding must be disregarded except where it is due to special causes, such as youth or inexperience, and even then the question of fact to be answered, though it covers a more limited area, should still be couched in a general form, viz.: Would a person of average intelligence, at the same age and with the same experience as the plaintiff, have appreciated the given risk?

"This principle applies only when the plaintiff has voluntarily assumed the risk. . . . The chief practical difficulty in applying it is in determining when the risk is assumed voluntarily. In the first place, one does not voluntarily assume a risk who merely knows that there is some danger, without appreciating the danger. On the other hand, he does not necessarily fail to appreciate the risk because he hopes and expects to encounter it without injury. If he comprehends the nature and the degree of the danger, and voluntarily takes his chance, he must abide the consequences, whether he is fortunate or unfortunate in the result of his venture. Sometimes the circumstances may show, as matter of law, that the risk is understood and appreciated; and often they may present in that particular a question of fact for the jury." *Fitzgerald v. Connecticut River Paper Co.* (1891) 155 Mass. 159, 29 N. E. 464.

In *Pritchett v. Poole* (1897) 76 L. T.

N. S. 472,—an appeal which turned on a technical point of procedure.—Cave, J., remarked in the course of his opinion that he doubted whether the maxim was applicable simply because the plaintiff could see the defect which caused his injury. In view of the cases already cited, it is evident that this hesitating expression of opinion might with perfect propriety have been exchanged for a categorical denial of the applicability of the maxim under the circumstances supposed.

A judgment for the plaintiff should be entered though the jury find that he worked "voluntarily" with a knowledge of the danger, where he has testified that he had not full knowledge of the danger he was incurring, but only that an accident might happen, and the question has not been put to them whether he knew the particular risk he was incurring. *Sanders v. Barker* (1896) 6 Times L. R. 324.

A miner who was injured while he was being hoisted from a shaft cannot be debarred from recovering on the ground that there was no banksman stationed at the pit mouth during the ascent of the cage, as the rules of his employer required, unless it is shown that those rules were brought to his notice. *Baddeley v. Granville* (1887) L. R. 19 Q. B. Div. 423, 56 L. J. Q. B. N. S. 501, 57 L. T. N. S. 268, 36 Week. Rep. 63, 51 J. P. 822.

For other explicit affirmations of the same doctrine, see *Brooke v. Radcliff* (1890) 63 L. T. N. S. 287, 55 J. P. 262; *Britton v. Great Western Cotton Co.* (1872) L. R. 7 Exch. 132, 41 L. J. Exch. N. S. 99, 27 L. T. N. S. 125, 20 Week. Rep. 525; *Medway v. Greenwich Inland Linoleum Co.* (1898) 14 Times L. R. 291 (applicability of maxim held to be negated by a finding that the plaintiff did not appreciate the risk); *Madden v. Hamilton Iron Forging Co.* (1889) 18 Ont. Rep. 55; *Hought v. Wortman & W. Mfg. Co.* (1893) 24 Ont. Rep. 618; *Fitzgerald v. Connecticut River Paper Co.* (1891) 155 Mass. 155,

point are the natural intelligence and acquired information and experience of the servant, the simple or recondite character of the fact to which the inquiry relates, and the opportunities which a person in his position would have had for exercising his faculties of observation. All these elements, having been discussed by the courts most elaborately in relation to cases in which the defense of a contractual assumption of the risk was relied upon, will be treated at length in the following chapter.²

373. Maxim not a defense unless the injured servant voluntarily undertook the risk.— That the ultimate question to the solution of which evidence of the servant's knowledge of the risk is directed is whether he was a voluntary agent in exposing himself to it is a necessary deduction from the meaning of the operative word in the maxim. To let in the maxim as a defense, it must be shown, not only that the servant was "a volunteer in the sense that he went into a place of danger when he might have stopped away, but that he went voluntarily, with a full knowledge and understanding of the risk."¹

In § 289, *ante*, some particular instances are mentioned in which it is considered that the existence of the element of voluntary action which must be established in order to support the defense of a contractual assumption of a risk, cannot be inferred, as a matter of law, from the mere fact that the risk was known to the servant. Similar conclusions would doubtless be entertained if similar circumstances were presented in cases where the maxim was directly relied upon. But with regard to cases which do not involve any such special features as those which are discussed in the passage referred to, there is a conflict of opinion which it seems hardly possible to adjust with

29 N. E. 464; *Hingsworth v. Boston Electric Light Co.* (1894) 161 Mass. 383, 25 L. R. A. 552, 37 N. E. 778; *Perham v. Portland General Electric Co.* (1897) 33 Or. 451, 40 L. R. A. 799, 53 Pac. 14 (these two last-named cases were actions against a stranger).

² In an action by a stableman for injuries received from the bite of a vicious horse, allegations that the horse was a dangerous animal, and on several previous occasions had attacked, bitten, and severely injured those who had charge of it, have been held to show that the plaintiff knew the animal's temper, and was therefore well aware of and wilfully assumed the risk he incurred in entering the stall to tie it up. *Fraser v. Hood* (1887) 15 Sc. Sess. Cas. 4th series, 178. But this case would certainly not be followed in all jurisdic-

tions. It seems clear that it was for the jury to say whether the servant really did know, or ought to have known, the animal's temper. It was surely not a conclusive presumption that the occurrences indicating viciousness operated as notice to plaintiff of such viciousness. That the question whether the plaintiff's act was voluntary should also have been left to the jury can scarcely be disputed, since the decision in *Smith v. Baker* (1891) A. C. 325, 60 L. J. Ch. B. N. S. 683, 65 L. T. N. S. 467, 55 J. L. 660, 40 Week. Rep. 392 (see § 372 *infra*).

¹ *Britton v. Great Western Cotton Co.* (1872) L. R. 7 Exch. 130, 41 L. J. Exch. N. S. 99, 27 L. T. N. S. 125, 20 Week. Rep. 525, per Bramwell, B. (p. 137 of Law Reports).

out the interference of the legislature, inasmuch as it really reflects the two essentially different points of view from which it is possible to regard the social and economic relations between the parties to a contract of service. See §§ 376, 377, 382, 383, *infra*.

374. Logical significance of the servant's knowledge of the risk.—

The doctrine that, where the implied terms of the contract of service are the measure of the rights and liabilities of the parties thereto, the master is to be regarded as being free from culpability or negligence, according as the servant was or was not chargeable with a comprehension of the risk to which the injury was due, has been discussed in chapter VII., *ante*. A similar point of view is traceable in the decisions relating to the effect of the maxim, *Volenti non fit injuria*. The position taken is that the effect of evidence which shows that the servant appreciated the risk which caused his injury, and that this appreciation was attended by circumstances which make a proper case for the application of the maxim, is to demonstrate that the master was not guilty of any breach of duty in exposing the servant to the risk in question.¹

On the other hand, judges of the highest eminence have taken the

¹ Of this doctrine the late Lord Bowen has given the following admirably lucid and forcible explanation: "The common law imposes on the occupier of premises no abstract obligation at all as to the state in which he is to keep them, provided that he carries on no unlawful business and is guilty of no nuisance. In the case of premises that contain an element of danger, a duty arises as soon as there is a probability that people will go upon them; but it is a duty only towards such people as actually do go. It is not a duty in the air, but a duty towards particular people. The occupier is bound to use all reasonable care to prevent such persons from being hurt. It is obvious that this duty must vary according to the character of the danger and the circumstances under which the premises are to be visited. It differs in the case of

n dangers and the case of dangers are palpable and visible; it may vary according to the age and comprehension of the visitor; in the case of bare licensees and of those who come upon the premises on the occupier's business and at his invitation. The only obligation on the occupier is to take such precautions as are reasonable in each instance to prevent mischief, and this is but the adaptation to a special case of the general doctrine,

Sic utere tuo ut alienum non laedas.

In the absence of any further act of omission or commission by the occupier of the premises or his servants, or of any disregard of statutory provisions or of individuals' rights, can it properly be said that there has been upon his part any breach of duty towards a person who, knowing and appreciating the danger and risk, elects voluntarily to encounter them? I employ a builder to mend the broken slates upon my roof, and he tumbles off. Have I been guilty of any negligence or breach of duty towards him? Was I bound to erect a parapet around my roof before I had its slates mended? In the case now before us the negligence relied on by the plaintiff is that a vat in the room in which he worked was left without a railing. Let us suppose that the defendant, impressed with the danger, had actually sent for a builder to put one up, and the builder had fallen in while executing the work. Would the defendant have been guilty of a breach of duty toward the builder?" *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 695, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. To a like effect, are the remarks of Fry, L. J., in the same case.

The theory of Lord Justice Bowen has been adopted by the Ontario Court

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ground that the rationale of the application of the maxim in this type of cases is that the master has been guilty of a breach of duty, but that the voluntary action of the servant in exposing himself with knowledge, to the danger created by such breach prevents him from relying upon it as a cause of action.²

of Appeals in *Hardman v. Canada Atlantic R. Co.* (1895) 22 Ont. App. Rep. 292 (see § 377, note 6, *infra*).

Compare also the following passages: "If the plaintiff had voluntarily undertaken the risk from which he suffered, there could, as a matter of course, be no negligence imputable to the defendants." *Smith v. Baker* (1891) A. C. 225, 352, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392, per Lord Watson.

"In the course of the argument I said that the maxim, *Volenti non fit injuria*, did not apply to a case of negligence, that a person never was *volens* that he should be injured by negligence,—at least, unless he specially agreed to it. I think so still. The maxim applies where, knowing the danger or risk, the man is *volens* to undertake the work." Lord Bramwell in *Smith v. Baker* (1891) A. C. 225, 60 L. J. Q. B. N. S. 683, 40 Week. Rep. 392, 65 L. T. N. S. 467, 55 J. P. 660 (p. 344 of Law Reports).

"Where both parties have equal means of knowledge, the rule is that the master is under no obligation to provide for the safety of the servant to a greater extent than the servant is bound to provide for his own safety. To this case the maxim, *Volenti non fit injuria*, applies." *Rudd v. Bell* (1887) 13 Ont. Rep. 47.

"One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger." *O'Malley v. South Boston Gaslight Co.* (1893) 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119.

The remark of Lord Cranworth, that "a party who rushes into danger himself cannot say. That is owing to your negligence," is possibly another judicial

recognition of the theory. *Paton v. Wallace* (1854) 28 Eng. L. & E. 1 Macq. H. L. Cas. 748.

See also opinion of Cockburn, C. in *Woodley v. Metropolitan Dist.* (1877) L. R. 2 Exch. Div. 384, 3 L. J. Exch. N. S. 521, as quoted 376, *infra*.

"It is well settled that a servant assumes the obvious risks of the service into which he enters, even if the service be ever so dangerous, and might easily be conducted more safely by the employer. This is implied in every voluntary undertaking, and it is within a principle which has a broader general application, and is expressed in the maxim, *Volenti non fit injuria*. The reason on which this is founded is that, whatever may be the master's general duty to conduct his business safely in reference to persons who may be affected by it, he owes no legal duty in that respect to one who contracts to work in the business." *Fitzgerald v. Connecticut Paper Co.* (1891) 155 Mass. 155, 29 N. E. 464.

In the case last cited the court took one part of its judgment went so far as to extend this theory to cases where the defense raised is contributory negligence, and declared that a plaintiff "should not be permitted to complain of the conduct of the defendant by himself, and find that it was negligent, and consider the plaintiff's conduct himself, and find that it was reasonable and careful." But this doctrine is inconsistent with the accepted view of the significance of this defense, as being based on an allegation that the plaintiff's negligence has severed the causal connection between the defendant's act and the injury complained of. *Thompson v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 697, 56 L. J. Q. B. N. S. 57, 51 L. T. N. S. 537, 35 Week. Rep. 51, 51 J. P. 516, per Bowen, L. J., who also remarks that "contributory negligence arises when there has been a breach of duty on the defendant's part, not where, *ex hypothesi*, there has been none." See also § 323, *ante*.

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Which of these antagonistic views is correct as a matter of abstract logic is a question upon which the commentator may well refrain from expressing any decided opinion, since it is apparent from the above citations that any opinion which he expresses must necessarily run counter to that of some of the most distinguished of modern jurists. But it seems quite safe to say that the latter view is the more likely, in the practical administration of justice, to lead to correct conclusions. An act which changes its quality completely, according as the servant is or is not aware of the physical consequences which it may entail, is, we think, a conception altogether too subtle and refined to be comprehended by the average juror. This consideration should perhaps be deemed decisive in any court

view is contained in the following passage from Lord Esher's opinion in a case where the servant was injured by a vicious horse of whose qualities he had for some time past been fully aware: "If the master had any duty at all to take care of his workmen, then allowing this imperfect plant to continue to be used was surely a breach of that duty. But it is said he may have had that duty, and may have neglected it as to those of his workmen who did not know of, or were not affected by, the particular defect, but not as to the plaintiff, who, knowing of the defect, still continued to drive the horse, and therefore comes within the maxim referred to. I confess that has always seemed to me to be not a bad way of illustrating the result; but it is to my mind a horrible way of stating the duty, to say that a master owes no duty to a servant who knows that there is a defect in machinery, and, having pointed it out to one in authority, goes on using it. It seems cruel and unnatural, and, in my view, utterly abominable. It may be that the breach of this duty gives no right of action,—that it is what is called a duty of imperfect obligation." *Farmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 652, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281. In a later passage in his opinion the same judge, referring to the theory of Bowen, L. J., in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 694, 695, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, that "the duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognizant of the full

extent of the danger, and voluntarily run the risk," said (p. 657 of Law Reports): "I must confess I do not like that way of putting it. I think there is a duty, though I agree that there is no actionable breach of that duty if the person injured, knowing and appreciating the danger, voluntarily elects to encounter it." Lindley, L. J., in the same case seems to have regarded the situation in the same light. See p. 659 of the Law Reports.

Compare also the statement of Lord Herschell in *Smith v. Baker* (1891) A. C. 325, 366, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392, that if there had been no breach of duty, it would obviously have been unnecessary to inquire whether the maxim afforded a defense.

Lord Halsbury also, in describing the conduct of the defendants in the same case, said (p. 336 of the Law Reports) that he emphasized the word "negligently" because some of the judgments below seemed to him to "alternate between the question whether the plaintiff consented to the risk, and the question whether there was any evidence of negligence to go to the jury, without definitely relying on either proposition."

Compare also the language of Lord Herschell in *Membery v. Great Western R. Co.* (1889) L. R. 14 App. Cas. 179, 193, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 38 Week. Rep. 145, 54 J. P. 244.

In *Williams v. F. F. Ingham Battery & Metal Co.* (1899) Q. B. 338, 68 L. J. Q. B. N. S. 918, it was assumed by Romer, L. J., that the question to be determined was whether the servant had lost his right of action for injuries

which follows the rule laid down in the leading case on the point, that the question whether the maxim is a bar to an action is always, in the first instance at least, be one of fact; though less moment in those jurisdictions in which the functions of the courts are virtually restricted to determining in doubtful cases whether the servant fully appreciated the conditions under which he was employed at the time of the accident.

375. Ordinary risks always presumed to have been voluntarily taken.—That a servant is "*volens*" in regard to what are termed "ordinary" risks of his employment—that is to say, risks the existence of which does not import negligence on the master's part—is axiomatic in this branch of law. As to these the presumption of knowledge and of voluntariness of action, must necessarily be conclusive, whatever conception may be entertained as to the exact aspect of the relations between masters and servants.¹ What

caused by a breach of duty on the master's part. See § 377, note 7, *infra*.

In *Wallace v. Carter Paper Mills Co.* (1892) 19 Sc. Sess. Cas. 4th series, 915, it was laid down that the servant's continuance of work did not show a willingness to take the risk on agreement "to relieve his master of the consequences of any injury caused by what, *ex hypothesi*, is the master's fault."

¹ *Smith v. Baker* (1891) A. C. 325, 60 L. J. Q. B. N. S. 683, 40 Week. Rep. 392, 65 L. T. N. S. 467, 55 J. P. 660.

"There are many kinds of work in which danger is necessarily inherent, where precautions such as would insure safety to the workman are either impossible, or would only be attainable at an expense altogether incommensurate with the end to be accomplished. In all such cases the workman must rely upon his own nerve and skill; and, in the absence of express stipulation to the contrary, the risk is held to be with him, and not with the employer." Lord Watson in *Smith v. Baker* (1891) A. C. 325, 356, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392.

"The maxim," said Lord Herschell in the same case, "has no special application to the case of employer and employed, though its application may well be invoked in such a case. The principle embodied in the maxim has sometimes in relation to cases of employer and employed, been stated thus: A person who is engaged to perform a dangerous operation takes upon himself the risks incident thereto. To the propo-

sition thus stated there is no objection in giving an assent, provided that it is meant by engaging to perform a dangerous operation, and by the accident thereto, be properly defined, neglect of such definition may be an error. Where a person undertakes to do work which is intrinsically dangerous notwithstanding that real care has been taken to render it as little dangerous as possible, he voluntarily subjects himself to the inevitable accompanying risk, or, not, if he suffers, he permitted himself to plain that a wrong has been done even though the cause from which he suffers might give to others a right of action. For example, one who agreed to take part in an operation necessitating the production of fumes injurious to health would have no right of action in respect of bodily suffering or inconvenience resulting from the fact that though another person residing at the seat of these operations might maintain an action if he sustained injuries from the same cause."

"A workman, whether he belongs to the regular staff of the occupier of the premises, or is called in for the occasion, cannot be heard to complain that a part of those premises which he has hired to repair was in a dangerous condition, as he is paid for the risk he runs in doing the work, and voluntarily incurs it." Roberts & W. *Employer and Employee*, 3d ed. 252, quoted with approval by Fry, L. J., in *Thomas v. Manchester S. Ry. Co.* (1887) L. R. 18 Q. B. Div. 702, 56 L. J. Q. B. N. S. 340, 57

are deemed ordinary, so as to fall within the scope of this rule, is a question already discussed in a former chapter. See §§ 264-269, *ante*.

376. Doctrine that voluntary action is inferable, as matter of law, when appreciation of an extraordinary risk is proved.—*a. United Kingdom and British Colonies.*—The earlier decisions in England proceed upon the theory that the servant's inability to maintain the action became a necessary inference as soon as it was clearly established that he had accepted or remained in the employment with a full comprehension of the risk from which his injury resulted.¹

N. S. 537, 35 Week. Rep. 55, 51 J. P. 516.

"If people will enter into dangerous employment, they do so without making other people liable for injuries they sustain." Lindley, L. J., in his opinion delivered in the court of appeals in *Smith v. Baker* (1891) A. C. 325, 343, 60 L. J. Q. B. N. S. 683, 40 Week. Rep. 392, 65 L. T. N. S. 467, 55 J. P. 660. In the same case (p. 346), Lord Bramwell argues on the hypothesis that the maxim operates as a bar to an action under such circumstances, and expressly approves of the statement in the court of appeal, that "a person who is engaged to perform a dangerous operation takes the risk of the operation of the work that he is called on to perform."

If the employment is in its own nature attended with danger, the workman is presumed to know its danger, and therefore, if he voluntarily engages in it, he is not entitled to compensation for an injury attending it. In such cases the maxim, *Volenti non fit iniuria*, is applicable. *Cook v. Bell* (1887) 13 Ont. Rep. 13.

Here a servant whose hand came into contact with the knives of a jointer working through a slot in a table was denied recovery.

¹*Skipp v. Eastern Counties R. Co.* (1853) 9 Exch. 223, 3 C. L. Rep. 185, 23 L. J. Exch. N. S. 23; *Senior v. Ward* (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261; *Griffiths v. Gidlow* (1858) 3 Hurlst. & N. 648, 27 L. J. Exch. N. S. 404.

The most elaborate presentment of this view is to be found in the leading case of *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521. Three out of five justices of the court of appeal held that no action could be maintained

against a railway company by a contractor's servant who was injured, while working on the track, by a passing train which came upon him unexpectedly, owing to the failure of the company to have a proper system by which warning could be conveyed to laborers in the plaintiff's position. Cockburn, Ch. J., said: "If the plaintiff, in doing the work on the railway, is to be looked upon as the servant of the company, the decision of the court of exchequer in his favor cannot, as it seems to me, be upheld. It could not be said that any deception was practised on the plaintiff as to the degree of danger to which he would be exposed. He must be taken to have been aware of the nature and character of the work and its attendant risks when he entered into the employ of the contractor for the job in question, or, at all events, he must have become fully aware of it as soon as he began to work. If he had been misled in supposing that precautionary measures such as the dangerous nature of the service rendered reasonably necessary would be taken, he had a right to throw up his engagement and to decline to go on with the work; and such would have been his proper course. But, with a full knowledge of the danger, he continued in the employment, and had been working in the tunnel for a fortnight when the accident happened. A man who enters on a necessarily dangerous employment with his eyes open takes it with its accompanying risks. On the other hand, if the danger is concealed from him and an accident happens before he becomes aware of it, or if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and from the want of such precautions an accident happens to him before he has become aware of their absence, he may

This theory is now superseded in that country and its dependencies by the one which will be explained in § 377 *infra*, even in the cases which have established the new rule there, more or less difference of opinion. Some distinguished judges unreservedly declared themselves in favor of retaining the

hold the employer liable. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or, in the alternative, to quit the service. If he continues to take the benefit of the employment he must take it subject to its disadvantages. He cannot put on the employer terms to which he has now full notice that the employer never intended to bind himself. It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible, as I certainly think the company were in the present instance. . . . But it may be said the plaintiff was not in the service of the defendants at all. He was on their premises, not only on lawful business, but it may be said by their invitation, as he was working under a contractor employed by them to do the work in question. He sustained the injury complained of through what the jury have found to have been negligence on the part of the company; he is therefore entitled to damages. But this reasoning appears to me to be fallacious. That which would be negligence in a company with reference to the state of their premises or the manner of conducting their business, so as to give a right to compensation for an injury re-

sulting therefrom to a person fully resorting to their premises in ignorance of the existence of the danger, will give no such right to one becoming aware of the danger, and encountering it, and fails to require the extra care necessary for avoiding it. If the same observation arises as before, that full knowledge of the manner in which the traffic was carried on, and the danger attendant on it, though not thought proper to remain in the employment. No doubt he thought that the exercise of extra vigilance and care on his part the danger might be avoided. By a want of particular care in loading one of his tools he exposed himself to the danger, and unfortunately suffered from it. He cannot, I think, make the company liable for injury arising from danger to which he voluntarily exposed himself. The contractor, the immediate employer of the plaintiff, undertook to execute work which he would be attended with danger under circumstances under which it was executed. The plaintiff as his servant did the same. They are in a very different position from that in which would have stood had they been on the defendants' premises in ignorance of the danger." Mellor J. pressed his concurrence as follows: "When, therefore, the contractor in the case undertook to perform the work in question, and in the performance of which the plaintiff was engaged at the time of the accident, it is reasonable to assume that the character and nature of the work was duly considered and included in the price paid for it; if the plaintiff thought that there was a danger of an unusual character in the nature of the work, he ought to have stipulated with his master or company to provide some additional means or precautions against such a possible danger, or, as he was better to judge than they whether the work could safely be performed without additional precautions, he ought to have refused the task unless they were provided. . . . I think that the company can in no respect be said to be guilty of negligence. They conducted

doctrine.² Others, while they admit that proof of the servant's knowledge of the risk which caused his injury is not of itself sufficient to let in the operation of the maxim, have so qualified the effect of this concession, both by the language in which they have stated their abstract doctrinal position, and by the practical construction which they have placed upon the maxim with reference to concrete cases, that the adoption of their views would do very little to improve the servant's position. Indeed, their utterances have been cited as authority for decisions which are in no respect different from what they would have been if the original English theory had been relied upon.³

the business in the ordinary way, and an accident did not occur through any misconduct or mismanagement on their part. I think that the plaintiff, who is presumed to know the ordinary course of the company, and the limited space within which he had to work, was within the maxim, *Volenti non fit injuria*, and has, at all events, no remedy against the defendants. . . . In the present case the plaintiff had probably the same opportunity of judging of the possible danger as his master had, and might have declined the work, and refused to undertake it, without additional precautions being taken or means provided by his master, but, as it appears to me, that was a matter affecting his relation with his master, and not in any way affecting the duty of the company."

"In *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283 (p. 667) Lopes, L. J., thus sums up his views with regard to the application of the maxim in cases where the servant brings suit under the employers' liability of 1880: "Whereas, before the new knowledge would have disentitled the workman to recover, now knowledge in the specified cases is no longer to create a disability, provided the workman gives information; but if, after giving information, he continues in the employment knowing the danger he is incurring the same inference arises as heretofore, viz., the inference that he voluntarily runs the risk; and any evidence of negligence arising from any breach of duty on the part of the employer is by the workman's conduct displaced." See further, as to this judge's views, in § 383, note 4, *infra*.

In *Mumbery v. Great Western R. Co.* (1889) L. R. 14 App. Cas. 179, 58 L. J.

Q. B. N. S. 563, 61 L. T. N. S. 566, 38 Week. Rep. 115, 54 J. P. 244, Lord Bramwell expressed a very decided opinion that the maxim was a bar to the action simply for the reason that the servant had been fully aware of the danger to which he was exposed. See § 377, note 12, *infra*, for the facts.

In *Smith v. Baker* (1891) A. C. 325, 60 L. J. Q. B. N. S. 683, 40 Week. Rep. 392, 65 L. T. N. S. 467, 55 J. P. 630, by which the new theory was definitely settled, the same eminent jurist recorded an emphatic dissent from the conclusions arrived at by the House of Lords. The original theory seems also to have held its ground in Scotland almost up to the time when *Smith v. Baker* was decided.

In *Fraser v. Hood* (1887) 15 Sc. Sess. Cas. 4th series, 178, it was held that, although the vicious temper of a horse was a defect in the plant of his employer, a stableman who entered his stall, having known for four years that the animal was a dangerous one, was, as a matter of law, debarred from recovering for injuries caused by a bite.

In another case, where a judge put the question to the jury whether "the plaintiff, a carrier, knowing the character of a restive horse he was told to drive," did, with that knowledge and with knowledge of the danger to which he was exposed, undertake the charge of it, "a finding that the plaintiff knew of the horse's character and the risk he ran in taking charge of it" was held to imply that the plaintiff went voluntarily to drive the horse and undertook the risk, and to amount, therefore, to a verdict for the defendant. *Wilson v. Lyle* (1889) 17 Sc. Sess. Cas. 4th series, 62.

³ In *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N.

b. United States.--In most of the American states the theory of the original English theory has always been taken for the consequence being that the servant's position in cases shown to have had knowledge of the abnormal risk to injury was due is the same, whether the master relied upon the theory of a contractual assumption of that risk or upon the maxim.⁴

S. 7, 36 Week. Rep. 283, it is mentioned that for some months after the publication of the opinions delivered in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. 310, 57 L. T. N. S. 537, 35 Week. Rep. 555, 5 J. P. 516, the judges of the courts of first instance made a practice of taking cases from the juries whenever the servant's knowledge of the risk was proved, this course being supposed to be justified or required by the decision of the court of appeal. That this supposition was not altogether inexcusable is clear from the extracts from the opinions both of Bowen and Fry, L.L.J., which is set out in note II to the following section.

The true significance of the decision of *Thomas v. Quartermaine*, as it was afterwards explained in *Yarmouth v. France* (see § 377, *infra*), was also missed in two Australian cases. In one of these it was laid down that the servant cannot recover if, before the happening of the accident, he had full knowledge, not merely of the facts, but of the risks attendant upon the performance of his duties. *Collins v. Munn* (1887) 14 Viet. L. R. (L.) 1. In the other the maxim was held to be a bar to the action, as a matter of law, where the plaintiff went on using a defective boiler after receiving a promise that it should be repaired. *Sinat v. Silra* (1887) 8 New So. Wales L. R. (L.) 415. The correctness of the latter decision was questioned in *Patterson v. Stevens* (1890) 1 New So. Wales L. R. (L.) 83, on the ground that it was inconsistent with *Thomas v. Quartermaine*. This is the gist of the explanatory remarks in *Yarmouth v. France*. But even under the older theory the decision is probably erroneous in view of the fact that the servant had gone on working in reliance on the promise of repairs. See chapter XXII., *post*.

⁴In the following cases the maxim was explicitly referred to as operating to bar the servant's recovery in an ac-

tion against his employer. *Pacific R. Co.* (1872) 50 Mo. 2; *River & L. E. R. Co. v. Bart*, 5 Ohio St. 541, 67 Am. Dec. 3; *v. Southern P. Co.* (1898) 29 219, 56 U. S. App. 323, 85 L. Williams v. Louisville & A. (1901) 23 Ky. L. Rep. 1124, 6738; *Hogenschutz v. South Ky.* 330, 1 S. W. 578; *South v. Johnson* (1895) 16 C. C. A. U. S. App. 1, 60 Fed. 559.

In *Kniskney v. Pratt* (1896) 1 372, 32 L. R. A. 367, 42 N. where the servant was injured on of the master's failure to furnish machinery, as required by the court said: "Where the obvious of the business result in the inability of the employee to sue to the fact that he voluntarily assumed those risks, not necessarily implied contract to do so, but a dependent act of waiver evidenced by his entering the employment with knowledge of all the facts."

A similar doctrine has been in several American cases, where the defendant was not the plaintiff, and the doctrine of a contractual assumption of risks had, therefore, no pertinence.

An employee of a railroad company which has the right under a contract to use the railroad track of a third party has no right of action against the owner of the track for injury received in consequence of his falling into a defective or unprotected frog in such track when he went to work upon the track knowing its condition. His assumption of the risks of the employment is no bar if he had been under contract with the owner. *Wood v. Locke* (1888) Mass. 604, 18 N. E. 578.

The danger which arises from the fact that merchandise is piled against slats inclosing the well of a freight elevator in a leased store in such a manner that the tenant's employee only start the elevator by standing

In Alabama the extreme view was at first taken that the maxim constituted a defense to an action under an employers' liability which was copied from that of England.⁵ But this doctrine was repudiated five years afterwards by a decision which embodied the rigorous rule that the maxim is applicable, as a matter of law, whenever the risk was appreciated by the servant.⁶

In two Massachusetts cases a strong inclination was manifested to adopt the English doctrine explained in § 377, *infra*.⁷ But shortly

the platform is obvious, and therefore accepted by them in such a sense that none of them cannot hold the landlord liable for injuries received in operating the elevator. *McCarthy v. Foster* (1902) 156 Mass. 511, 31 N. E. 385.

In *Elder v. New Orleans & N. E. R.* (1897) 49 La. Ann. 86, 21 So. 153, it was conceded that a brakeman employed by a steam railroad, who was injured through being swept off the top of a car by a guy-wire maintained in a dangerous position by an electric railroad company, would be debarred from recovering damages from the latter company if it had been proved that he had continued in the service with a positive knowledge of the precise danger assumed; but it was held that the evidence did not establish the conclusion.

Mobile & B. R. Co. v. Holburn (1887) 84 Ala. 133, 4 So. 146. The court said: "If it was intended in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, to apply the maxim, *Volenti non fit injuria*, to the case of a defect of which the employer was aware and negligently failed to remedy, we are not willing to adopt such construction of the statute."

Birmingham R. & Electric Co. v. Allen (1892) 99 Ala. 359, 20 L. R. A. 457, 13 So. 8. To the same general effect see *Louisville & N. R. Co. v. Banks* (1894) 104 Ala. 508, 16 So. 547; *Louisville & N. R. Co. v. Stutts* (1894) 105 Ala. 368, 17 So. 29; *Alabama G. & S. R. Co. v. Davis* (1898) 119 Ala. 572, 24 So. 862; *Bridges v. Tennessee Coal, I. & R. Co.* (1895) 109 Ala. 287, 19 So. 405.

In *Fitzgerald v. Connecticut River Paper Co.* (1891) 155 Mass. 156, 29 N. E. 464, it was held that an employee in attempting to descend slippery steps holding by the rail does not, as matter of law, voluntarily assume the risk of slipping and falling, where, although

she knows their condition and that there is some danger in passing over them, their condition is constantly changing with spray falling on them and freezing, the extent of the danger is not obvious, from a mere ocular inspection, and she has no means of egress from the building she works in except the steps.

In *Dalbony v. Dorr* (1892) 153 Mass. 513, 30 N. E. 366, where a female employee was injured through slipping on a staircase which became temporarily covered with ice during the term of her employment, it was held to be a question of fact whether, when she started down the stairs, she understood and appreciated the danger of going, and, if she understood it, whether she assumed it voluntarily, or because she felt obliged to continue in the service and make the best of the situation in which she found herself. Knowlton, J., after laying it down that the maxim was a conclusive defense in the case of ordinary risks and extraordinary dangers which may be considered normal, proceeded thus: "But in a much larger class of cases it is a question of fact, when one has been injured by reason of an exposure which he knew involved some risk, whether he voluntarily took the risk of the injury which he received. The question divides itself into two parts, viz., whether he understood and appreciated the risk, which is sometimes a question of law and sometimes a question of fact; secondly, if he appreciated it, whether he assumed it voluntarily or acted under such an exigency, or such an urgent call of duty, or such constraint of any kind, as, in reference to the danger, deprives his act of its voluntary character. He may reluctantly, so far as the danger is concerned, and under extraneous pressure which amounts almost to compulsion, expose himself to a danger which originates in another's fault, and under such circumstances it cannot be said that he assumes the risk voluntarily. . . . The tendency of

afterwards, that doctrine was denied to be applicable to a case in which the risk was due to the condition of a permanent structure which had remained unchanged since the servant began work many years before the accident.⁵ In a still later case it was laid down that where a new risk is created by the introduction of new apparatus after the servant has entered the employment, and he continues to work without any objection, he is as much debarred from an action as if the risk had existed when he first entered the employment. It would seem, therefore, that this court has finally elected to adopt the English doctrine *in toto*. Compare § 384, *infra*.

377. Doctrine that voluntary action is not inferable, as matter of fact, when appreciation of an extraordinary risk is proved.—*a. Kingdom and British Colonies.*—After an extraordinary and protracted and elaborate discussion by some of the ablest of the English judges, it has at length been finally settled that, in order to establish the defense embodied in the maxim, it is necessary to do something more than to prove that the servant knew of and comprehended the risk from which his injury resulted.

This doctrine is possibly recognized in an early Scotch case which was afterwards declared by the House of Lords to have been decided on the facts.¹ But the language used was, as is

recent decisions is to hold that, in regard to dangers growing out of the master's negligence, which are not covered by the implied contract between the master and servant when the service was undertaken, it is a question of fact whether a servant who works on, appreciating the risk, assumes it voluntarily or endures it because he feels constrained to." The learned judge added that he was not aware of any adjudications in Massachusetts which were necessarily inconsistent with the "just and reasonable doctrine" of *Smith v. Baker* (see § 377, note 7, *infra*), although different opinions had been expressed on the point ruled in that case by eminent judges, both English and American.

⁵*O'Maley v. South Boston Gaslight Co.* (1893) 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119 (servant denied recovery for injuries caused by the want of guards upon a run along which he was employed to wheel coal).

¹*Carrigan v. Washburn & M. Mfg. Co.* (1898) 170 Mass. 79, 48 N. E. 1079. Compare *Davis v. Forbes* (1898) 171 Mass. 548, 47 L. R. A. 170, 51 N. E. 20, where a servant was denied recovery for injuries caused by a defective

strap. The maxim was not mentioned in the opinion of the majority. *Knowlton, J.*, in a lengthy dissenting judgment, argued on the assumption that the rights of the plaintiff were upon the question whether the injury was *volens*, and he considered the question, in view of the fact that the risk had been superadded to the employment, was for the jury to determine.

¹In *Sword v. Cameron* (1839) 10 Sess. Cas. 2d series, 493, where the defendant was held liable for a defect in a system of blasting which left the plaintiff a man an insufficient interval to reach a place of safety after the signal for the charge. Lord Mackenzie remarked that he did not see any ground for supporting the finding of the lower court, implying that "the plaintiff had not sufficient expedition to escape, except should be thought that the maxim *lenti non fit injuria*, could apply. English of that," said the learned judge, "would just be that, if the plaintiff wished to be killed, why let him be. But I am afraid that will hardly do. Suppose that the pursuer had stood up to the blast and sat down

by the passage quoted in the note below, rather nebulous, and more than thirty years elapsed before the theory thus vaguely hinted at was adopted by any English judge. The decision referred to was, however, carefully limited to the point that voluntary action is not necessarily deducible from the servant's knowledge, if the injury was caused by the master's breach of a specific duty imposed by statute for the protection of the servant.² A few years afterwards a similar doctrine, divested of this restriction, was propounded in a dissenting opinion delivered by Mellish, L. J., in a case where the action was brought by the servant of a contractor against the railway company by which the latter was employed.³

top of the charge, it could scarcely be pleaded that Duff [the foreman] was entitled then to fire the shot, and say that if the pursuer wished to be blown up he should be indulged." This case was relied upon by Lord Watson in *Smith v. Baker* (1891) A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392, who considered that Lord Cranworth, although he did not refer directly to the maxim, must have approved of the reasoning of the Scotch court, as he expressed the opinion that the decision was justifiable, in *Barton's Hill Coal Co. v. Reid* (1858) 4 Jur. N. S. 767, 3 Macq. H. L. Cas. 290.

²*Britton v. Great Western Cotton Co.* (1872) L. R. 7 Exch. 130, 41 L. J. Exch. N. S. 99, 27 L. T. N. S. 125, 20 Week. Rep. 525, where the plaintiff's decedent was caught in an unprotected fly wheel while greasing the bearings. The reasons of the judges are rather obscurely stated, and the difficulty of ascertaining their precise point of view is increased by the fact that the language ascribed to them in the Law Reports differs in some important respects from that found in the Law Journal. In the former the gist of the argument of Bramwell, B., is given as follows (p. 137): "It is further contended that at any rate the deceased knew the danger as well as his employers. That may be doubtful in fact. . . . Assuming, however, that he did share his employers' knowledge, it must be remembered that the liability of the defendants here is not at common law, but by statute. They are in default to begin with, and the mere circumstance that the deceased entered on a dangerous employment does not exonerate them, unless he knew the nature of the risk to which, in consequence of that default, he was

exposed." In the Law Journal the last sentence is considerably expanded, and appears in this form (p. 101): "Here the plaintiff is not placed in the dilemma which arises when the action is for a breach of a duty at common law. That dilemma is this,—either the danger was obvious or it was not. If obvious, the servant must have known it as well as the employer; if it was not obvious, there was no negligence in the employer. That dilemma is not in the plaintiff's way here, for the duty is a statutory one. If the deceased dispensed with the performance of it, knowing the duty and knowing the danger, I think he would be '*volens*,' but not otherwise." In the latter report Channell, B., is said to have expressed his agreement with Bramwell, B., as to the distinction which he drew between an action on a breach of a common-law duty and an action on a breach of a statutory duty, and to have added: "In the latter case, if the plaintiff rushed into the danger with a full knowledge of it, he could not maintain an action for negligence: but in the present case the deceased [plaintiff], though he was '*volens*,' in the sense that he was at liberty to accept or reject the employment, yet he was not '*volens*' in the sense of being guilty of contributory negligence. If the servant, fully aware of the dangerous nature of the employment, was induced to accept it by a higher pay, then it is clear he would be '*volens*.'"

³*Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. (C. A.) 384, 46 L. J. Exch. N. S. 521. "Is it, then," asked the learned judge, a necessary inference in point of law from the fact of the plaintiff having worked in the tunnel for a fortnight, without making any objection and without abandoning his service with his master,

The fact that this case was decided only by a bare majority of justices to two possibly explains to some extent the reopening of the question ten years later in the same court. But the main reason why another discussion was inevitable was that, during the intervening period, the employers' liability act had come into force. It was necessary to determine how far, if at all, the doctrine of assumption of risks was open to the master in actions brought under that statute. The conclusion of the court of appeal was that the servant was, by the words of the statute, put upon the same footing as a stranger, he could no longer be debarred from recovery on the ground of an implied agreement to assume the abnormal risk which caused his injury, but that the principle embodied in the maxim was still available to the master if the evidence was such as to render it applicable.⁴ If the judgment in the case referred to had stood there, the differentiation of the two defenses would have been to the advantage to the servant, for the reason that, under the earlier decisions, it was, for practical purposes, a matter of indifference

that he consented to the company's running their trains as usual without taking any precautions for the safety of the workmen in the tunnel? In my opinion it is not. In the first place, it is by no means certain that the plaintiff, an ordinary bricklayer's laborer, understood at all what the extent of the risk was which he was running, or what the precautions were which were reasonably necessary. In the next place, assuming that he did understand what the risk was which he was running, and that he knew that the workmen in the tunnel were not reasonably protected, it seems to me it would be extremely unjust to hold that he was obliged either at once to quit his master's employment, or else to lose his right of action against the railway company for negligently running over him. I think he is entitled to say: 'I know I was running great risk, and did not like it at all, but I could not afford to give up my good place from which I get my livelihood, and I supposed that if I was injured by their carelessness I should have an action against the company, and that if I was killed my wife and children would have their action also.' Suppose this case: A man is employed by a contractor for cleansing the street, to scrape a particular street, and for the space of a fortnight he has the opportunity of observing that a particular hansom cabman drives his cab with ex-

tremely little regard for the safety of the men who scrape the streets. At the end of a fortnight the man who cleans the streets is negligently run over by the cabman. An action is brought in the county court, and the cabman pleads in his defense: 'You know me, I am a hansom driver, you had seen me drive a fortnight. I was only driving in my usual style.' 'Yes, but your usual style of driving is a very negligent one, and my having seen you drive a fortnight has nothing to do with it. It will not be disputed that the cabman is negligent in the case I have stated. The plaintiff is entitled to maintain his action. In my opinion his case does not differ from the case we have to decide, there being no contract between the defendant and the plaintiff any more than between the cabman and the scraper of the streets. On the other hand, I am of opinion that the judgment of the court below ought to be affirmed.' *Thomas v. Quartermaine* (1875) 18 Q. B. Div. 685, 56 L. J. Q. B. 57, L. T. N. S. 537, 35 Week. R. 51, J. P. 516. The doctrine of assumption of risk seems to have been established by the Scotch court of session in *Macdonald v. Mackinnon* (1885) 12 Sc. 4th series, 810. But the decision does not actually turn upon the effect of the maxim, nor was it specifically applied by the judges.

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whether the effect of the evidence was considered with reference to the conception of an implied contract or with reference to the maxim. In either event it was a peremptory inference of law that the servant could not recover for an injury caused by a risk which he comprehended. See § 376, *supra*. But Bowen, L. J. (with whom Fry, L.J., concurred), went on to draw the very important distinction that, although the servant's knowledge of the risk was a conclusive bar to his action under the theory of an implied agreement, it was merely evidence tending to show his acceptance of the risk in cases where the master was forced to rely upon the maxim. A portion of the remarkably able judgment in which this conception of the effect of the maxim was explained has been already quoted. See § 376, note 3, *supra*. As there stated, much of the language used by the Lord Justices (see note 11, to the present section) created a misapprehension as to the real scope of the doctrine propounded, and the position of the court of appeal remained somewhat obscure until the rendition of another decision a few months later.⁵

"Mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring [him] the workman within the maxim." *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 657, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283, per Lord Esher, summarizing the effect of *Thomas v. Quartermaine*.

The plaintiff is entitled to recover "unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." Per Lord Esher in the same case. (This statement was adopted in *Osborne v. London & N. W. R. Co.* [1888] L. R. 21 Q. B. Div. 220, 57 L. J. Q. B. N. S. 618, 59 L. T. N. S. 227, 36 Week. Rep. 809, 52 J. P. 806.)

"The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff." Per Lindley, L. J., in the same case (p. 660 of Law Reports).

In *Yarmouth v. France* the injury was caused by a vicious horse bought several years after the plaintiff had entered the employment. The essence of the evidence was that the plaintiff objected to driving him, and told the fore-

man of the stable that the horse was unsafe to drive, whereupon the foreman said: "You have to drive him; and, if any accident happens, we (meaning the employer) will be responsible." The trial judge thought he was bound by *Thomas v. Quartermaine* to decide that there could be no recovery for injuries caused by a kick which the plaintiff received from the animal. Two members of the court of appeal, Lord Esher and Lindley, L. J., were of a different opinion, while Lopes, L. J., a portion of whose opinion has been quoted in § 376, note 2, *supra*, held that the maxim was a bar to the plaintiff's claim. Commenting on the construction placed by the trial judge upon *Thomas v. Quartermaine*, Lindley, L. J., said: "The principles laid down in that case are no doubt to be accepted and followed; and, if I may say so, I entirely concur in them; but it is not, in my opinion, correct to regard that case as deciding this. The facts there and the facts here are materially different. In *Thomas v. Quartermaine* the facts were all one way: there was evidence that the plaintiff was *volens*, and not merely *sciens*; he was not even directed to do what led to his injury; he did it voluntarily, of his own accord; there was no evidence that the plaintiff was *volens*; the plant was not defective or dangerous to persons engaged in the ordinary course of their employment; the plaintiff had never complained of it;

During the next four years the doctrine thus established was in several cases,⁶ and was then finally ratified by a majority of the House of Lords in a decision, the effect of which, broadly

the injury was the result of a pure accident; and the case might well have been decided on that ground alone. In the present case the horse was vicious; the plaintiff was constantly complaining of it to the defendant's foreman; the foreman told the plaintiff to go on driving it, and the plaintiff did so rather than run the risk of dismissal; nor is it possible to regard this case as one of accident. Under these circumstances, the question is whether the plaintiff with knowledge and appreciation of both the risk and the danger voluntarily took the risk upon himself. The plaintiff was not engaged to drive vicious horses; and the conversation with the foreman, though not evidence against the defendant of any promise by him to take the risk, is, in my opinion, admissible to explain the conduct of the plaintiff, and to rebut the inference that he voluntarily took the risk upon himself."

Lord Esher, while he agreed with these views in the abstract, considered that, on the facts, *Thomas v. Quartermaine* had been wrongly decided: "For myself, I cannot help thinking that whether or not a workman has voluntarily agreed to incur the risk of defective machinery is a question of fact, and that, in my opinion, would have made the decision in *Thomas v. Quartermaine* wrong, for the majority of the judges there took upon themselves to decide the question of fact, whereas in my opinion they had no right to decide it; the utmost they properly could do was to send it back to the county court. They held in that case that the facts were conclusive to show that the plaintiff did voluntarily—in the sense in which they understood the word—accept the risk. This revives the old difficulty as to contributory negligence in cases of railway accidents. . . . I have always protested that it is not for the judge to say whether or not a plaintiff (or the deceased in the case of death) has been guilty of contributory negligence; he (the judge) has no right to hold that the evidence of it is conclusive; it should be left for the decision of the jury."

"A judge is not justified in withdrawing the case from the jury unless the evidence can bear no other construction than that the servant thoroughly

understood the risk. *Amos v. [Q. B. D. 1890] 6 Times L. R. 18.*

The maxim is not a bar to the case where a defective machine was upon the complaint of the plaintiff he was told when he resumed that it was working properly. *v. Davies (1887) 3 Times L. R. 18.* "Mere knowledge by the plaintiff that a risk would be run by him is not enough to deprive him of the right to recover. There must be a full comprehension on his part of the danger and the risk, and a voluntary taking by him of that risk as a condition of his employment." *Brooke v. Ramsden (1890) T. N. S. 287, 55 J. P. 262.*

Where a servant was killed by falling from an unrailed platform, the plaintiff held that his continuance of the employment with knowledge of the risk justified the finding that he was willing to accept that risk. *Church v. Appleby (D. 1889) 5 Times L. R. 88.*

As to the case of *Buddley v. [Q. B. D. 1887] L. R. 19 Q. B. Div. 171.* *L. J. Q. B. N. S. 501, 57 L. T. N. S. 36 Week. Rep. 63, 51 J. P. 822, 3 Times L. R. 335, 34 Week. Rep. xxxv., post.*

A finding that the servant knew the frog in which he caught his foot was not packed is not conclusive against him. *LeMay v. Canadian P. & N. E. Ry. Co. (1889) 18 Ont. Rep. 314, 1 Allm. Ont. App. Rep. 293, but the maxim is not referred to).*

The mere fact that a servant objects to and refuses to take the risk of the work is not conclusive against him if he becomes apprehensive that his refusal will result from the system adopted of doing the work in hand does not mean that he assumes the risk. *MacDonald v. Hamilton Iron Forging Co. (1889) 18 Ont. Rep. 55.*

See also *Bateman v. Moffatt (W. W. & A'B. (Victoria) 162, 1889, note 5, infra.*

Where a servant of one of the contractors engaged in erecting a bridge suffered injury through the negligent manner in which another of the contractors carried on his work, the action against the latter contractor was necessarily barred by the maxim that the injured servant had a duty to protect himself from danger, and his refusal to do so after his request had been refused. *Thruswell v. Handyside (L. R. 20 Q. B. Div. 359, 57 L. J. 100, 34 Week. Rep. 100, 51 J. P. 822, 3 Times L. R. 335, 34 Week. Rep. xxxv., post.*

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ing, is that the mere fact of the servant's having continued to work with a knowledge of the abnormal risk which caused his injury does not necessarily and as a matter of law require the inference that he had voluntarily consented, within the meaning of the maxim, to assume that risk.⁷

N. S. 347, 58 L. T. N. S. 344, 52 J. P. 279.

In *Osborne v. London & N. W. R. Co.* (1888) L. R. 21 Q. B. Div. 220, 57 L. J. Q. B. N. S. 618, 59 L. T. N. S. 227, 36 Week. Rep. 809, 52 J. P. 806, a railway passenger was injured in attempting to descend a flight of ice-covered steps. The court laid it down that a defendant cannot succeed in a court of review on the ground that the maxim is applicable, unless he has either had a finding of fact in his favor, or all the facts are before the court, so that it is in a position to decide it. Grantham, J., said: "I think that the judgment of Bowen, L. J., in *Thomas v. Quartermain* confirms the view which I take, that the maxim, *Volenti non fit injuria*, does not apply to such a case as the present. If it did, it would go to the root of the liability of all persons who would otherwise be liable to provide safe premises or safe machinery. For instance, in the case of a stage coach, if a passenger sees that one of the horses is vicious, is he bound to stay at home and give up his journey, or if he does not do so, and suffers injury, is he to lose all remedy? The same considerations would apply in the case of a railway. It seems to me that the whole difficulty in the present case arises from the answer of the plaintiff to a question put to him in cross-examination being too much relied on. What he meant was that he knew there was some danger in going down the steps, and that it was necessary to be careful, but he thought he could get down safely with the assistance of the hand rail. The only chance for the defendants was to show contributory negligence on the part of the plaintiff, and this they have failed to show."

⁷*Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660. There the plaintiff, after doing different kinds of work for the defendant, had been transferred about two months before the accident to the duties which he was discharging when injured. These consisted in drilling holes in a rock cutting near a crane worked by his coemployees,

which at times would swing stones so that they passed over his head. One of the stones broke in pieces while it was in the sling, and fell upon the plaintiff. He sought to recover damages on the ground that this system of handling the stones without taking precautions to warn him so that he might move to a place of safety while the hoisting was in progress indicated negligence. The evidence on which it was asserted that a nonsuit should have been granted consisted of the statements of the plaintiff himself. Speaking of the operation of slinging the stones over the heads of the workmen, he said that it was not safe, and that whenever he had sufficient warning, or saw it, he got out of the way. The gang foreman told the workmen to get out of the way of the stones which were being slung. The plaintiff said he had been long enough at the work to know that it was dangerous, and another workman in his hearing had complained that it was a dangerous practice. A clear statement of the rationale and effect of this decision, abstracted from the more general discussions of the maxim by the judges, is contained in the following passage of Lord Herschell's opinion (p. 362 of the Law Reports): "Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered. If, then, the employer thus fails in his duty towards the employed, I do not think that because he does not straightway refuse to continue his service, it is true to say that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim *Volenti non fit injuria* becomes applicable. . . . I think that, where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows

Although the decision in *Smith v. Baker* [1891] A. C. 325, L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, J. P. 660, was rendered in an action brought under the employ-

of the risk, and does not remonstrate, does not preclude his recovering in respect of the breach of duty, by reason of the doctrine, *Volenti non fit injuria*, which, in my opinion, has no application to such a case."

Another passage which may usefully be inserted here is the following extract from Lord Watson's opinion: "The only question which we are called upon to decide, and I am inclined to think the only substantial question in the case, is this: Whether, upon the evidence, the jury were warranted in finding as they did, that the plaintiff did not 'voluntarily undertake a risky employment with a knowledge of its risks.' Whether the plaintiff appreciated the full extent of the peril to which he was exposed or not, it is certain that he was aware of its existence and apprehensive of its consequences to himself; so that the point to be determined practically resolves itself into the question whether he voluntarily undertook the risk. If upon that point there are considerations *pro* and *contra*, requiring to be weighed and balanced, the verdict of the jury cannot be lightly set aside. The defendants' case is that the evidence is all one way; that the plaintiff's continuing in their employment, after he had become aware and had complained of the danger, of itself affords proof absolute and conclusive of his having accepted the risk of a stone falling in the course of its transit from the quarry to the loading bank. . . . I am unable to accede to the suggestion that the mere fact of his continuing at his work with such knowledge and appreciation will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case." (p. 355 of Law Reports).

Lord Halsbury (p. 336 of Law Reports) thought that the nonconclusiveness of a plaintiff's knowledge of a risk might be deduced from principles which are independent of the fact that the person sued is his employee. He said: "It appears to me that the proposition upon which the defendants must

rely must be a far wider one than involved in the maxim *Volenti non fit injuria*. I think they must go to the tent of saying that, where a person knows there is a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk. For this purpose, in order to test this proposition, I have nothing to do with the relation of employer and employee. The maxim, its application in the law is not solicited; but where it applies it applies equally to a stranger as to anyone else, and if applicable to the extent that I now insisted on, no person ever ought to have been awarded damages for being run over in London streets; for no one (at all events, some years ago, before the admirable police regulations of late years) could have crossed London streets without knowing that there was a risk of being run over."

Lord Morris concurred with the majority on the narrow ground that, though the servant was both *sciens* and *volens* as to the danger of working without anyone to warn him when the crane would pass over his head, he was not shown to have been aware of the danger arising from unfit machinery.

Later decisions in which the same doctrine has been recognized are *Gibb v. Sulphur Co.* (1891) 14 Times L. R. 31 (no combings round batchway); *Medway v. Greenwich Dock Co.* (1898) 14 Times L. R. 29; *Marley v. Osborn* (1894) 10 Times L. R. 388; *Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 368 L. J. Q. B. N. S. 918; *Wallace v. Cutler Paper Mills Co.* (1892) 19 Times L. R. 19; *Rodgers v. Hamilton Cotton Co.* (1893) 23 O. R. 425; *Sin v. Dominion Fish Co.* (1901) 2 Ont. L. Rep. 69.

Where it is specially found by the jury in an action brought by an employee of a lumber company to recover for injuries caused by the negligent manner in which the servants of a railway company shunted its cars on a siding belonging to his employer, that the employee "voluntarily accepted the risks of shunting," these will be taken to mean simply that the employee voluntarily incurred the risks attending

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liability act, the reasoning on which it was founded is quite general in its scope and character. There is, accordingly, no ground upon which it can be contended that the principle there laid down is inapplicable to common-law actions. That it is not inapplicable was assumed in a recent decision by the court of appeals.⁸ The precise

upon shunting in a careful manner, and the inference will therefore be that the maxim is not applicable. *Hurdman v. Canada Atlantic R. Co.* (1893) 25 Ont. Rep. 209 (1895) 22 Ont. App. 292 (1895) 25 Can. S. C. 205. Dismissing the effect of this finding in the Ontario court of appeal, Osler, J., said: "This at first sight might seem opposed to the answers finding negligence, because if it were to be inferred therefrom that the deceased had absolved the defendants from any duty towards him of taking care in the management of the shunting engine, then there was no breach of duty on their part, no negligence of which he or the plaintiff could complain. The defendants do not assert that the deceased was guilty of contributory negligence, which assumes or admits negligence in the first instance on their part. Their defense is rested on the application of the maxim, *Volenti non fit injuria*. The deceased, they say, was assenting to all risks of shunting incident to his situation in the car, even to those incurred by their negligent or improper management of it; in other words, that they were entitled to conduct their operations without regard to the fact that he was in the car. But the answer of the jury, in my opinion, does not go as far as this. It can only be understood as affirming that the deceased assumed or accepted the risks incident to shunting, so far as the operation, when performed with reasonable care, would be intrinsically dangerous to a person in his situation, not that he assented to their managing it just as if he were not in the car. Given that the

shunting was performed without unnecessary violence, such an occurrence as the shifting of the lumber was not inevitable, and here it was the unnecessary force used which produced that result, and thereby caused the death of the deceased. It is a question of fact in every case in which the maxim is invoked, what risks were accepted, and it ought to be very clearly made out that that of negligence was one of them. See Pollock, Torts, 3d ed. p. 154. There is no evidence here that it was, and the jury have not said so; the question and

answer must therefore be rejected as irrelevant."

The plaintiff's knowledge of only one of the two causes from which the injury resulted will not bar his action. *Foley v. Webster* (1892) 2 B. C. 138. Compare §§ 271, 295, *ante*.

It is a misdirection to charge a jury that the servant's knowledge of the danger of the employment is an absolute bar to the plaintiff's claim. *Tobin v. New Glasgow Iron, Coal & R. Co.* (1896) 29 N. S. 70.

A declaration against a master for negligence in providing defective appliances is not denurrable for the reason that it does not allege the servant's ignorance of the defect. *Lake v. Drury* (1893) 32 N. B. 82.

A court will not set aside a general verdict for the defendants where there is evidence sufficient to sustain a finding that the plaintiff was *volens* in regard to the special risk from which his injury resulted. *Campbell v. Railway Commissioners* (1900) 21 New So. Wales L. R. (L.) 371.

In *Williams v. Birmingham Batteries & Metal Co.* (1899) 2 Q. B. 338, 68 L. J. Q. B. N. S. 918, an action was brought under Lord Campbell's act to recover damages at common law for the death of a workman who had been killed while descending from an elevated tramway on which he had been working for the defendant. The jury found that the defendants did not exercise due care to have the tramway in a proper condition so as to protect their servants working upon it against unnecessary risk; that it was dangerous to descend from the tramway without a ladder; that the deceased had the same means of knowing that it was dangerous as the defendant had; that he knew that it was dangerous; and that he had not been guilty of contributory negligence. It was held that a judgment for the defendant could not be entered on these findings. Romer, L. J., said: "If, by reason of breach of that duty [i. e., to protect a servant] a servant suffers injury, the employer is *prima facie* liable; and it is no sufficient answer to the *prima facie* liability for the em-

scope of this decision, it will be observed, is merely that, if the defendant in an action of this class has elected to rely upon the maxim and not the theory of a contractual assumption of the risk, it is primarily a question for the jury whether he was *volens*. To the extent the doctrine of the earlier English cases cited in § 376, *supra*, is abrogated. It may yet be an interesting subject of investigation whether the modern theory of the respective provinces of the court and the jury in determining the applicability of the maxim does not logically point to the conclusion that the conception of an implied contract to assume a risk should no longer be treated as furnishing a basis for a peremptory conclusion of law. Broadly speaking, the essential question to be decided is the same, whether the servant's rights are referred to that conception or to the maxim,— *viz.*, whether he had or had not voluntarily accepted the responsibility for an injury which he might receive owing to the existence of a certain risk known to and appreciated by him. Apart from precedent it is difficult to see any adequate reason why it should be deemed proper that this question should be determined by the court or referred to the jury, according as the defendant may elect to take his stand upon the theory of an implied agreement, or of a waiver of rights, which is independent of the conception of contract.

In the leading case already cited, Lord Halsbury expressed his opinion that, "in order to defeat a plaintiff's right by the application of the maxim relied on, . . . the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself."

The employer is not to be allowed to show merely that the servant was aware of the risk and of the nonexistence of the precautions which should have been taken by the employer, and which, if taken, would or might have prevented the injury. In order to escape liability the employer must establish that the servant has taken upon himself the risk without the precautions. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case. In considering such a question the circumstance that the servant has entered into or continued in his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive against him." It had been suggested by defendant's counsel that the rule laid down in *Smith v. Baker* was not applicable to common-law actions. But no notice was taken of this contention by

either of the lord justices who delivered the opinions.

¹ *Smith v. Baker* [1891] A. C. 323 (L. J. Q. B. N. S. 683, 65 L. T. N. S. 1040, 40 Week. Rep. 392, 55 J. P. 660 (p. 661 of Law Reports)). Referring to the facts of the case before him, his Lordship said: "If I were to apply the proposition to the particular facts of this case, I do not believe that the plaintiff ever did or would have consented to the particular act done under the particular circumstances. He would have said, 'I cannot look out for myself at present. You are employing me in a form of employment in which I have not the ordinary means of looking out for myself; I must attend to my duty. If you will not give me warning when the stone is going to be slung, at least let me look out for myself.' He does not place me under a crane which is lifting heavy stones over my head, w

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But so far as can be judged from the rest of his opinion and the conclusions at which he arrived with regard to the facts before him, the test thus proposed seems to yield, in its practical application, results which are essentially identical with those obtained by the doctrines which are enunciated in the opinions of the other members of the House of Lords. The same remark is applicable to the somewhat similar language which had previously been used by Lord Justice Lindley in an earlier case.¹⁰

The limits of the right of a court to control or override the finding of a jury in favor of a servant have not, as yet, been defined with any precision. The theoretic rule governing this right is similar to that which prevails in every instance where the extent of the respective provinces of judges and juries in drawing inferences from admitted facts comes into question; viz., that, if only one inference can reasonably be drawn, it is justifiable either to direct a verdict embodying that inference, or to set aside a verdict which is inconsistent therewith. But it seems impossible to maintain with any show of plausibility that all the cases can be satisfactorily reconciled on this basis. In only two English cases has the servant, so far as the writer has been able to ascertain, been declared unable to recover, as a matter of law. One of these cases is that which established the doctrine now under discussion.¹¹ In another a judgment of the

you keep my attention fixed upon an operation which prevents my looking out for myself." So far from consenting, the plaintiff did not even know of the particular operation that was being performed over his head until the injury happened to him, and consent, therefore, was out of the question."

"If in any case it can be shown as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But, in the cases mentioned in the act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot, in my opinion, be held, as a matter of law, to have impliedly agreed to incur that danger, or to have voluntarily incurred it because he does not refuse to face it; nor can it, in my opinion, be held that there is no case to submit to a jury on the question whether he has agreed to incur it or has voluntarily incurred it or not, simply because, though he protested, he went on as before. The facts of each par-

ticular case must be ascertained and considered." *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 661, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281.

"*Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. There an employee in a brewery, while trying to pull from under the boiling vat a plank which he required for the purpose of covering the adjacent cooling vat, which was not fenced but surrounded by a rim 16 inches high, fell into the latter vat owing to the fact that the plank, after at first sticking fast, suddenly yielded when he gave it a harder pull. He had worked round the vats for several months and was fully acquainted with the conditions. The following passage from the opinion of Bowen, L. J., contains the gist of the reasoning by which he was led to this conclusion: "Knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier [of premises] must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk

court of appeal was affirmed by the House of Lords not long after. The subject underwent the exhaustive discussion in *Smith v. Lewis* (see note 6 in this section). In the lower court, Bowen, L. J., proceeded upon the supposition that the facts brought the case within the scope of the same rule which he had previously enunciated in *Wainwright v. Macary*,¹¹ the case last cited.¹² The position taken by Lord Bramwell in the

case was voluntarily incurred. The maxim, he it observed, is not *Scienti non fit injuria*, but *Volenti*. It is plain that mere knowledge [of the risk] may not be a conclusive defense. There may be a perception of the existence of the danger without comprehension of the risk; as, where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent. There may, again, be concurrent facts which justify the inquiry whether the risk, though known, was really encountered voluntarily. . . . Knowledge is not a conclusive defense in itself. But when it is a knowledge under circumstances that leave no inference open but one, *viz.*, that the risk has been voluntarily encountered, the defense seems to me complete. . . . Knowledge is not conclusive where it is consistent with the facts that, from its imperfect character, or otherwise, the entire risk, though in one sense known, was not voluntarily encountered; but here, on the plain facts of the case, knowledge on the plaintiff's part can mean only one thing. For many months the plaintiff, a man of full intelligence, had seen this vat—known all about it—appreciated its danger—elected to continue working near it. It seems to me that legal language has no meaning unless it were held that knowledge such as this amounts to a voluntary encountering of the risk."

The language used by Fry, L. J., propounds a doctrine even less favorable to the servant, whom it would virtually place in a position not, as it would seem, materially different from that which he occupied under the earlier English decisions cited in § 376, *supra*. Construing § 1 of the employers' liability act of 1880, he put the question: "If the workman is to have the same rights as if he were not a workman, whose rights is he to have?" and answered it thus: "I think that we ought to consider him to be a member of the public entering on the defendant's property by his invitation. Can such a person maintain an action in re-

spect of an injury arising from a defect of which defect and of the damage he was as well informed as the defendant? I think not. A person it appears to me that he is, *Volenti non fit injuria*, and he cannot sue."

Except on the ground suggested by Lord Morris in *Smith v. Lewis*, A. C. 325, 60 L. J. Q. B. N. S. 8, 38 Week. Rep. 392, 65 L. T. N. S. 1, J. P. 660, *viz.*, that the facts show any negligence on the part of the master, it seems quite impossible to reconcile this decision with the latest pronouncement on the subject by the court of appeal in *Wainwright v. Birmingham Battery & Manufacturing Co.*, [1890] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918 (see note 7, *supra*), in which case the risks also were created by a peculiar arrangement of the plant, with which the servant had long been familiar.

"That rule he is reported to have stated as follows: 'If a man voluntarily incurred a risk he cannot afterwards complain. The question whether his conduct was voluntary or not was an issue of fact, but it was always for the jury. If the plaintiff was all one way, it was for the jury to withdraw the case from the court. If there was conflicting evidence, for instance, there was evidence of negligence, as in *Yarmouth v. The France*, the question must be left to the jury.' In *Membery v. Great Western Ry. Co.*, A. 1889) 4 Times L. R. 504, it was affirmed in (1889) L. R. 14 Q. B. 179, 58 L. J. Q. B. N. S. 563, 38 N. S. 566, 38 Week. Rep. 115, 72 L. J. 244. In that case the original agreement between the plaintiff's master and the defendant was that the defendant should furnish an assistant for the purpose of enabling him to execute his greater safety, the shunting work. His master had contracted to furnish an assistant if it had one. This agreement had been carried out for several years. A new arrangement was then made, the purpose of which was merely that the defendant should furnish an assistant if it had one. The plaintiff continued to work for several years, sometimes

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of Lords has been already stated in the last section. The judgment of the rest of the House, except in so far as it was not influenced by the special reason noticed in § 380, *infra*, seems rather to be based upon the conception that no negligence on the master's part had been established, than upon the conception that the maxim was, as a matter of law, a bar to the action. Supposing this to be the actual rationale of the decision, it is not inconsistent with that which was rendered in *Smith v. Baker*. But much of the language used in the opinions seems to indicate that the House was not as yet entirely prepared to stand sponsor for that liberal construction of the maxim which was indorsed two years afterwards. In British Columbia it has quite recently been decided that a servant who, with a full knowledge of the conditions, took a certain route which had been rendered unsafe through the master's breach of duty, when he might have taken another route which was secure, must be held, as a matter of law, to have consented to incur the risk of injury while using that route.¹³ But the facts involved in this case would seem to indicate that the servant's inability to recover should have been referred to the conception that he was negligent in exposing himself to a danger unnecessarily, rather than to the conception of a consent to incur that danger. Hence, even if it can be properly said to fall within the scope of the maxim (see § 371, *supra*), it does not throw any light upon the point discussed in the English decisions just cited. See further §§ 381-383, *infra*.

b. United States.—The supreme court of Indiana has recently followed the lead of the English judges to the extent of holding that, where the duty violated was a statutory one, the servant's action is not necessarily barred by the fact that he was chargeable with actual or constructive knowledge of the dangerous conditions.¹⁴ But a comparison of the cases cited in the last subdivision and in § 376, *b*, *supra*, shows that, on the whole, the maxim is construed in essentially different senses by the English judges and by those of the American states in which its effect has been discussed.

So far as regards the Massachusetts and Alabama decisions in actions brought under the employers' liability acts, there would seem to be good grounds for arguing that the position thus taken is in contravention of the familiar principle that the presumed intention

an assistant and sometimes without one. It was held that, under these circumstances, he could not recover damages for an injury caused by the want of an assistant.

¹³ *Davies v. Le Roi Min. & Smelting Co.* (1899) 7 B. C. 6 (miner ascended by a "ship" [*i. e.*, elevator] from which the safety appliances had been removed, instead of using the ladders).

¹⁴ *Monteith v. Kokomo Wood Enameling Co.* (1902; Ind.) 58 L. R. A. 944, 64 N. E. 610, citing *Smith v. Baker* and the decisions which preceded it.

of a legislature which adopts a foreign statute is that it shall have the same construction as the courts have put upon it in the state where it was originally enacted. As regards Alabama, it is remarked that the situation is peculiarly unsatisfactory, as the leading English case was not even cited in the judgment by which the prevailing rule in that state was established.¹⁵ It remains to be seen whether a controlling force will be ascribed to this principle in any of the American states in which statutes modeled upon the English one have been, or may hereafter be, adopted.¹⁶

The obligation of the American courts to defer to the action of the English judges in actions at common law is of course equally strong. But the reasoning which has been employed to sustain the doctrine that the applicability of the maxim *volens, non nocet* in actions also is primarily and essentially a question for the jury is itself quite convincing.¹⁷

B. PARTICULAR CIRCUMSTANCES BEARING UPON THE QUESTION WHETHER THE SERVANT WAS VOLENS.

378. Increased compensation given for encountering a specific risk. The advocates of both the doctrines discussed in §§ 376, 377 are apparently agreed upon the doctrine that knowledge is conclusive against a servant, where he is to receive higher pay in consideration of his doing the work which involves an abnormal risk due to a defective condition of the instrumentalities.¹

¹⁵ *Birmingham R. & Electric Co. v. Allen* (1892) 99 Ala. 359, 20 L. R. A. 457, 13 So. 8. This decision was rendered, as is apparent from a comparison of dates, in the year after *Smith v. Baker* had finally settled the English doctrine. See note 7, *supra*.

¹⁶ In the New York act of 1902, it will be observed that the legislature has introduced a clause expressly providing that an assumption of the risk shall not be inferred, as a matter of law, from the fact of the servant's knowledge. See chapter XXXVII., *post*.

¹⁷ The following remark made *arguendo* in a Maine case may perhaps be regarded as indicating that the English rule will be adopted in that state when the point is specifically presented: "The risk from the master's breach of duty never rests upon the protesting or even unwilling servant. *Volens, non nocet*, is the test." *Dempsey v. Sawyer* (1901) 95 Me. 295, 49 Atl. 1635.

¹ On the one hand we find it laid down that there is "a marked distinction . . . [between] the employee who undertakes dangerous work as the ordinary course of his employment and one who undertakes extra risk work for extra wages. In the latter case the employee should be properly considered a 'volunteer' for a higher rate of remuneration because he undertakes the risk, known to him, of injury or death." Channell, B., in *B. & Great Western Cotton Co.* (1877) 7 Exch. 130, 138, 41 L. J. Ex. 99, 27 L. T. N. S. 125, 20 W. R. 525. So also in *Smith v. Bolton* (1840) 11 A. C. 325, 344, 60 L. J. Q. B. N. 65, 11 T. N. S. 467, 55 J. P. Week. Rep. 392. Lord Bramwell has laid down that a servant who undertakes work exposing him to a particular risk for a certain compensation is not a volunteer, but that which he demanded is in the situation as one whose wages the master agrees to increase in consideration of his incurring the additional risk.

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378a. Injury inevitable if the servant remains at work.—In the old English case Lord Herschell conceded that there might be cases in which a workman would be precluded by the maxim from recovering, even though the risk which led to the disaster resulted in the employer's negligence. Such a case would, he suggested, be presented if the inevitable consequence of the employer's discharging his duty would obviously be to occasion him personal injury.¹

379. Assumption by the master of responsibility for any injury that may be received.—In some instances the evidence may justify the inference that it is the intention of the master to make himself answerable for any injury that the servant may receive. Under such circumstances the legal situation is simply that the master is deemed to have surrendered any right he might otherwise have had to protect himself by the maxim.¹ The shifting of the responsibility will, of

advocates of the more liberal view express himself as follows: "I need only repeat that I detest the attempt to alter the law by maxims. They are not invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them. I do not doubt that if we put this maxim into plain English part of it is true; that is to say, that if a thing is put before a workman, and he is told, 'Now, I do not ask you to do this unless you like; but I will give you more wages if you do. You see what it is. There is a rotten ladder; it is ten to one that it will break under you; but if you choose to run that risk, I will give you higher wages.' If the workman, seeing the risk, elects to incur it, no one could doubt that he could be precluded from recovering damages against his employer for any injury he might sustain from the breaking of the ladder. The same result would follow if the injured person was not a workman but for hire." Lord Esher in *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 36 Week. Rep. 281, 57 L. J. Q. B. N. S. 7.

Compare the following passage, which also suggests the limitation of the effect of the maxim to cases where there is adequate consideration for incurring the additional risk caused by defective appliances: "If the employed agreed, in consideration of special remuneration, or otherwise, to work under conditions in which the care which the employer ought to bestow, by providing

proper machinery or otherwise, to secure the safety of the employed, was wanting, and to take the risk of their absence, he would no doubt be held to his contract, and this whether such contract were made at the inception of the service or during its continuance."—per Lord Herschell (*arg.*) in *Smith v. Baker* [1891] A. C. 325, 362, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 600, 40 Week. Rep. 392.

¹ *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 40 Week. Rep. 392, 60 L. T. N. S. 467, 55 J. P. 600. The learned judge thus contrasted this hypothetical case with the one under consideration: "Suppose, to take an illustration, that, owing to a defect in the machinery at which he was employed, the workman could not perform the required operation without the certain loss of a limb. It may be that if he, notwithstanding this, performed the operation, he could not recover damages in respect of such a loss, but that is not the sort of case with which we have to deal here. It was a mere question of risk which might never eventuate in disaster. The plaintiff evidently did not contemplate injury as inevitable, not even, I should judge, as probable."

Nonvoluntary action may be properly inferred by a jury if it is proved that the workman was told by his superintendent not to mind, and that if any accident happened the employer must make it good. *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 661, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, per Lindley, L. J.

course, enure to the servant's benefit, whatever, theory may be adopted, as to the proper inference to be drawn from his knowledge of the risk.

380. Injury the result of the servant's own acts or omissions.

One of the exceptions to which it is conceded that the doctrine established in England is subject rests upon a distinction taken between cases in which the operations or conditions which produced the servant's injury were independent of his own act, and cases in which the injury was the direct result of his own act or omission. In the former class his knowledge of the risk may or may not let in the operation of the maxim; in the latter class his knowledge of the risk is deemed conclusive against him.¹

No objection can reasonably be made to the enforcement of the maxim in any instance in which the servant created, or con-

tributed to, the danger in the operation of the machine. The master's acceptance of the responsibility is implied where he directs the servant to perform labor to which he is not accustomed, after the foreman of the work has sent him back for the reason that he is not deemed sufficiently strong. *Albertz v. Bach* (1890) 32 N. Y. S. R. 1014, 10 N. Y. Supp. 639.

¹ In *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392, Lord Halsbury said (p. 338 of the Law Reports): "Every sailor who mounts the rigging of a ship knows and appreciates the risk he is encountering. The act is his own, and he cannot be said not to consent to the thing which he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complaining plaintiff himself, and where, therefore, the application of the maxim *Volenti non fit injuria* is completely justified."

Similar views were thus expressed by Lord Watson in the same case (p. 357 of the Law Reports): "The risk may arise from a defect in a machine which the servant has engaged to work, of such a nature that his personal danger and consequent injury must be produced by his own act. If he clearly foresaw the likelihood of such a result, and, notwithstanding, continued to work, I think that, according to the authorities, he ought to be regarded as *volens*. The case may be very different when there is no inherent peril in the work performed by the servant, and the risk to which he is exposed arises from a defect in the machinery used in another department over which he has no control. The present case belongs to

that category. There was no danger in the operation of the machine which the plaintiff was engaged to work, and the peril from which he suffered was the direct result of his own act, and not of any defect in the machine. The fact that he was in contact with him by workmen in a different operation," This was cited as an authority in a case where a farm servant was injured by the fact that a cooperated the brake of a horse-drawn machine automatically gave way, the consequence being that the machine began to run at a dangerous speed, and the driver's wheel burst. It was held that the maxim was a bar to his recovery, the evidence showed that he understood the nature of the machine, he had made no complaint, and had been in the habit of replacing the brake whenever it became worn. *Heritt* (1893) 23 Ont. Rep. 60.

In *Membery v. Great Western Railway Co.* (1889) L. R. 14 App. Cas. 179, Q. B. N. S. 563, 61 L. T. N. S. 88, 54 J. P. 244, the court decided, in so far as it rested upon the applicability of the maxim, was by Lord Halsbury to the effect that it thus explained (p. 186 of the Law Reports): "The man obviously entered a known risk which he had to counter for a period of service, and therefore he is not entitled to recover, upon the ground that he was voluntarily incurring the risk, and that the risk existed; and, further, that he was himself doing the very thing which caused danger and ultimately injured himself."

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381. Work undertaken by the order of master or superior employee.—

The effect of evidence that the work in course of performance when the injury was received was undertaken in compliance with the direct order of a superior does not seem to have been discussed by any court which infers voluntary action from the mere fact of the servant's knowledge. But presumably the significance of this element in any such case is the same as it is in cases where the servant's rights are being considered with reference to the questions whether he had contractually assumed the risk, or had been guilty of contributory negligence. See chapter XXIII., *post*.

Under the English doctrine, the fact that the servant was injured in obeying an order to perform dangerous duties evidently cannot be of any differentiating import. But, so far as it goes, it makes in the servant's favor.¹

381a. Work undertaken outside scope of ordinary duties.—(Compare chapter XXV., *post*.)—In all jurisdictions, English, colonial, and American, it would probably be held, as it has been held in Massa

² *Highland A. & B. R. Co. v. Walters* (1890) 91 Ala. 435, 8 So. 357, holding that a railway company cannot be held liable for the death of a yardmaster due to his being thrown off the footboard on the front of a switch engine by striking against a pile of coal near the track, which had been deposited there by the consignee with his permission. See also *Poll v. Hewitt* cited in note 1, *supra*, in which the servant's

right of recovery might have been denied on the same special ground.

¹ In one case it was held to be a question for the jury whether the servant was willing to encounter the danger, where he was ordered to adjust a belt, that duty being outside the scope of his employment and dangerous. *Barter v. Wyman* (1888) 4 Times L. R. 255. In another he was allowed to recover while complying with an order to clean mov-

achusetts, that the servant is debarred from recovery, as a matter of law, where he was injured while engaged in work outside his ordinary duty, which was undertaken at the suggestion of a fellow workman and with the mere consent of his immediate superior.¹

If such work was undertaken by the orders of an employer who represented the master, the question whether the servant was negligent will depend upon the considerations adverted to in the preceding section. See the first of the two cases cited in note 1.

382. Servant's fear of losing his position.— (Compare §§ 2 (6), *ante*.)—It is manifest that, in the last analysis, the economic significance which shall be attached to the influence exercised upon the servant's mind by the apprehension that, if he declines to undertake a certain extra-hazardous duty, he may lose his position, must depend upon considerations which are sociological rather than juristic. See § 62, *ante*.

One theory applied in the decisions embodies the same conception of the relation between masters and servants as that postulated by economic science which is commonly known as the mobility theory. The servant, that is to say, is assumed to be an entirely free agent in respect to taking up or abandoning an employment. This assumption obviously involves the corollary that no coercive influence is ascribed to his fear of the consequences of a refusal to incur a normal risk.¹ According to the judges who take this view

ing machinery. *Marley v. Osborn* (1894) 10 Times L. R. 388.

¹*Mellor v. Merchants' Mfg. Co.* (1890) 150 Mass. 362, 5 L. R. A. 792, 23 N. E. 100. There a loom fixer who was injured by a belt slipping off a pulley while he was attempting to repair a defect failed to recover, for the reason that he had voluntarily taken the risk of an obvious danger.

²The most uncompromising of the English exponents of this theory was the late Lord Bramwell. In *Ogden v. Rimmens* (1863) 3 Fost. & F. 751, while he was trying a case one of the workmen testified that if he had complained of the danger of the work he would have been told that someone else would do it. The remark of the judge was that this was "a very sensible answer, . . . but that showed that he had an option to do it, or not to do it." This brief comment was expanded into the following incisive homily in the opinion which he delivered in *Membery v. Great Western R. Co.* (1889) L. R. 14 App. Cas. 179, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 28 Week. Rep.

145, 54 J. P. 244: "I hold that a man is not physically compelled where he can at his option do or not, and he does it, the matter lies with him. What is *volens*? Willing. A man is willing when he wills a thing and does it. No doubt, popularly speaking, is said to do unwillingly, with no good will. He does it, no matter what his will is, he prefers doing it to being alone. He wills to do it. He will not to do it. I suppose that the opposite of *volens*, its *negativus*. There are two men; one refuses work, wills not to do it, and does it. The other grumbles, but wills it, and does it. Are both men unwilling? Suppose an extra inducement induced the man who did the work. Is he *volens* or has he shilly-shallied him *volens*? There must be a notion either that a man who grumbles and grumbles is *volens*, is willing, has not the will to do it, there is something intermediate *volens* and *volens*, something like

situation, the servant's proper course is to throw up his position, as he has a right to do.²

The other theory takes into account the notorious and indisputable fact that in those parts of the civilized world in which the common law prevails the industrial conditions are such that the labor market is normally more or less overcrowded, and in times of unusual stress is "thronged with suitors" to such an extent that fresh employment in any given line of business is almost impossible to procure. It is recognized that the servant's knowledge of this fact may reasonably be supposed to impair his freedom of will, to a greater or less extent, when he finds that a new hazard has been superadded to his environment by a breach of duty on his master's part, and that he is compelled to elect between encountering that hazard, or abandoning his position, or running the risk of a possible discharge, if, without actu-

being without a will, and yet who wills. If the shilling made him *volens*, why does not the desire to continue employed do so? If he would have a right to refuse the work and his discharge would be wrongful, with a remedy to him, why does not his preference of certain to an uncertain law not make him *volens* as much as any other motive? There have been an infinity of profoundly learned and useless discussions as to freedom of the will; but this notion is new. This is an important question. Is the maxim to be got rid of? Are we to say *Volenti fit injuria* provided he grumbles, as Mr. Bell contended? To do so would be most unjust and unreasonable. The master says, Here is the work, do it or let it alone. If you do it, I pay you; if not, I do not. If he has engaged him, he says, I discharge you if you do not do it; I think I am right; if wrong, I am liable to an action. The master says this, the servant does the work and earns his wages, and is paid, but is hurt. On what principle of reason or justice should the master be liable to him in respect of that hurt? On this ground, also, I am of opinion the judgment should be affirmed. I may observe that the court of appeal thought that neither of the cases where this novel notion was entertained bore on the present." In the later case we find him reiterating these views: "It is said that to hold the plaintiff is not to recover is to hold that a master may carry on his work in a dangerous way and damage his servant. I do so hold, if the servant is foolish enough to agree to it. This sounds very cruel. But do not

people go to see dangerous sports? Acrobats daily incur fearful dangers. Lion tamers and the like. Let us hold to the law. If we want to be charitable, gratify ourselves out of our own pockets." *Smith v. Baker* [1891] A. C. 325, 346, 60 L. J. Q. B. N. S. 683, 35 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392. Other judges have used similar language. In *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, Lopes, L. J., was of opinion that the inference of a voluntary assumption of a risk caused by a master's breach of duty could not be rebutted by showing that he feared that a refusal to incur the risk would cost him his position. "This is a country of free labor. . . . It has been said that the servant is more powerful than his master. But I rather think the servant is not less powerful than his master; and certainly he is quite able to enforce the contract and defend his rights." *Crichton v. Keir* (1863) 1 Sc. Sess. Cas. 3d Series, 407, per Ingus, J.

²*Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521, per Cockburn, Ch. J., whose remark that "if a man, for the sake of the employment, takes it or continues in it, with a knowledge of its risks, he must trust to himself to keep clear of injury," seemed to Lopes, L. J., to embody the true principle. *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 663, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281.

In one case Bramwell, B., declared that he "could not consider that he [the

ally leaving the service, he declines to do the work which will in exposure to the hazard.³ See § 65, *ante*.

servant] was acting under compulsion, even if he had been bound by contract to serve." *Britton v. Great Western Cotton Co.* (1872) L. R. 7 Exch. 130, 27 L. T. N. S. 125, 20 Week. Rep. 525, 41 L. J. Exch. N. S. 99 (as reported in the latter serial only p. 191). The views of this learned judge, however, respecting what is and is not compulsion, are of a very extreme character. See note 1, *supra*.

³In *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, Lord Esher and Lindley, L. J., both declared that evidence of the servant's fear of being discharged tended to rebut the inference that he was *volens* in continuing to work. The former said (p. 657 of Law Reports): "Here the judge of the court below has come to the conclusion that the moment it appeared that the plaintiff knew and appreciated the danger, and did not at once quit the defendant's employ, he came within the maxim, and was therefore, upon the authority of *Thomas v. Quartermaine*, disentitled to recover. He did not bring his mind to bear upon the motives which induced the plaintiff to act as he did,—whether he relied upon the foreman's statement that the employer would be responsible in case of an accident, or whether he was influenced by the fear of being thrown out of employ if he disobeyed the foreman's orders. All that was for a jury; and the judge ought to have applied his mind to it." The latter said (p. 660 of Law Reports): "The act [*i. e.*, employers' liability] cannot, I think, be properly construed in such a way as to protect masters who knowingly provide defective plant for their workmen, and who seek to throw the risk of using it on them by putting them in the unpleasant position of having to leave their situations or submit to use what is known to be unfit for use. . . . If nothing more is proved than that the workman saw the danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred."

Similar views were again expressed

in the following year by Lord Esher, who in discussing the meaning of *volens* in the employers' liability 1880 made these remarks: "There has always been, I think, two schools of thought in relation to cases of this kind. . . . The view of one school has been that, in order to prevent justice to masters, the construction of these enactments relating to masters and workmen should be narrowed so that they should be construed as liberally as possible. The view of the other school is that masters and workmen are not really on an equal footing; that there is danger in the employment does not exist with regard to the master, but only in the case of the workman; and the workman is not on an equal footing, because he must either run the risk or give up his employment. I myself have always belonged to the latter school." *Walsh v. Limerick* (1888) L. R. 21 Q. B. Div. 371, 58 L. J. Q. B. N. S. 586, 36 Week. Rep. 576, 53 J. P. 38.

About the same time we find Lord Esher, J., using the following language in *Thruswell v. Handyside* (1888) L. R. 21 Q. B. Div. 359, 57 L. J. Q. B. N. S. 58, 58 L. T. N. S. 344, 52 J. P. 275. "It cannot be said, where a man is lawfully engaged in work, and is in danger of dismissal if he leaves his work, that he wilfully incurs any risk which he encounters in the course of such work, and here the plaintiff had asked the defendants' men to take care. It is different where there is no duty to be performed, and a man takes his chance of the danger, for there he voluntarily counters the risk. If the plaintiff had gone away from the dangerous place without incurring the risk of losing his means of livelihood, the result might have been different; but he was obliged to be there; his poverty, and his will, consented to incur the risk. The learned judge also suggested that if it had been impossible for the defendants to take precautions against danger, it might have been held that the plaintiff was bound to take his chance. The case was distinguished from *Woodley v. Metropolitan Dyeing Co.* (1877) L. R. 2 Exch. Div. 33, 46 L. J. Exch. N. S. 521, on the ground that, in the latter case the plaintiff only knew that there was danger, and had it in his power to protect himself."

ch will involve

by Lord P. meaning of the maxim; "Then two schools of cases of the law of one side or to prevent the construction of the law being narrowed, or construed as strictly in view of the facts and workmen as footing; that, in employment, regard to the use of the workman is not on the must run the employment, belonged to the *h. v.* Div. 371, 374 36 Week. Rep. we find *H. v. Langdon* (1888) L. R. 20 Q. B. N. S. 337 J. P. 270. If a man is liable, is in danger of his work, that is the risk which he makes of such work had asked for care. It is his duty to be careful, his chance of voluntarily or the plaintiff could the danger of the risk of his life, the case is not; but he was poverty, not his or the danger suggested that for the defendants against it. It has been held that to take his distinguished *Capital Dist. R. ch.* Div. 384, 36 on the ground the plaintiff was not was danger, he protect himself.

383. Complaint, objection, or protest omitted or made.—(Compare § 290, *ante*.)—The logical significance which shall be ascribed to the fact that, before the accident, the servant either had or had not complained of, objected to, or protested against, the maintenance of the abnormally dangerous conditions which caused his injury, will obviously depend upon the particular doctrine held by the court as to the inference to be drawn from the servant's having continued to work with a knowledge of the conditions,—such knowledge being manifestly an element always present in any case where the servant has thus expressed dissatisfaction with his environment.

a. No complaint, protest, or objection established by the evidence.—If the maxim is deemed to be a conclusive bar to his action whenever it is shown that he went on working with a knowledge of the risk which caused his injury, the failure to express any dissatisfaction can carry no higher significance than that of a circumstance tending

while in the former the plaintiff could not have avoided the danger, unless he had disobeyed the orders of his employers, and incurred the risk of dismissal. In *Memberg v. Great Western R. Co.* (1889) L. R. 14 App. Cas. 179, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 38 Week. Rep. 145, 54 J. P. 244, the other members of the House of Lords seem to have been somewhat staggered by Lord Bramwell's outspoken advocacy of the doctrine that the putting a man in fear of starvation does not amount, in a legal point of view, to the application of physical coercion (see note 1, *supra*), and preferred to reserve their opinion on the subject. Lord Halsbury contented himself with saying that there was no evidence that the plaintiff had been compelled to do the work by any such fear, but subsequently remarked that he wished to leave open the question as to the true scope of the maxim. Lord Herschell also desired that the matter should be left open for argument and declined to express any positive opinion as to the correctness of Lord Bramwell's views. Lord Fitzgerald did not directly discuss the question whether the fear of losing employment was compulsion, but thought that no compulsion could be predicated of a case where the servant, after having asked for assistance and met with a refusal, simply went on doing the same work in the same manner in which he must often have done it before during his seven years of service. The "physical compulsion" theory of Lord Bramwell was, however, emphatically condemned by Lord Coleridge

and Mathew, J., in *Sanders v. Barker* (1890) 6 Times L. R. 324.

In *Madden v. Hamilton Iron Forging Co.* (1889) 18 Ont. Rep. 55, the fact that the servant went on working to avoid being discharged was mentioned as one of the elements which excluded the operation of the maxim.

In *Mellor v. Merchants' Mfg. Co.* (1890) 150 Mass. 362, 5 L. R. A. 792, 23 N. E. 100, Holmes, J., remarked: "It may be that a case like *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, comes very near the line; because, if the servant is acting within the scope of his regular employment, or in obedience to special orders, the fear of losing his place may take away his choice so far that he cannot be said freely to take the risk upon himself." Compare the following remarks of the same judge in *Boule v. New York & N. E. R. Co.* (1890) 151 Mass. 102, 23 N. E. 827. "This accident happened before the date of this statute, and here there can be no doubt that the risk was assumed by the plaintiff's intestate, so that even if his conduct was not negligent in the sense of culpable, still, as it involved danger manifest to him, he could not complain of the consequences, or argue, as it might be argued, perhaps, in some cases under the act of 1887, that if he acted under the fear of losing his place he did not act at his own peril, unless a jury found him to have been culpably careless." The application of these expressions of indi-

to corroborate the inference of voluntary action. Under such circumstances it cannot be a differentiating element.¹

Under the doctrine that knowledge is not of itself conclusive of the voluntary character of the servant's action, the fact of his making a complaint is ordinarily nothing but a circumstance for the jury to consider in connection with the rest of the evidence in the case. But in cases in which the court is justified, apart from this circumstance, in declaring that the maxim is applicable, the fact of a complaint having been made sometimes appears as a corroborative element.³

b. Complaint, protest, or objection established by the evidence.

In any jurisdiction in which voluntary action is inferred, as a matter of law, as soon as it appears that the servant comprehended the nature of the injury to which his injury was due, it is obvious that the fact of a complaint having been made is nothing but a circumstance which

individual opinion seems intended to be limited to cases arising under the employers' liability act. If not so limited they are in direct conflict with the specific rulings of this court, as noticed § 288, *ante*. Compare § 65, *ante*.

¹The earliest case in which this situation is illustrated is *Skipp v. Eastern Counties R. Co.* (1853) 9 Exch. 223, 3 C. L. Rep. 185, 23 L. J. Exch. N. S. 23, where the servant was injured owing to the inadequacy of the number of servants furnished for the work. The judges, during the argument of counsel, unanimously declared that he could not recover for reasons stated by each of them as follows: "The case," said Platt, B., "falls within the maxim *Volenti non fit injuria*." "I acted upon that principle at the trial," said Martin, B., "being of opinion that the company was not liable, as the plaintiff had done the same work for several months without any intimation on his part that he was unable to carry it on; and I therefore considered him a voluntary agent." "The defendants," said Parke, B., "were bound to use all due and reasonable care only. Here the plaintiff was engaged in the same work for several months, and made no complaint whatever as to the inadequacy of the means employed. If he felt that he was in danger by reason of the want of a sufficient number of fellow servants, he should not have accepted the service." Similar language was employed by Martin, B., in his opinion: "I think that if the case had gone to the jury they must have found a verdict for the defendants.

But, as I entertained a very strong opinion upon the matter, I thought it clearly to be my duty not to leave the case to them upon the chance of their finding a verdict for the plaintiff upon motives of commiseration. The plaintiff brought the accident upon himself for if he found that he could not do the work which was set him, he ought to have declined it in the first instance. He, however, carried it on for several months, and never made the least complaint upon the matter."

In a very recent case a servant was denied recovery for an injury caused by his falling into an uncultivated, where he knew at the time he accepted the service that the conditions were all in this condition, and he remained three years in the service without objection. *West v. Southey* (1898) 29 C. C. A. 219, 56 U. S. 323, 85 Fed. 392.

"The mere fact that he [the servant] continues his work, even though he knows of the risk and does not protest, does not preclude his recovery in respect of the breach of duty, by reason of the doctrine. *Smith v. [1891] A. C. 325, 60 L. J. Q. B. 683, 65 L. T. N. S. 467, 55 J. P. 6 Week. Rep. 392, per Lord Herschell 365 of the Law Reports*). See *Yarmouth v. France* (1887) 12 Q. B. Div. 647, 57 L. J. Q. B. N. S. 283, 55 Week. Rep. 283, per Lindley, J. (of the Law Reports).

³See, for example, *Pell v. [1893] 23 Ont. Rep. 619 (§ 380, 1, *ante*).*

conclusively that he understood the hazardous nature of his environment, and which therefore serves merely to establish the existence of the single element upon which, in this point of view, the applicability of the maxim depends.⁴

On the other hand, under the modern English doctrine, the servant's expressions of dissatisfaction are naturally regarded as evidence that he was not *volens* within the meaning of the maxim.⁵ Especially

⁴In *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, Lopes, L. J., argued as follows in his dissenting opinion: "The point that Yarmouth was not engaged to drive a dangerous horse is met by the fact that he continued in the service after he knew the horse was dangerous; and his constant complaints may be regarded as evidence of his thorough appreciation of the risk he was incurring and of his willingness to incur that risk rather than relinquish his employment. After complaining he remains in the service for a long time, knowing the risk and knowing that no steps had been taken to prevent its continuance. This is more consistent with his acquiescence in a disregard of his complaints, and with a willingness to incur the risk, than with the contrary view. . . . The present case seems a stronger case of voluntary exposure to danger than that of *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. In the latter case there is little, if any, evidence that Thomas knew of or appreciated the danger; but in the present case the evidence is strong to show that Yarmouth thoroughly understood the danger to which he was exposing himself. With a knowledge of the danger, though complaining, he continues in the service, indicating thereby a willingness to incur the risk rather than give up his employment." Commenting on *Woodley's* case (see § 376, note 1, *supra*), the learned judge said: "The only distinctions that I can find between that case and the present are the following: Woodley was hired to do dangerous work, and knew its dangerous character and attendant risks. Yarmouth was hired to do work not dangerous, *viz.* amongst other work to drive horses, which most frequently are manageable. The horse which did the mischief was intrusted to his care after he entered on the employment, and it was then first he learned its propensities;

but long after he had been made aware of its vicious nature he continued to drive it. There was no evidence that Woodley ever made any complaint to his employer. Yarmouth, on the contrary complained, but continued in the employment. Having regard to the judgments of the majority of the court, I do not think that what I have suggested furnishes any substantial ground for distinction."

See also the extract given in § 381, note 1, *supra*, from Lord Bramwell's opinion in *Memberg v. Great Western R. Co.* (1889) L. R. 14 App. Cas. 179, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 38 Week. Rep. 145, 51 J. P. 244.

⁵In *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392, where the servant had been exposed for two weeks to the danger which produced his injury, two members of the house, Lord Halsbury (p. 337) and Lord Watson (p. 357) explicitly rejected the contention that his remedy was barred because he had made repeated complaints. The latter said: "The complaints made to the foreman by his fellow workmen, coupled with the fact of their continuing to work, might be fairly construed as an intimation to the defendants that they must either discontinue the vicious practice of slinging stones over the heads of their workmen or take the consequences. It was a protest against the practice, which does not naturally or necessarily imply that they were willing to submit to it or to accept the risk of it."

In *Bacon v. Dares* (1887) 3 Times L. R. 557, it was held that the servant could recover where the evidence was essentially that he had complained of a defect in a machine, that the work had been stopped for the purpose of remedying the defect, and that when he resumed work he was told it was working properly. Cave, J., said that merely going on with work is not enough to let in the maxim; to produce that result there must be something to show

will a court refuse to hold the action not maintainable, as a matter of law, where the servant's protest elicits, from the master a promise that the dangerous conditions should be remedied.⁶ See chapter *post*. But where the period during which the servant continued his work was so long that the only inference which can be drawn is that he had resolved, however reluctantly, to accept the existence of a dangerous situation, it would seem the presumption of an acceptance of the risk becomes so strong that it cannot be disturbed by evidence that he had often expressed his dissatisfaction.⁷

384. Existence of risk contemporaneous with or subsequent to upon the employment.—(Compare § 283, *ante*.)—Taking the Massachusetts decisions as they stood a few years ago, the doctrine prevailing might, it would seem, be enunciated in this form: in cases where the risk to which the servant's injury was due existed when he commenced the performance of his contract, proof that he was chargeable with an appreciation of that risk would justify the court in declaring, as a matter of law, that he was *volens* in regard to it;¹ while on the other hand, in cases where the risk in question

that he was perfectly contented to go on, that he had made no complaint, and that he understood and acquiesced in the danger.

In *Sanders v. Barker* (1890) 6 Times L. R. 324, it was laid down broadly that evidence of a remonstrance by the servant tended to negative the inference of voluntary action on his part.

In *Brooke v. Ramsden* (1890) 63 L. T. N. S. 287, 55 J. P. 262, Mr. Justice Cave remarked that "if everyone who complained or knew of a defect was held to be disentitled to recover, bad masters would only have to point out defects to put themselves in a better position than masters who took all possible pains to ensure the safety of their workmen."

Where a machine became unfenced after the servant entered the employment, and he was injured, after making complaint, while he was pointing out the defect to the employer's engineer, the question of his consent was held to be for the jury. The proper inference from his complaining and not getting the defect removed is that he let the master take the risk. *Wallace v. Culter Paper Mills Co.* (1892) 19 Sc. Sess. Cas. 4th series, 915.

In *Dean v. Ontario Cotton Mills Co.* (1887) 14 Ont. Rep. 119, it was held that evidence of a complaint made by the servant justified the inference that he had not consented to take the risk.

By an Australian court it has been

declared that the maxim is not applicable to an action merely because a servant, although he objects to his master's mode of driving, voluntarily allows himself to be driven by him. The master is bound to exercise skill and proper caution. *Bateman v. Moffatt* (1888) 13 W. & A. B. (Victoria) 125, 13 V. L. R. (1869) L. R. 3 P. C. 115, 22 L. J. P. 140, 6 Moore P. C. C. N. S. 369, held on this point.

Foley v. Webster (1892) 2 B. C. 1. Thus, in *Membery v. Great Western R. Co.* (1889) L. R. 14 App. C. 58 L. J. Q. B. N. S. 563, 61 L. T. 566, 38 Week. Rep. 145, 54 J. P. 325, where the plaintiff had remained in service several years after the discovery of a breach of duty in not furnishing a ladder, all the law lords, including those who afterwards concurred in the decision in *Smith v. Baker* (1891) 13 Q. B. N. S. 513, 60 L. J. Q. B. N. S. 403, 10 T. Rep. 392, 65 L. T. N. S. 467, 55 J. P. 660, were of opinion that the fact of the servant's having made repeated requests for additional assistance, and of his standing against the dangers to which he was exposed on account of its not being furnished, will not prevent the maxim *volenti non fit injuria* from being a conclusive bar to his action.

This is the effect of *O'Halloran v. Boston Gaslight Co.* (1893) 158 L. R. 135, 47 L. R. A. 161, 32 N. E. 100.

supervened after he began work, the applicability of the maxim was essentially a matter to be determined by the jury.² But this doctrine has now been definitely repudiated in that state (see § 376, b, *supra*), and there can be very little doubt that the distinction suggested by the decisions just referred to is neither warrantable on logical grounds nor sustained by any adequate authority.

The objections to which it is open on the former score are sufficiently obvious. Although a person who is seeking employment generally enjoys a larger liberty of action in regard to the acceptance or rejection of work which involves an abnormal amount of danger than one who, after he has entered upon the performance of his duties, finds himself confronted by the necessity of choosing between incurring an additional peril or looking for a new place, yet the unwillingness to decline a situation which is desirable, except in the single respect that some of the instrumentalities are in a bad condition, is a feeling which is the same in kind as his unwillingness to throw up a situation having the same drawback. There is, accordingly, no satisfactory grounds upon which it can be affirmed that evidence of the servant's having had notice of a risk before he entered the employment should be regarded as raising an absolute bar to an action for injuries due to that risk, while voluntariness of action is not a necessary inference from evidence that he obtained knowledge of a risk after entering the employment, and with that knowledge went on working. To ascribe essentially different legal consequences to the operation of a specific constraining motive, simply because it may exercise a somewhat more powerful influence in the one case than in the other, is, it is submitted, wholly unjustifiable. There is clearly no logical alternative between refusing altogether to treat this feeling as a factor in the problem, and declaring it to be a constant quantity in that problem, the effect of which is that, whether the extraordinary risk existed when the contract of service was made, or only arose after-

²Such were the circumstances involved in *Fitzgerald v. Connecticut River Paper Co.* (1891) 155 Mass. 156, 29 N. E. 464; *Mahoney v. Dore* (1892) 155 Mass. 513, 30 N. E. 366. In the latter case it was considered that the effect of *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 40 Week. Rep. 392, 65 L. T. N. S. 467, 55 J. P. 660, was that "a servant who continues to work where he is exposed to a danger which he understands and appreciates, and which results from his employer's negligence, and which he did not assume by his implied contract when he entered the service, does not, as matter of law,

voluntarily assume it by merely remaining in a place which is rendered unsafe by his master's fault." (See note 9, *infra*, *ad post.*) The court said it was not aware of any adjudications in Massachusetts which were necessarily inconsistent with this just and reasonable doctrine.

Mr. Beven treats the subject (1 Neg. pp. 767 *et seq.*) upon the hypothesis that the presumptions with reference to which the inquiry is to be conducted are wholly different, according as the known risk existed when the servant began work, or was afterwards superadded to the employment.

wards, the servant's assumption of that risk cannot be inferred from his knowledge alone.

It will be observed that, in this point of view, the question whether the contract under which the servant was working was one which bound him for a definite period, or one which was terminable at will, is wholly immaterial. The action is in no event sustainable unless the master has been guilty of some act of commission or omission which, when considered without reference to the servant's knowledge, and possibly whether that knowledge be treated as a factor or not (*§ 374, supra*), constitutes a breach of duty, and that breach of duty clearly absolves the servant from any obligation under which he is otherwise lie to remain in employment for a certain term. The only thing that can be said with regard to such an obligation is that, if such a term had come to an end between the time when the risk was covered and the injury was received, that school of thought which regards the servant as a free agent will naturally view the fact of his having failed to take advantage of the expiration of the term as being absolutely conclusive evidence of his consent to acquiesce in the situation.³

The authorities are in full accord with the conclusions to which this reasoning conducts us.

Of none of these English decisions can it be reasonably affirmed that the time when the risk became an incident of the servant's environment was really treated as a differentiating factor. In the instances in which the risk existed when the servant began work, he was held unable to recover either because, as under the older theory, his knowledge was deemed to be conclusive proof that he had consented to incur the risk,⁴ or because, as under the later theory, the facts were such that a jury could not reasonably infer involuntary action.⁵ The decisions in which the maxim is held to be a bar to recovery for injuries caused by a risk superadded after entry into

³ In *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392, Lord Bramwell, speaking with special reference to the terms of the contract of hiring, under which most English laborers work, said (p. 346 of Law Reports): "In these services every week there is a new engagement, and, therefore his last week's work was under a contract made by the plaintiff, with full knowledge of the risk. If we suppose the contract was from week to week till determined by notice, surely he is *volens* if he does not give the notice." In the same case he expressed the opinion that

if a servant found himself exposed to new danger after his term of employment had begun, the right compensation him to take was to sue for a breach of the engagement, and that, if he continued work with a knowledge of these conditions, the maxim would prevent claiming any indemnity for an injury traceable to that danger.

⁴ *Woodley v. Metropolitan Dist. R.* (1877) L. R. 2 Exch. Div. 384, 46 L. Exch. N. S. 521.

⁵ *Thomas v. Quartermaine* (1887) Q. B. Div. 685, 56 L. J. Q. B. N. S. 57, 57 L. T. N. S. 537, 35 Week. Rep. 51 J. P. 516.

employment are governed by precisely the same considerations, the former being the rationale of the conclusion arrived at in the older cases,⁶ the latter being relied upon in those of a more recent date.⁷

The negative testimony which is thus furnished against the soundness of any theory which would place on a different footing risks which existed when the employment began and risks subsequently added thereto is corroborated by the fact that none of the cases, either early or recent, in which the maxim was held not to be applicable, attach any controlling importance to the time when the risk came into existence, the specific grounds upon which recovery was allowed being either that the duty infringed was statutory,⁸ or that knowledge was not of itself conclusive of the voluntary character of the servant's actions.⁹ Various specific circumstances are adverted to by the courts as evidence tending to negative such voluntary action (see preceding sections); but there is no suggestion that the servant's position is in any respect strengthened by the fact that the risk was one not originally incident to the employment.

The American cases lend even less support, if that be possible, than those of the English courts, to the doctrine stated at the commencement of this section. Setting aside the suggestions contained in the Massachusetts cases there cited, the authorities unanimously hold that the maxim constitutes a bar to the action in any case in which the servant is proved to have continued work with an appreciation of that

⁶ *Skipp v. Eastern Counties R. Co.* (1887) 14 Ont. Rep. 119; *Foley v.* (1853) 9 Exch. 223, 23 L. J. Exch. N. S. 23, 3 C. L. Rep. 185; *Senior v. Ward* (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261; *Griffiths v. Gidlow* (1858) 3 Hurlst. & N. 648, 27 L. J. Exch. N. S. 404.

⁷ *Membery v. Great Western R. Co.* (1889) L. R. 14 App. Cas. 179, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 38 Week. Rep. 145, 54 J. P. 244.

⁸ *Britton v. Great Western Cotton Co.* (1872) L. R. 7 Exch. 130, 41 L. J. Exch. N. S. 99, 27 L. T. N. S. 125, 20 Week. Rep. 525.

⁹ *Risk existing when work begun.*—*Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918; *Greenhalgh v. Corman Coal Co.* [1891] 8 Times L. R. 31; *Medway v. Greenwich Inlaid Linoleum Co.* (1898) 14 Times L. R. 291; *Wallace v. Collier Paper Mills Co.* (1892) 19 Se. Sess. Cas. 4th Series, 915; *Rodgers v. Hamilton Cotton Co.* (1893) 23 Ont. Rep. 425; *Dean v. Ontario Cotton Mills*

Co. (1887) 14 Ont. Rep. 119; *Foley v.* (1853) 9 Exch. 223, 23 L. J. Exch. N. S. 23, 3 C. L. Rep. 185; *Senior v. Ward* (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261; *Griffiths v. Gidlow* (1858) 3 Hurlst. & N. 648, 27 L. J. Exch. N. S. 404. *Risk superadded after employment began.*—*Vermouth v. Finney* (1887) 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283; *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 40 Week. Rep. 392, 65 L. T. N. S. 467, 55 J. P. 660; *Barter v. Wynn* (1888) 4 Times L. R. 255; *Amos v. Duffy* (Q. B. D. 1890) 6 Times L. R. 339; *Brooke v. Ramsden* (1890) 63 L. T. N. S. 287, 55 J. P. 262; *Bacon v. Davies* (1887) 3 Times L. R. 557; *Marley v. Osborn* (1894) 10 Times L. R. 388; *Sim v. Dominion Fish Co.* [1901] 2 Ont. L. Rep. 69.

In this connection it should be remarked that, although the actual substance of the decision in *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 40 Week. Rep. 392, 65 L. T. N. S. 467, 55 J. P. 660, is correctly stated by the supreme court of Massachusetts in the case cited in note 2, *supra*, there is no intimation, in any of the opinions delivered in the House of Lords, that the

risk, whether that risk existed when he began work,¹⁰ or subsequently.¹¹

Length of time which elapsed between the discovery of and the occurrence of the accident.—(Compare §§ 284, 302.)—The cases in which the maxim is directly discussed throw no light whatever upon the materiality of the question whether the length of the period which elapsed between the time when the servant discovered the existence of the risk and the time when he received the injury was a long or short one. Under the English rule this question can very seldom be of any practical importance, inasmuch as the opinion of the jury must in any event be taken in the first instance, and since the most recent decision on the subject by the House of Lords,¹ it seems difficult to maintain that any period of continuing length, however long, would be conclusive against the servant.

Under the American rule, it might be that some courts would hold that a case where the maxim was specifically relied upon, but which did not draw a legal inference of voluntary action under circumstances such as those discussed in § 302, *ante* (notes 6-9). But it is no matter of conjecture what position they would take in these instances. As a matter of fact it will almost always happen that, when a servant is held to have assumed a new risk, the injury was received a sufficient time after the servant's knowledge was acquired to render it not unreasonable to say that he had had an opportunity for considering whether he should go on with or give up the work. The time may be only a few hours, or it may be several years, but if it has been long enough to furnish an opportunity for real deliberation and an estimate of the comparative advantages of continuing in or leaving the employment, it would seem that the respective rights of the master and servant are definitely fixed, and that an extension of the period cannot be made without it no additional or characteristic legal results.

386. Act rendered necessary by the arrangement of the place.

There is some authority for the doctrine that, where the character

of the servant's environment having been rendered more dangerous after he entered the employment is in itself to be regarded as a material circumstance.

¹⁰ *West v. Southern P. Co.* (1898) 20 C. C. A. 219, 56 U. S. App. 323, 85 Fed. 392; *Williams v. Louisville & N. R. Co.* (1901) 23 Ky. L. Rep. 1124, 64 S. W. 738; *Deritt v. Pacific R. Co.* (1872) 50 Mo. 302; *Knisley v. Pratt* (1896) 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986.

¹¹ *Birmingham R. & Electric Co. v. Allen* (1892) 99 Ala. 359, 20 L. R. A. 457, 13 So. 8; *Bridges v. Tennessee R. Co.* (1895) 109 Ala. 287, 495; *Alabama G. S. R. Co. v. ...* (1898) 119 Ala. 572, 24 So. 862; *...ville & N. R. Co. v. Banks* (1899) Ala. 508, 16 So. 547; *Bogenschmidt v. Smith* (1886) 84 Ky. 330, 1 S. W. 1856; 5 Ohio St. 541, 67 Am. D. 400, 30 Atl. 16.

¹ *Williams v. Birmingham Bate Metal Co.* [1899] 2 Q. B. 338, 68 Q. B. N. S. 918.

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a servant's action in taking a certain route through his master's premises is in question, the fact that, owing to manner in which the plant was arranged, he had practically no alternative but to take that route, tends in some degree to show that he was not a free agent in subjecting himself to the risks which were thus encountered.¹

In one case it was remarked that evidence deciding whether he voluntarily took a route which showed that an employee had no way of leaving his employer's mill except by going down steps covered with ice was proper to be considered in

the risk of using the steps. Fitzgerald v. Connecticut River Paper Co. (1894) 155 Mass. 155, 29 N. E. 464.

CHAPTER XXI.

WHEN KNOWLEDGE OF A RISK IS IMPUTED TO A SERVANT.

387. Introductory.

A. GENERAL PRINCIPLES.

388. Constructive and actual knowledge identical for juridical purposes.

389. Servant's failure to know of certain risks may be treated as contributory negligence.

390. Provinces of court and jury in determining whether knowledge shall be imputed to a servant.

391. When a servant is chargeable with knowledge; generally.

392. Evidential elements to be considered in determining whether knowledge shall be imputed to a servant.

B. WHAT RISKS ARE DEEMED TO BE WITHIN THE COMPREHENSION OF ADULT SERVANTS.

393. Generally.

394. Risks which every adult is presumed to comprehend without special experience.

395. Risks not deemed to be, as a matter of law, comprehended without special experience.

396. Risks of which a comprehension has been imputed, as a matter of law, to servants having special experience.

397. Risks not deemed to be, as a matter of law, within the comprehension of servants having some experience.

C. MINORITY AS A DIFFERENTIATING ELEMENT; SIGNIFICANCE OF.

398. Generally.

399. Cases illustrating the capacity for appreciating dangers, which are imputed to minor servants.

400. Effect of cases discussed.

D. SERVANT'S MEANS OR OPPORTUNITIES OF KNOWLEDGE.

401. Generally.

402. No opportunities of obtaining knowledge before the time of the accident.

402a. Sufficiency or insufficiency of opportunities actually obtained before the accident.

403. Same subject continued. Illustrative decisions.

403a. Sufficiency or insufficiency of the opportunities of knowledge actually obtained at the time of the accident.

404. Knowledge of particular risks; how far inferable from knowledge of general conditions.

404a. Knowledge of coservant not imputed to injured servant.

D. COMPARISON BETWEEN THE POSITION OF MASTER AND SERVANT IN REGARD TO IMPUTED KNOWLEDGE.

- 405. Servant's means or opportunities of knowledge equal to those of the master.
- 406. Servant's means or opportunities of knowledge superior to those of the master.
- 407. Servant's means or opportunities of knowledge usually inferior to those of the master.

E. SERVANT'S DUTY AS REGARD INSPECTION AND INQUIRY.

- 408. Servant not ordinarily charged with the duty of inspection or inquiry.
- 409. Rationale of this doctrine.
 - a. Servant not bound to take notice of concealed defects.
 - b. Different standards of care in the case of master and servant.
 - c. Servant entitled to assume that the master has performed his duties properly.
- 410. Doctrine considered with reference to the sufficiency of the complaint.
- 410a. Doctrine considered with reference to the propriety of the instructions.
 - a. Correct.
 - b. Incorrect.
- 411. Decisions illustrative of the doctrine.
- 412. Doctrine considered in relation to the servant's opportunities of knowledge.
- 413. Limits of the servant's exemption from the duty of inspection; generally.
- 413a. Duty of inspection: when predicable from circumstances indicative of danger.
- 414. Duty of inspection inferred from the nature of the functions discharged by the servant.
- 415. When this inference is not drawn.
- 416. Duty of inspection under rules, special notices or orders, and express contracts, generally.
- 417. Limits of the duty under these circumstances.

As to the circumstances under which a servant is chargeable with knowledge of rules, see § 227, *ante*.

Other cases bearing upon the circumstances under which knowledge of risks is imputed to servants are discussed in the four following chapters, with special reference to the elements indicated in the titles.

387. Introductory.—In all the cases of the types reviewed in the five preceding chapters the primary and essential, though not the sole, question to be determined is whether the servant appreciated the risk to which his injury was due. Direct testimony bearing upon that question may be, and sometimes is, adduced;¹ but in the great

¹ The fact that a servant who fell into that he had the danger in mind. *Car-*
an uncovered vat while passing through *ripton v. Washburn & W. Mfg. Co.*
a dimly lighted room was moving cau- (1898) 170 Mass. 79, 48 N. E. 1079.
tiously just before the accident indicates

majority of instances the answer which it should receive is a matter of inference and deduction from certain facts which establish either the conclusion that the servant ought, in the exercise of reasonable care, to have known of and comprehended the danger, or the conclusion that he could not, by the exercise of reasonable care, have obtained such knowledge and comprehension of the danger. The ensuing chapter will be devoted to a review of the cases, and the effect of circumstantial evidence of this description.

A. GENERAL PRINCIPLES.

388. Constructive and actual knowledge identical for juridical purposes.—The proposition that a servant is presumed to have known and understood whatever an ordinarily prudent and intelligent person having the same means and opportunities as the servant would have observed and understood, and that he is presumed to have observed or understood anything more than that, is as completely axiomatic as the corresponding proposition, which defines the extent of the master's liability. See chapter x., *ante*. It is to say, the true test of his right to recover is whether he has actually known and comprehended the danger in question, and whether he did in fact know and comprehend it.¹ As the correctness of this principle is taken for granted in all the cases in the following sections, it would be a work of supererogation to quote more than a very few of the statements in which it has been recognized by the courts.² In any case where the evidence is susceptible of the construction that the servant ought to have known

¹*Klatt v. N. C. Foster Lumber Co.* (1896) 92 Wis. 622, 66 N. W. 791.

²"The master has a right to expect him [*i. e.*, the servant] to be alert to inform himself of existing conditions, and he cannot attack the master from the shelter of unjustifiable ignorance of the business, machinery, and methods which he is employed to use. Actual ignorance will not alone suffice to charge a master; the ignorance must also be excusable." *Ragan v. Toledo, A. A. & N. M. R. Co.* (1893) 97 Mich. 265, 56 N. W. 612.

"The law requires that men shall use the senses with which nature has endowed them; and when, without excuse, one fails to do so, he alone must suffer the consequences, and he is not excused where he fails to discover the danger, if he made no attempt to employ the

faculties nature has given him." *Wright v. Cleveland, C. C. & St. L. Ry. Co.* (1893) 137 Ind. 210, 36 N. E. 101.

In his dissenting opinion in *Forbes* (1898) 171 Mass. 548, L. R. A. 170, 51 N. E. 20, Kuebler, speaking of cases of the plaintiff's actual assumption of the obvious permanent risks of the work, said: "The rights of the plaintiff depend, not necessarily upon the employee in fact understanding the risks, but upon the fact that he ought to understand and appreciate them, and upon his making such a contract for service upon that which the employer has a right to suppose that he understood and appreciated."

In *Brown v. Louisville & N. R. Co.* (1895) 111 Ala. 275, 19 So. 1.

the risk to which his injury was due, and it is therefore material that the jury should comprehend the doctrine that obligatory knowledge stands, in a juridical point of view, upon the same footing as actual knowledge, it is error for the trial judge to give any instructions which directly contravene that doctrine,³ or to omit to explain its significance and scope in the instructions formulated by himself,⁴ or to refuse to comply with a request by the defendant for an instruction in which it is enunciated,⁵ or to give, at the plaintiff's request, an in-

court used the following language: "Notice is not, in such cases, of the equivalent of knowledge. A brakeman would have notice of a rule forbidding him to uncouple moving cars if he had information that his employer had adopted and promulgated a set of rules for the conduct of employees. This would put him on inquiry which, if pursued, would lead to a knowledge of the particular rule. Still, until the inquiry has been made and the knowledge gained, his conduct as to care or negligence cannot be measured by the rule,—a factor which did not operate upon him in the act done. He might be negligent in not pursuing the inquiry, but such negligence would be only a remote cause of the injury suffered by doing the act in a manner forbidden by the unknown rule." It is difficult to see how this argument can be reconciled with the principle now under discussion.

As, where the language used is such that the jury are likely to draw the inference that the servant's action is maintainable unless he had new of and comprehended the danger in question, *Louisville & N. R. Co. v. Hall* (1890) 91 Ala. 112, 8 So. 371 ("notice," said the court, "meets all the requirements of the law"); *Atchison, T. & S. F. R. Co. v. Absdorf* (1892) 47 Ill. App. 209; *Pennsylvania Co. v. Ebaugh* (1898) 152 Ind. 531, 53 N. E. 763; *Louisville R. Co. v. Shirell* (1892) 13 Ky. L. Rep. 902, 18 S. W. 944; *Heritt v. Hot & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 659 (disapproving instruction to effect that train were not negligent in failing to secure a car on a side track, if they did not know that it followed them out onto the main track); *Hill v. Meyer Brothers' Drug Co.* (1897) 140 Mo. 433, 41 S. W. 909 (jury were told that they might find the servant negligent "if they believed that he knew of the danger"); *Benjamin & L. Co. v. Costello* (1899) 63 N. J. L. 27, 42 Atl. 766; *Ferguson v.*

Phoenix Cotton Mills (1901) 106 Tenn. 236, 61 S. W. 53 (held proper to refuse an instruction that the defendant, in order to escape liability, was required to prove plaintiff's knowledge of the existence of a certain obvious defect); *Wells v. Coe* (1886) 9 Colo. 159, 11 Pac. 50 (jury in effect told that the servant's means of knowledge concerning the conditions which caused the injury could not influence their verdict); *Klatt v. A. C. Foster Lumber Co.* (1896) 92 Wis. 622, 66 N. W. 791; *Craven v. Smith* (1894) 89 Wis. 119, 61 N. W. 317.

An instruction in an action for personal injuries to a painter whose clothing caught upon a set screw in a revolving shaft, that because he asserted that he could not see that there were protruding set screws he did not assume the risk of working near a coupling provided with such protruding screws, is erroneous, where his testimony warrants an inference that he knew that the shaft was not perfectly smooth, and that there might be some projection near the screws which would catch his clothing if it came in contact with them. *Taylor-Craig Corp. v. Hage* (1895) 16 C. C. A. 339, 32 U. S. App. 548, 69 Fed. 581. *Union P. R. Co. v. Menden* (1893) 50 Kan. 539, 31 Pac. 1002.

Haley v. Jump River Lumber Co. (1892) 81 Wis. 412, 51 N. W. 321, 956; (train wrecked by large log lying near the track); *Illinois C. R. Co. v. Spordeder* (1900) 90 Ill. App. 590 (section hand injured while attempting to drive a claw bar under a sunken spike holding a rail).

In a case where the defense relied upon was contributory negligence, it was held error to refuse to give an instruction to the effect that if the jury found from the evidence that the injured servant knew, or by the exercise of ordinary care and prudence would have known in time to avoid injury, the alleged defects and the dangers of attempting to manipulate them under the

struction which tells the jury in unqualified terms that they find for him if they believe that the defendant did not use reasonable precautions to secure his safety.⁶

On the other hand, any instruction is unexceptionable and which lays it down that, in so far as the servant's right depends upon his knowledge, it is a matter of indifference whether the danger was actually known to him, or whether he ought, in the exercise of ordinary care, to have known of it.⁷

As the servant is only bound to exercise ordinary care so that he may ascertain the dangers connected with his employment, it is error to give an unqualified instruction that it is his duty, during the employment, to ascertain those dangers.⁸ Compare *et seq., infra*.

In spite of a general allegation of the absence of knowledge on the part of the servant, a complaint is demurrable if the specific allegations show that he must have known of the defects, or had the same knowledge and opportunity for such knowledge as the master possessed.⁹

Special findings that the plaintiff might have known of the defect which caused his injury, and the manner in which the defective machine was operated, preclude the entry of a judgment in his favor.

389. Servant's failure to know of certain risks may be treated as specific contributory negligence.— For the purposes of the rule stated in the preceding section, the ultimate logical fact which is controlling is the servant's imputed comprehension of the risk. But it is not sufficient to show that he was ignorant of the danger, or that it was not obvious that, considering his age, intelligence, experience, judgment, and discretion, he ought, in the exercise of reasonable care, to have known it. If it is proved that his ignorance was not excusable, his inability to comprehend the risk, or his failure to ascertain the danger, will maintain the action may, by shifting the standpoint, be referred to the question of whether his failure to acquire the obligatory knowledge or to ascertain the danger, under the circumstances, was negligence.

Litton v. Thornton (1881) 7 Rep. (L) 4.

An instruction that if the danger was one which was known or comprehended by him, or was so obvious that, considering his age, intelligence, experience, judgment, and discretion, he ought, in the exercise of reasonable care, to have known it, assumed the risk, is proper.

United States Leather Co. (1901) 19 Wis. 305, 83 N. W. 473.

Holman v. Kempe (1897) 74 Ind. 422, 73 N. W. 186.

Louisville & N. R. Co. v. ... (1897) 147 Ind. 561, 47 N. W. 390, 19 N. W. 278.

A charge to the effect that if a servant goes on working a machine, knowing, or having the opportunity of knowing, its faulty construction, he takes the risk on himself, has been approved.

Moran v. Harris (1884) 63 N. W. 390, 19 N. W. 278.

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the danger was contributory negligence. Negligence, as has been observed, may, and often does, consist in failing to know, as well as in failing to do.¹

390. Provinces of court and jury in determining whether knowledge shall be imputed to a servant.—In all the cases it is asserted or taken

Heritt v. Flint & P. M. R. Co. (1887) 67 Mich. 61, 34 N. W. 659.

"The servant is culpable if he fail to discover such a defect as would have been apparent without a thorough examination, if he had used ordinary diligence to discover it." *Chesson v. John L. Roper Lumber Co.* (1896) 118 N. C. 59, 23 S. E. 925.

"It is the [servant's] duty to use ordinary care in informing himself of the dangers and responsibilities attending his employment. . . . Moreover, the servant's duty in this regard is a continuing one. He may not close his eyes to serious defects or weaknesses in machinery or appliances, occasioned by use, of which, considering his employment, he might reasonably take notice." *Wells v. Coe* (1886) 9 Colo. 159, 11 Pac. 50.

Where ordinary inspection and carefulness will enable the employee to avoid the danger, there he will be required to use such inspection and carefulness. *Steinhauser v. Spraul* (1893) 114 Mo. 551, 21 S. W. 515, 859.

The phrase "negligent in not knowing" occurs in *George v. Clark* (1898) 29 C. C. A. 374, 56 U. S. App. 505, 85 Fed. 608.

For other cases in which the conception that the servant's failure to observe a danger may be treated as specific contributory negligence has been recognized, see *Brooks v. Northern P. R. Co.* (1891) 47 Fed. 687; *Lake Shore & M. S. R. Co. v. Stupak* (1886) 108 Ind. 1, 8 N. E. 630; *Western & A. R. Co. v. Bradford* (1901) 113 Ga. 276, 38 S. E. 823; *Hill v. Gust* (1876) 55 Ind. 45; *Haynes v. Erk* (1893) 6 Ind. App. 332, 33 N. E. 637; *Eicheler v. Hanggi* (1889) 40 Minn. 263, 41 N. W. 975; *Frederburg v. Northern C. R. Co.* (1889) 114 N. Y. 582, 21 N. E. 1049; *Albert v. New York C. & H. R. R. Co.* (1894) 80 Hun. 152, 20 N. Y. Supp. 1126; *Philadelphia & R. R. Co. v. Huber* (1889) 128 Pa. 63, 5 L. R. A. 439, 18 Atl. 334; *Bemis v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998.

The two kinds of contributory negligence—the failure to observe a continuing danger incident to the work, and the omission to use due precautions at the time of the accident—are sometimes

mentioned in the same case. *Gustafson v. Washburn & M. Mfg. Co.* (1890) 153 Mass. 468, 27 N. E. 179.

In *Goltz v. Milwaukee, L. S. & W. R. Co.* (1890) 76 Wis. 156, 44 N. W. 752, the question was as to the true construction of this finding in a special verdict: "Up to the time the hook was delivered to the plaintiff there was a defect in it that could be observed by the owner of the hook, or parties that used it, if they were exercising ordinary care in using or taking care of it." The court said: "The learned counsel of the respondent contends that this finding refers only to the defendant, the owner of the hook, and to parties that used it for the defendant before it was delivered to the plaintiff, and is a finding of the defendant's negligence. But the language is too broad and comprehensive for such a restrictive meaning. It may embrace the defendant, but it also embraces the plaintiff and all persons who used the hook. It is impossible to construe it otherwise. 'Up to [or at] the time the hook was delivered to the plaintiff there was a defect in it that could be observed by parties that used it if they were exercising ordinary care in using it' (or while using it). The defect at that time was such, and had been such, as to be observable to the plaintiff or any parties that used it, including the plaintiff, if he or they was or were exercising ordinary care in or while using it. The legal effect is inevitable that the defect was such that the plaintiff could have observed it if he had exercised ordinary care while he was using it. If he had observed or discovered the defect he was then negligent in continuing to use it. If he did not observe it then he was negligent in not observing it. In either case he was not exercising ordinary care, or he was guilty of a want of ordinary care. If he had exercised ordinary care he would not have been injured by that defect. He would have avoided it. The jury in this finding found certain facts, the legal conclusion of which is that the plaintiff was guilty of a want of ordinary care which contributed to the injury. This precludes his recovery."

for granted that there are two situations in which the question whether the servant was chargeable with notice of the risk from his injury resulted must be left to the jury to determine, and in their findings with regard to that question are conclusive in a court of review:

(a) Where the evidence is conflicting as to the material circumstances which are available for the purpose of determining whether the servant ought to have known of the risk.¹ It is clear that such a conflict is presented where the evidence tending to establish ignorance is that of the injured servant himself, whether it merely has a direct relation to the physical conditions existing at or before the time of the accident,² or amounts to a general denial of his possession of knowledge which it is sought to impute to him.³ But it is also

¹The question whether or not a hole in the planking between the rails over a street crossing was so obvious that an employee ought to have known of it is for the jury, where the evidence is conflicting as to its size and whether or not there were others like it in the yard, as well as upon the question of what caused it. *Valley R. Co. v. Keegan* (1898) 31 C. C. A. 255, 58 U. S. App. 377, 87 Fed. 849.

It is for the jury to say whether a servant injured by the breaking of a ladder understood the risk of using it, where the evidence was that he had been using it for a considerable time, and that he knew it had been broken previously and was spliced; while the testimony as to the strength of spliced ladders was conflicting; some witnesses stating that they were only from one half to three fourths as strong as originally, and others that they were just as strong. *Jones v. Pacific Mills* (1900) 176 Mass. 354, 57 N. E. 663.

On the ground that the witnesses had expressed different opinions as to the dangerous character of the work, the question whether the servant should have so fully realized the perils to which he was subjected by continuing to work that he should have left the employment was held to be for the jury, in a case where a laborer was engaged in the operation of pulling up signal posts on a railway, and the method adopted was to take several turns round a post with the end of a cable which was attached at the other end to a car, and hold on to the cable until it was drawn taut by the movement of the car, and thus either broke or pulled up the post. *Union P. R. Co. v. O'Hern* (1888) 24

Neb. 775, 40 N. W. 293 (post which the car had been pulled up and was dragging the ground struck an obstacle, and being twisted around, struck the plaintiff).

²Whether or not an employee at work in a box car was guilty of contributory negligence in failing to discover a hole in the car floor about 6 inches wide, 10 inches long, 14 inches from the front end, and 5 or 6 inches from the side of the car, precluding recovery for injury by stepping into the hole, is for the jury, upon his testimony that the hole was concealed by pieces of bark and snow and straw, and that the accident occurred about twenty minutes after he entered the car, although witnesses testified that the hole was in plain view and had been mentioned on the car. *King v. Chicago & N. W. R. Co.* (1908) 108 Iowa, 748, 78 N. W. 837. The question is for the jury where the plaintiff workman injured by the collapse of the sides of a trench which was inadequately shored up, swore that he had served nothing to warn him of the danger of the work. *Schmit v. Gillen* (1904) 41 App. Div. 302, 58 N. Y. Supp. 1002. Where a servant injured by the breaking of a belt in a spinning room of a factory testified that she had seen only one break during her employment, and the defendant showed that belts were frequently breaking there, it could not be said, as a matter of law, that the servant assumed the risk of injury from the breaking of the belts occasioned by the defendant's neglect to lace them properly. *McGarr v. National & P. Washed L.* (1901) 22 R. I. 347, 47 Atl. 1092.

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that if the courts were always to decline to interfere with the verdict of a jury in cases in which the servant has thus testified in his own favor, their controlling functions would, for practical purposes, be confined within very narrow limits. There are, it may be supposed, very few trials in which the servant does not swear that the risk was unknown to him. Due weight is attached to this consideration; for, taking the cases as they stand, it seems permissible to say that such a denial is treated as being a merely corroborative element which furnishes an additional justification for a conclusion in itself not unwarrantable even if that element were abstracted. This predicament is exemplified by a case in which the servant's injury was traceable to dangers which could not be appreciated without experience or special technical training (see subtitle B, *infra*), and his own positive statement that he did not possess those qualifications has not been contradicted by any other witness;⁴ by a case in which the minority of a female servant was treated as a sufficient reason for refusing to impute knowledge to her, as a matter of law, although she was skilled in her work;⁵ and by the cases in which the servant's statement that the risk was not known to him is mentioned in connection with facts which justify the inference that his opportunities for obtaining such knowledge were not such that a reasonably observant man could not have failed to discover it.⁶ See subtitle D, *infra*. Both on principle

⁴*Mather v. Rilliston* (1894) 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464 (properties of dynamite).

⁵*Crocker v. Banks* (1888) 4 Times L. R. 324. For facts, see § 399, note 1, subd. 2, *infra*.

⁶Whether one who had for two years been a brakeman on a road, the regulation distance between tracks on which is 7 feet, knew, or ought to have known, that a certain siding was only 5 feet 6 inches from the next track, and of the consequent danger, he testifying that he did not know thereof, is for the jury. *Vorhees v. Lake Shore & M. S. R. Co.* (1899) 193 Pa. 115, 44 Atl. 335.

The question whether a conductor knew that certain ties at a place where a switch had been removed projected unusually far is for the jury, where he has testified that he did not know that the ties projected, though he had frequently stopped at or near them, and it had been his custom to alight at a freight house close by to deposit his waybills, while the train proceeded a short distance to a passenger depot. *Whitcher v. Boston & M. R. Co.* (1900) 70 N. H. 242, 46 Atl. 740.

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The question whether a railroad switchman was chargeable with notice of obvious defects in a switch should be submitted to the jury, where he denies knowledge thereof and his service at that point was mainly at night. *Pearce v. Clarin* (1897) 27 C. C. A. 227, 53 U. S. App. 492, 82 Fed. 550.

A nonsuit is properly refused where it is a fair inference from the testimony that, considering the opportunities available for acquiring a knowledge of the location and height of an overhead bridge on a railway, the plaintiff was not chargeable with knowledge, and should have received instructions. *Atlee v. South Carolina R. Co.* (1884) 21 S. C. 550.

The plaintiff's knowledge is a question for the jury where he has testified that he did not know that the ditch into which he stepped had been dug, and that he had never been on that particular part of the spur track across which it had been dug. *Hollenbeck v. Missouri P. R. Co.* (1897) 141 Mo. 97, 38 S. W. 723, 41 S. W. 887.

Where a switchman was injured in attempting to jump onto a moving train

and authority it is indisputable that if the servant's testimony is contrary to all probability when the rest of the evidence is considered, it may be disregarded by a court of review.⁷

at a point where there was a pile of stones about 2½ feet high near the track, it cannot be said, as a matter of law, that he knew of the obstruction, where there were no other similar piles of stones along the track, and he testified that he had never seen the stones in question. *Donahue v. Boston & M. R. Co.* (1901) 178 Mass. 251, 59 N. E. 663.

Where a street-railway conductor, being ordered to change from one car to another at an unusual place, where the company had paving stones piled up near the track, which it was repairing, was thrown by the sudden starting of the car, as he was attempting to board it, and, striking against the stones, was rolled under it, he will not be held, as a matter of law, to have assumed the risk arising from the presence of the stones; he testifying that his attention was first called to the stones at that time. *North Chicago Street R. Co. v. Dudman* (1900) 184 Ill. 477, 56 N. E. 796, Affirming (1899) 83 Ill. App. 528.

In a case where a servant was injured while coupling a car to an engine, he testified that he had not been on the engine much; that he did not think he had coupled a car to the front of the engine more than four times; that, when the engine first approached the car, it stopped 10 feet from it; that he did not notice the height of the car, and did not know that there was any danger that the bunter would pass under the car until he actually attempted to make the coupling. The defendant produced adverse testimony. The court held the question of the servant's contributory negligence to be one for the jury, advertent to the general principle that its function is not to pass upon the weight of the evidence, but merely to determine whether there was evidence which should be submitted to the jury. *Lawless v. Connecticut River R. Co.* (1883) 136 Mass. 1.

In the face of the plaintiff's own express assertion that he did not observe the dangerous conditions, a court cannot say, as a matter of law, that a servant working occasionally near a planer was chargeable with a knowledge of the risk created by revolving knives which he could not see from the position which he occupied. *Veginan*

v. Morse (1893) 160 Mass. 141, 451.

Knowledge of the risk is not a necessary inference where an employee engaged in using the defect by the breaking of which he was injured testified that he had knowledge of the defect. *Thayer v. Arbor R. Co.* (1897) 144 Mass. N. W. 40.

Whether a stevedore engaged in taking away lumber in the hold of a vessel where it was lowered through a hatchway, and who was injured by lumber slipping from a box in the hold while it was being lowered, because of nothing over the end of it, is liable, as to its descent, was assumed the unusual risk, the evidence that the ends were closed, depends on whether the jury understood and had a right to find that the stevedore knew and intended to use it; and this is a question for the jury, though the stevedore testifies that the lumber was sometimes loaded in boxes. *Hennsey v. Bingham* 125 Cal. 627, 58 Pac. 209.

In a case where a servant was injured by a machine which fell upon him while he was attempting to couple it, he is entitled to go to the jury with his own testimony and that of his fellow-servants to show that he had no knowledge of the machine before, and that it was required to handle it in a dangerous manner. *Walsh v. Peet Valve Co.* (1898) 158 Mass. 23.

See also *Thompson v. C. & P. R. Co.* (1900) 86 Mo. App. 499, 49 App. Div. 485, 63 N. Y. Sup. Ct. 558, 11 S. W. 29.

A statement by an employee that he did not know the risk of using a cracked saw for the purpose of cutting an iron plate is insufficient to rebut the presumption of knowledge arising from an experience of fourteen years with machinery. *Erdman v. Steel Co.* (1897) 95 Wis. 6, 63 N. W. 993.

The testimony of a youth, 17 years of age at the time of the accident, that he did not know that if he put his fingers into the rolls of a steel plate they would be caught there, and that they were caught he would be

(b) Where the evidence is of such a character that the proper inference to be drawn from it is a question with respect to which different opinions may not unreasonably be formed.* This is the situation illustrated by most of the cases to be hereafter cited, in which the servant was allowed to go to the jury or to retain a verdict in his favor. Whether it actually exists in any given instance is a matter which, it is manifest, affords a very wide scope for a diversity of views, and which will, in practice, be determined according to the theory which in the jurisdiction where the right of recovery is being determined is entertained with respect to the proper significance of the extremely vague casuistry which is employed in this connection for the purpose of defining the boundary line between the prov-

does not raise a question for submission to the jury, where defendant, his employer, had a right to assume that he possessed the usual faculties of a boy of age. *Roth v. S. E. Barrett Mfg. Co.* (1897) 96 Wis. 615, 71 N. W. 1034.

Admissions by a brakeman serving for personal injuries incurred while coupling cars, that he could and did see the drawhead, and that the link and pin were properly adjusted, and his failure to deny that he knew the car had a sill, will render his statement that he did not have time to see the sill before the coming together of the cars not more than a scintilla of evidence, which need not be submitted to the jury. *Vany v. Price* (1897) 26 C. C. A. 521, 54 U. S. App. 196, 82 Fed. 162.

It has been asserted that the question whether the unsound condition of an appliance should have been perceived by the servant is one of contributory negligence, in respect to which the master has the burden of proof, and which, by consequence, he cannot ask to have withdrawn from the jury. *Atchison, T. & S. F. R. Co. v. Mulligan* (1895) 14 C. C. A. 547, 34 U. S. App. 1, 67 Fed. 569. This reason for denying the power of a court to interfere in the decision of such a question would obviously have no particular weight in jurisdictions where the plaintiff has the burden of proving that he was not negligent.

Remond v. Dilworth (1885) 111 Pa. 343, 2 Atl. 355, 363; *McDade v. Washington & G. R. Co.* (1886) 5 Mackey, 111. Affirmed (1890) in 135 U. S. 551, 34 L. ed. 235, 10 Sup. Ct. Rep. 1041; *Parvix v. Fall River* (1897) 168 Mass. 60, 46 N. E. 408; *Magee v. North Pacific Coast R. Co.* (1889) 78 Cal. 430, 21 Pac. 114; *Ingerman v. Moore* (1891)

90 Cal. 410, 27 Pac. 306; *Joliet, A. & V. R. Co. v. Veit* (1889) 36 Ill. App. 459; *Proctor Fireproof Constr. Co. v. Heath* (1901) 189 Ill. 123, 59 N. E. 535; *Union, J. & E. R. Co. v. Eschen* (1896) 68 Ill. App. 96; *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582; *Sherman v. Chicago, M. & St. P. R. Co.* (1886) 34 Minn. 259, 25 N. W. 593; *Burbo v. Bassett* (1886) 35 Minn. 485, 29 N. W. 198; *Pitts v. Florida C. & P. R. Co.* (1896) 98 Ga. 655, 27 S. E. 189; *Hadden v. Minneapolis & St. L. R. Co.* (1884) 32 Minn. 303, 20 N. W. 317; *Flanigan v. Guggenheim Smelting Co.* (1899) 63 N. J. L. 647, 44 Atl. 762; *Spoda v. Libera* (1896) 65 Minn. 337, 68 N. W. 36; *Gulf C. & S. F. R. Co. v. Johnson* (1892) 83 Tex. 639, 19 S. W. 151; *Cumbe v. Belleville Stone Co.* (1897) 59 N. J. L. 226, 36 Atl. 473; *Simmons v. Peters* (1895) 85 Hun. 93, 32 N. Y. Supp. 680; *Mahaney v. St. Louis & H. R. Co.* (1891) 108 Mo. 192, 18 S. W. 895; *Muirhead v. Hannibal & St. J. R. Co.* (1885) 19 Mo. App. 634; *Higgins v. Missouri P. R. Co.* (1891) 43 Mo. App. 555; *Moore v. St. Louis Wire Mill Co.* (1893) 55 Mo. App. 491; *Lake Shore & M. S. R. Co. v. Fitzpatrick* (1877) 31 Ohio St. 479; *Stone v. Oregon Mfg. Co.* (1870) 4 Or. 52; *Galveston v. Hemmis* (1889) 72 Tex. 558, 11 S. W. 29; *Litton v. Thornton* (1881) 7 Viet. L. R. (L.) 4.

In an English case Pollock, C. B. is reported to have laid it down that the servant's means of knowledge is a question of law (*Dynen v. Leach* [1857] 26 L. J. Exch. N. S. 221), but this remark was presumably made with reference to the circumstances under discussion.

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inances of courts and juries. A comparison of the decisions adverse to the servant indicates very clearly that some judges have exercised more extensive powers than others in regard to the control and review of verdicts. Upon the whole, however, it is not possible to deny that in cases of this class the general tenor of the judicial opinion has been decidedly adverse to the servant, and that the courts have often encroached upon the proper domain of the jury to an extent which cannot be justified under any reasonable view of that partition of functions which is the essence of the common-law system of procedure.

In the great majority of instances the doctrine that the servant's constructive knowledge of a risk is a question with regard to which the finding of a jury is *prima facie* conclusive is usually asserted to the benefit of the servant. But this doctrine will, of course, in many cases, be to the advantage of the master under appropriate circumstances.

391. When a servant is chargeable with knowledge; general rule. The juridical theory of imputed knowledge, which is applicable to actions by a servant against his employer, is simply this: that the master is or is not chargeable with a comprehension of the conditions which have caused his injury and of the risks created by those conditions, depending as it may reasonably be inferred that those conditions would or would not have been comprehended by a person of ordinary prudence, whose mental and physical capacities, natural and acquired, and opportunities for observing the facts and the nature of danger, were the same as those of the servant himself.

¹*Hughes v. Winona & St. P. R. Co.* (1880) 27 Minn. 137, 6 N. W. 553. Plaintiff slipped on a pile of wet ashes while coupling cars, and fell under the wheels. Verdict for defendant upheld, the jury having found that the plaintiff had reasonable means of knowledge of the custom of the company to allow the ashes to remain on the track.

²This principle has been enunciated so frequently that it would be a waste of time and space to attempt to collect even a tithe of the statements in which it has been stated with more or less precision and amplitude. The following paragraphs will illustrate sufficiently the language used by the courts:

"The question in each case is not whether the employee has actually observed, and by a conscious act of the will assumed, all of the risks involved, but whether the risks are incident to and naturally grow out of the employment in which he is engaged, and are such as, taking his age, intelligence, and

experience into account, he ought to have appreciated if he saw, and as, if he did not see, he could have and understood if he had looked. Risks are of this character if they are said to be obvious, and the employer assumes them." *Kennan v. L. Cordage Co.* (1897) 168 Mass. 117, N. E. 117.

"A servant will be deemed to have notice of all risks of which a person of his experience and understanding, are or ought to be, obvious." *Rummell v. Del.* (1891) 111 Pa. 343, 2 Atl. 355, 363.

An employee is not acquitted of the risk merely because he does not comprehend the danger; the true test is whether an ordinary prudent person of his age and experience, under like circumstances would have comprehended the danger. *Craven v. Smith* (1894) 89 Wis. N. W. 317.

Instructions are correct or erroneous, according as they are consistent or inconsistent with this principle.²

"If however the defect is patent, open to observation, or such as the ordinary use of the machine in the business the servant is engaged in would disclose to an ordinarily observant man operating it, and the servant had ample opportunity by operating it before being injured to observe the defect, his opportunity to know would be held as knowledge, whether in fact he knew of the defect or not." *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 77, 36 Am. Rep. 454.

"A servant assumes a risk which, from the facts before him, it was his duty to infer." *Russell v. Minneapolis & St. L. R. Co.* (1894) 32 Minn. 230, 20 N. W. 117.

Those risks are assumed which should have been seen by the employee and he exercised such prudence as a man of ordinary prudence would have exercised under like circumstances." *Gull, C. & S. P. R. Co. v. Johnson* (1892) 83 Tex. 630, 19 S. W. 151.

The servant is chargeable with "such knowledge of the character of what is apparent as, by his employment, he assumes to have or from his education or experience he actually has." *Pennsylvania Coal Co. v. Kelly* (1894) 54 Ill. App. 622.

An open and visible risk which is assumed by a servant is one so patent that a person familiar with the business will instantly recognize it, and about which there can be no difference of opinion between intelligent persons accustomed to the service. *Johnston v. Oregon Short Line & C. N. R. Co.* (1892) 23 Or. 94, 31 Pac. 283.

The servant is held to take the risk of such defects in an instrument which he is frequently using as are obvious to the senses, or with reasonable diligence ought to be discovered or known by him. *Anderson v. Minnesota & N. W. R. Co.* (1888) 39 Minn. 523, 41 N. W. 104.

In numerous cases the risks assumed by a servant have been declared to be those discovered by the exercise either of "ordinary care" (*Williams v. Delaware, I. & W. R. Co.* [1889] 116 N. Y. 628, 22 N. E. 1117; *Sievers v. Peters Box & Lumber Co.* [1898] 151 Ind. 642, 50 N. E. 877, Rehearing Denied in 151 Ind. 662, 52 N. E. 399; *Johnson v. Ashland Water Co.* [1890] 77 Wis. 51, 45 N. W. 807; *Greenleaf v. Illinois C. R. Co.*

[1870] 29 Iowa, 14, 4 Am. Rep. 181; *Gibbston, H. & S. V. R. Co. v. Garrett* [1889] 73 Tex. 262, 13 S. W. 62; *O'Neil v. Chascon & L. Coal R. Co.* [1892] 132 Ind. 110, 31 N. E. 669; *Lumby v. Caswell* [1877] 47 Iowa, 159; *Vie v. Texas P. R. Co.* [1891] 82 Tex. 473, 18 S. W. 571; or of "ordinary diligence." (*Denver Tramway Co. v. Nesbit* [1896] 22 Colo. 408, 45 Pac. 405; *Chesson v. John F. Rogers Lumber Co.* [1896] 118 N. C. 59, 23 S. E. 925; *Hanes v. Chicago, R. I. & P. R. Co.* [1884] 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *Reyes v. Chicago, H. & St. P. R. Co.* [1897] 103 Iowa, 665, 72 N. W. 789); or of "reasonable care." (*Pennsylvania Co. v. Elough* [1898] 152 Ind. 531, 53 N. E. 763; *Kattermuhm v. Sioux City & P. R. Co.* [1883] 62 Iowa, 285, 17 N. W. 585; *Pennsylvania Co. v. Wille* [1896] 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377; *Louisville, N. A. & C. R. Co. v. Quinn* [1896] 14 Ind. App. 554, 43 N. E. 240); or of "reasonable care and skill" (*Western T. Tel. Co. v. McMullen* [1895] 58 N. J. L. 155, 32 L. R. A. 351, 33 Atl. 384); or of "reasonable care and diligence" (*Moran v. Harris* [1884] 63 Iowa, 390, 19 N. W. 278); or of "reasonable care and prudence" (*Carlson v. Sioux Falls Water Co.* [1891] 5 S. D. 402, 59 N. W. 217); or of "reasonable and ordinary care" (*Haley v. Jump River Lumber Co.* [1892] 81 Wis. 423, 51 N. W. 321, 956); or of "reasonable observation" (*Whipple v. New York, N. H. & H. R. Co.* [1896] 19 R. I. 587, 35 Atl. 305); or of "reasonable care and caution" (*Lindvall v. Woods* [1891] 44 Fed. 855); or of "ordinary observation or reasonable skill and diligence" (*Lafrenouille v. Bennington & R. R. Co.* [1891] 63 Vt. 336, 22 Atl. 656).

An instruction that, if the plaintiff could have seen or known of the abnormal conditions by the exercise of ordinary care and prudence, the defendant would not be liable, is proper. *Ferguson v. Phoenix Cotton Mills* (1901) 106 Tenn. 236, 61 S. W. 53.

A jury is properly instructed that it was plaintiff's duty to inform himself as to the danger in using the appliance in question so far as he could by observation, and that if it was defective he cannot recover unless it appears by a preponderance of evidence, that the

The conditions and the risks which are presumed, as a matter of law, to be comprehended by a servant, are also frequently emphasized by descriptive epithets or phrases, used either singly or in combination, which are intended to express in a brief form the fact that those conditions and risks must have been appreciated by the servant if he had used proper care.³

defect was not observable by ordinary, careful observation. *Chilson v. Lansing Wagon Works* (1901) 128 Mich. 43, 87 N. W. 79.

It is error to charge that plaintiff did not assume the risk incident to the method under which defendant conducted its business, unless he "must necessarily" have known of such method by the exercise of ordinary care; since if plaintiff by the exercise of ordinary care could have known of such methods, his knowledge might be presumed, and the expression "must necessarily have known" is not synonymous with "could have known" or "must have known." *Gulbranson, H. & S. A. R. Co. v. English* (1900; Tex. Civ. App.) 59 S. W. 626.

In instructing a jury it should be clearly explained to them that the test by which the servant's presumed comprehension of the risk is to be determined is his exercise or nonexercise of "ordinary care" in the premises. Accordingly, an instruction to the effect that even if the appliance in question was defective, yet if from his opportunities of observation the plaintiff's testate knew, or should have known, of its defective condition, he is held in law to have assumed the risk of its insufficiency, is erroneous in that it fails to define with sufficient precision the degree of care or observation which the law requires. *Durand v. New York & L. B. R. Co.* (1901) 65 N. J. L. 656, 48 Atl. 1013.

"Obvious." *Garnett v. Phoenix Bridge Co.* (1899) 98 Fed. 192; *Whalen v. Whitcomb* (1901) 178 Mass. 33, 59 N. E. 660; *McIntire v. White* (1898) 171 Mass. 170, 50 N. E. 524; *Goldthwait v. Haverhill & G. Street R. Co.* (1894) 160 Mass. 554, 36 N. E. 486; *Joyce v. Worcester* (1885) 140 Mass. 245, 4 N. E. 565; *Wilson v. Steel Edge Stamping & Retinning Co.* (1895) 163 Mass. 315, 39 N. E. 1039; *Watts v. Hart* (1893) 7 Wash. 178, 34 Pac. 423, 771; *Kennedy v. Manhattan R. Co.* (1884) 33 Hun, 457; *Demers v. Deering* (1899) 93 Me. 272, 44 Atl. 922; *Chicago, B. & Q. R. Co. v. McGinnis* (1896)

19 Neb. 619, 68 N. W. 1057; *Robins* (1896) 3 App. Div. 1, 100 N. Y. Supp. 214; *Condon v. R. & Foundry Co.* (1896) 105 N. W. 50; *Young v. L. & Co.* (1898) 69 N. H. 356, 41 Atl. 661; *Gooden v. B. & Co.* (1894) 162 Mass. 287, 38 N. E. 232, 33 N. E. 396; *Storrs v. R. Co. v. Drake* (1894) 53 Kie. 1825; *Larson v. St. Paul, H. & C. R. Co.* (1890) 43 Minn. 423, 45 N. W. 111; *Dillenburger v. Wendt* (1891) 100 N. J. L. 292, 45 Atl. 638, 63 Atl. 638; *Atlantic Coast Electric R. Co. v. Duncanson* (1889) 73 W. Va. 61 N. J. L. 380, 39 Atl. 674; *son v. Duncanson* (1889) 73 W. Va. 61 N. W. 337; *Shaw v. Shaw* (1893) 103 N. Y. 667, 9 N. E. 183; *Kavanaugh* (1876) 62 Mo. 222; *Central R. Co.* (1900) N. J. L. 1032; *Dusano v. New York & L. B. R. Co.* (1898) 20 Atl. 7; *Williams v. J. & Co.* (1901) 110 Wis. 456, 86 N. W. 100; "Obviously evident." *Stanton & A. R. Co.* (1888) 147 Me. 18 N. E. 209.

"Visible and obvious." *Duncan v. New York C. & H. R. R. Co.* (1898) 100 N. Y. 100, 100 N. E. 255.

"Open and obvious." This expression is very common. *Condon v. R. & Foundry Co.* (1896) 105 N. W. 50; *Storrs v. R. Co.* (1901) 126 Mich. 66, 86 N. E. 134; *Carlson v. Sioux Falls & M. R. Co.* (1895) 8 S. D. 47, 65 N. W. 419; *Chicago & I. Coal R. Co. v. Ind.* 110, 31 N. E. 669, 100 N. E. 429, 17 S. W. 580; *R. Co. v. Mills v. Green* (1900) 98 N. Y. 100, 100 N. E. 963; *Clark v. Richmond & D. R. Co.* (1884) 78 Va. 709, 49 Am. 15; *Philadelphia & R. R. Co. v. (1888) 119 Pa. 301, 13 Atl. 180; (1887) 111 Pa. 111, 111 Pa. 2 Atl. 355, 363; Southern R. Co. v. Manzy* (1900) 98 Va. 692, 5 S. W. 2d 83; *Heiges* (1897) 83 Atl.

Not infrequently these epithets and phrases are supplemented and amplified by other words. In some instances these appear to have been introduced merely for the sake of emphasis.¹ But it will also be found that not a few of these additions suggest with greater or

- At. S. L. W. Co. v. Chicago & N. W. R. Co.* (1899) 163 Wis. 1, 79 N. W. 22; *Oshtemo v. Lehigh Valley Coal Co.* (1897) 97 Wis. 27, 71 N. W. 844; *Jarvis v. McClure* (1897) 95 Wis. 533, 70 N. W. 662.
- Other examples of a terminology conveying a similar meaning are these: "Visible." *Kelly v. Baltimore & O. R. Co.* (1887) Pa. 10 Cent. Rep. 56, 11 Atl. 659; *Thomas v. Quintermarine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 36 Week. Rep. 555, 51 J. P. 516, per Bowen, L. J.; *Davis v. Baltimore & O. R. Co.* (1893) 152 Pa. 314, 25 Atl. 498. "Plainly visible." *Baker v. Bayher Asphalt Pav. Co.* (1899) 92 Fed. 117; *Davis v. Baltimore & O. R. Co.* (1893) 152 Pa. 314, 25 Atl. 498; *Henderson v. Crane* (1888) 31 Ill. App. 75.
- "Visible and plain." *The Maharajah* (1890) 40 Fed. 784.
- "Open and visible." *Tuttle v. Detroit, G. H. & M. R. Co.* (1887) 122 U. S. 195, 30 L. ed. 1116, 7 Sup. Ct. Rep. 1166; *Reid v. West Virginia C. & P. R. Co.* (1885) 27 W. Va. 116; *Fisher v. Chicago & G. T. R. Co.* (1889) 77 Mich. 546, 43 N. W. 926; *French v. Falls* (1893) 72 Hun. 412, 25 N. Y. Supp. 188; *Wallace v. Central Vermont R. Co.* (1892) 43 N. Y. S. R. 639, 18 N. Y. Supp. 280; *Johnton v. Oregon Short Line & U. N. R. Co.* (1892) 23 Or. 94, 11 Pac. 283.
- "In plain view." *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582; *Chicago & A. E. R. Co. v. Wagner* (1896) 17 Ind. App. 22, 45 N. E. 76, 1121.
- "Open to view." *Gibson v. New York & N. E. R. Co.* (1893) 159 Mass. 68, 21 N. E. 79.
- "Open, permanent, and visible." *Kelly v. Baltimore & O. R. Co.* (1887) Pa. 10 Cent. Rep. 56, 11 Atl. 659.
- "Patent." *Richtman v. Stolte* (1889) 120 Ind. 314, 22 N. E. 304; *Faren v. Sellers* (1887) 39 La. Ann. 1011, 3 So. 363; *Sikes v. Packer* (1882) 99 Pa. 465; *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 77, 36 Am. Rep. 454; *The Maharajah* (1891) 1 C. C. A. 181, 1 U. S. App. 20, 49 Fed. 111; *Texas & P. R. Co. v. Rogers* (1893) 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378; *Philadelphia, P. & W. R. Co. v. Bolton* (1892) 57 Ark. 76, 20 S. W. 808.
- "Patent dangers are those seen or by their presence perceptible to the senses." "Patent dangers are those not seen or perceptible to the senses by their existence." *Williams v. Walton & W. Co.* (1892) 9 Houst. (Del.) 322, 32 Atl. 726.
- "Patent and obvious." *Galt, C. & S. F. R. Co. v. Jackson* (1894) 12 C. C. A. 507, 27 U. S. App. 517, 65 Fed. 48; *Williams v. Walton & W. Co.* (1892) 9 Houst. (Del.) 322, 32 Atl. 726; *McCann v. Chicago, B. & O. R. Co.* (1896) 22 C. C. A. 99, 40 U. S. App. 181, 76 Fed. 125; *American Decolouring Co. v. Wallis* (1898) 28 C. C. A. 141, 55 U. S. App. 460, 81 Fed. 128; *Amelia v. Texas & P. R. Co.* (1894) 9 C. C. A. 139, 23 U. S. App. 62, 60 Fed. 553; *Bonnett v. Tactic Iron Co.* (1893) 9 Calab. 291, 34 Pac. 61; *St. Louis, Ft. S. & W. R. Co. v. Irwin* (1887) 37 Kan. 704, 16 Pac. 146.
- "Apparent." *Kohn v. McVulla* (1893) 117 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298; *Healey v. Standard Oil Co.* (1900) N. J. L. 47 Atl. 803; *Fancher v. New York, L. E. & W. R. Co.* (1894) 75 Hun. 350, 27 N. Y. Supp. 62; *McTier v. Pennsular Car Co.* (1889) 76 Mich. 94, 42 N. W. 1078; *Olson v. McMurray Cedar Lumber Co.* (1894) 9 Wash. 500, 37 Pac. 679.
- "Manifest." *Casey v. Pennsylvania Asphalt Paving Co.* (1901) 198 Pa. 548, 47 Atl. 1128.
- "Open and manifest." *Herold v. Pfister* (1896) 92 Wis. 417, 66 N. W. 355.
- "Palpable." *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283 (per Lord Esher); *Rafette v. Canadian P. R. Co.* (1889) 5 Manitoba L. Rep. 365.
- ¹As, for example, the following: "Patent and open to the eye of the plaintiff." *McGrath v. Texas & P. R. Co.* (1894) 9 C. C. A. 133, 23 U. S. App. 86, 60 Fed. 553.
- "Open to observation." *Corey v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 635; *Woods v. St. Paul & D. R. Co.* (1888) 39 Minn. 435, 40 N. W. 510; *Texas & P. R. Co. v. French* (1893) 86 Tex. 98, 23 S. W. 642.

less distinctness one or more of the essential elements which are involved in the fundamental principle set forth at the commencement of this section.⁵

"Patent to observation." *Mellott v. Schuenebroich v. St. Cloud Falls* Louisville & N. R. Co. (1897) 101 Ky. Co. [1894] 59 Minn. 116, 60 212, 40 S. W. 696.

"Patent to the understanding." *Davis v. Baltimore & O. R. Co.* (1893) 152 Pa. 314, 25 Atl. 498.

"Patent and open to observation." *Nie v. Texas & P. R. Co.* (1891) 82 Tex. 473, 18 S. W. 571.

"Apparent to the senses." *Week v. Fremont Mill Co.* (1892) 3 Wash. 629, 29 Pac. 215.

"Obvious to the senses." *Waldhier v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 37.

"Open to the senses, requiring only their exercise to become known to the servant." *Quick v. Minnesota Iron Co.* (1891) 47 Minn. 361, 50 N. W. 244.

Thus we find such phrases as these:

"Apparent to a casual observer." *Lamotte v. Boyce* (1895) 105 Mich. 545, 63 N. W. 517; *Ragon v. Toledo, A. A. & N. M. R. Co.* (1893) 97 Mich. 265, 56 N. W. 612.

"Patent to the most cursory observation." *McGinn v. Chicago, B. & Q. R. Co.* (1896) 22 U. C. A. 99, 40 U. S. App. 181, 76 Fed. 125.

"Ascertainable by simply looking." *Hathaway v. Michigan C. R. Co.* (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634.

"Ascertainable by 'a casual glance.'" *Peterson v. Sherry Lumber Co.* (1895) 90 Wis. 83, 62 N. W. 948.

"Plain at a glance." *Shaw v. Sheldon* (1886) 103 N. Y. 667, 9 N. E. 183.

"Obvious even to a passing glance." *Kohn v. McNulta* (1893) 147 U. S. 238, 37 L. ed. 159, 13 Sup. Ct. Rep. 298.

"Open and patent to common observation." *St. Louis, A. & T. R. Co. v. Lemon* (1892) 83 Tex. 143, 18 S. W. 331.

"Apparent to ordinary observation." *Gibson v. Erie R. Co.* (1875) 63 N. Y. 149, 20 Am. Rep. 552; *Davidson v. Cornell* (1892) 132 N. Y. 234, 30 N. E. 573; *Dering v. New York C. & H. R. R. Co.* (1893) 50 N. Y. S. R. 832, 22 N. Y. Supp. 344; *Fraunce v. Rome, W. & O. R. Co.* (1895) 88 Hun. 318, 34 N. Y. Supp. 408; *Kean v. Detroit Copper & Brass Rolling Mills* (1887) 66 Mich. 277, 33 N. W. 395.

"Dangers which may be understood by the exercise of 'common observation.'" *Shuenebroich v. St. Cloud Falls* Louisville & N. R. Co. [1894] 59 Minn. 116, 60 1093; or of "ordinary observation." *Lattemouille v. Bennington & Co.* [1891] 63 Vt. 336, 22 Atl. 674.

"Patent, manifest to ordinary observation." *Boland v. Louisville & Co.* (1895) 106 Ala. 641, 18 So. 132.

"Obvious defects and such as discovered by reasonable observation." *Wabash & W. R. Co. v. Morgan* 132 Ind. 430, 31 N. E. 661.

"Apparent and which the servant has the opportunity to detect." *Shreveport Belt R. Co.* (1896) 1057, 36 L. R. A. 114, 20 S. W. 642.

"Open to the observation of an ordinary capacity." *Texas & P. R. Co. v. French* (1893) 86 Tex. 98, 31 S. W. 525.

"Obvious to any person of ordinary observation." *Bonnet v. Galveston & S. A. R. Co.* (1895) Tex. Civ. App. 31 S. W. 525.

"Obvious to persons of the experience and understanding of the servant." *Mahn v. Thelin* (1896) 47 Neb. 650.

"Patent defects which an ordinary observation of the employee's duty readily disclose." *Francis v. R. Co. v. Duca* (1892) 134 Ind. N. E. 355.

"Obvious, and such as cannot be discovered by ordinary careful observation." *Matte v. Boyce* (1895) 105 Mich. 63 N. W. 517.

"So obvious as not to escape the observation of an ordinarily prudent person." *Moore v. St. Louis Wire Mfg. Co.* (1893) 55 Mo. App. 491.

"Obvious defects, of which the servant knew, or, as a reasonably prudent man, might have known." *Yates v. Cullough Iron Co.* (1888) 69 Mo. 16 Atl. 280.

"Plain to be seen by anyone inclined to look for them." *Lake Shore & W. R. Co. v. McCormick* (1881) 74 Ill. 440.

"Manifest to one of common experience and observation, and which by the diligent exercise of the senses and common sense can be perceived." *Quick v. Minnesota Iron Co.* (1891) 47 Minn. 50 N. W. 244.

"Dangers which a person of ordinary intelligence would observe." *Peterson v. Sherry Lumber Co.* (1895) 90 Wis. 83, 62 N. W. 948.

The phraseology which is thus used to designate the risks of which a servant is bound to take notice is also employed with the addition of a negative, for the purpose of defining the limits of the knowledge which is imputed to him.⁶ But the risks of which a servant may be ignorant without necessarily incurring the charge of negligence are more usually described by the epithets "latent," "concealed," or the like. See §§ 408 *et seq.*, *infra*.

392. Evidential elements . be considered in determining whether knowledge shall be imputed to a servant.—As is indicated by the language used in stating the general principle enunciated in the preceding section, the elements with reference to which it is determined whether the injured servant was chargeable with a knowledge of the given risk are partly subjective, and partly objective. They are as follows:

(a) The servant's natural and acquired capacity for obtaining knowledge. The essential matters to be considered under this head are the extent of his intelligence, as deducible from his age or other circumstances; and the extent of his technical skill and information, whether that skill and information be derived from his practical experience in the employment to which the risk was incident, or from a special education and training received in some other way.

(b) The servant's opportunities or means of obtaining a knowledge of the material conditions which created the given risk.¹

(c) The extent of the servant's duty of active inspection and inquiry with regard to the existence of such risks as that to which the injury was due.

The precise significance of each of these elements with relation to the countless groups of slightly variant facts which are presented in actions by injured servants it is frequently impossible to ascertain,

v. Sherry Lumber Co. (1895) 90 Wis. 83, 62 N. W. 948.

Defects which the servant "by proper watchfulness might have discovered." *Coyle v. Griffing Iron Co.* (1899) 63 N. J. L. 609, 47 L. R. A. 147, 44 M. L. 665.

⁶Thus, it has been said that an employee does not assume the risk of using a defective appliance, where the defect is not open to observation in its ordinary use. *Nichols v. Crystal Plate Glass Co.* (1894) 126 Mo. 55, 27 S. W. 516, 28 S. W. 991.

Where the evidence tended to show that the defect was not a patent one, a charge that, to make plaintiff guilty of contributory negligence, it must appear that the defect was so visible that a

man could not overlook it except by gross negligence, is not erroneous. *Kansas City, P. & G. R. Co. v. Spellman* (1900) 42 C. C. A. 321, 102 Fed. 251.

¹The phrase "means of knowledge" occurs in the case which laid the foundation of the modern law of employer's liability. *Priestly v. Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, 7 L. J. Exch. N. S. 42. As is shown by many of the cases cited in subtitle D, *infra*, the phrase has always been, and still is, a familiar one. But the alternative combination of words, "opportunities of knowledge," is possibly found rather more frequently in the American reports.

for the reason that, in a large number of the cases in which some of them are involved, the language used does not indicate with certainty whether the court intended to attribute to two or more of them in combination a differentiating value which would not have been imputed to a single one of them when considered separately, to ascribe such a value to each of them independently, or to make the decision turn upon a particular one of them to the exclusion of the others. That the difficulties of classification are, under such circumstances, enormously increased, is sufficiently obvious; but it is the arrangement adopted in the ensuing sections will be reasonably serviceable for the purposes of research.

B. WHAT RISKS ARE DEEMED TO BE WITHIN THE COMPREHENSION OF ADULT SERVANTS.

393. Generally.— The cases turning upon the natural and acquired capacity of adult servants may be conveniently divided into four classes, illustrative of one or the other of the following conclusions:

(a) That the risk was within the comprehension of any adult of ordinary intelligence, irrespective of the question whether he had or had not any special experience or training in the work in which he was engaged.

(b) That, by reason of his inexperience, the servant was not necessarily chargeable with a comprehension of the risk.

(c) That a comprehension of the risk was imputable, as a matter of law, to a person having the same amount of special experience or training as the servant.

(d) That the amount of special experience or training possessed by the servant was not sufficient to warrant a court in declaring, as a matter of law, that he ought to have understood the risk.

The decisions which illustrate each of these conclusions will be discussed in the ensuing sections. But it should be remembered that the actual effect of many of them is somewhat problematical, for the reason explained at the end of the last section.

To the situations indicated by the above statements may also be added a fifth, which is of such exceptional occurrence, and, comparatively speaking, of such slight importance, that it merely deserves passing notice; *viz.*, that the servant's previous experience of the conditions ordinarily prevailing in the employment in question may have led him to draw false inferences as to the conditions actually prevailing at the time of the accident. If the evidence is susceptible of

construction, a court will not say that he was chargeable, as a matter of law, with a knowledge of the resulting risk. See § 396, *infra*.

It will be observed that a considerable number of the cases cited in the two sections, 394, 396, *infra*, in which the servant's comprehension of the risk was treated as an inference of law, involve injuries resulting from risks which are included either by all or by some of the courts among the ordinary or normal class. Whenever this situation is disclosed by the evidence, the decision might be referred directly to the general principle that such risks, in so far as they are obvious, are presumed to be accepted by any servant who undertakes the employment to which they are incident. See §§ 259, *et seq.*, *ante*. But as the conclusions reached are arrived at without the aid of that presumption, and the material elements considered and the criterion employed are equally applicable whether the risk be ordinary or extraordinary, cases of this type must, in a logical point of view, and therefore for purposes of classification, be treated as belonging to a different category from those in which recovery is denied for the reason that the risk in question was an ordinary one.

394. Risks which every adult is presumed to comprehend without any special experience.—In the subjoined note are collected a large number of cases in which it is either certain, or seems to be a matter of reasonable inference from the language of the court, that the inability to maintain the action was predicated in spite of or independently of the element of special experience or technical skill.¹

¹ (a) *Railway tracks and appurtenances.*—The risk created by the want of ballast between the ties on a siding has been treated as one which, in respect to a brakeman, is obvious. *Ragon v. Toledo, A. A. & N. M. R. Co.* (1893) 97 Mich. 265, 56 N. W. 612 (experience of servant not adverted to).

The danger arising from the want of a block between a rail and a guard rail at a switch is so obvious that even an inexperienced brakeman will, as matter of law, be presumed to understand the risk incident to working without it. *Mayer v. Chicago, R. I. & P. R. Co.* (1884) 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680, modifying on rehearing the opinion expressed at the first hearing, —that it was for the jury to say whether the inexperience of the brakeman was a sufficient excuse for his nonappreciation of the danger.

A carpenter in a railway shop is chargeable with a knowledge of the risk of being crushed against the wall inclosing a turntable, while he is helping to

pull it round. *Mellott v. Louisville & N. R. Co.* (1897) 101 Ky. 212, 40 S. W. 696 (element of inexperience was not adverted to, but was apparently regarded as immaterial).

(b) *Obstructions beside railway tracks.*—The danger of getting caught in a space 3½ inches wide, between a trail car and a doorway in the power house of a street railway, through which a street car must be pushed to attach it to the dummy, is presumed to be comprehended by a newly employed conductor. *Jennings v. Tacoma R. & Motor Co.* (1893) 7 Wash. 275, 34 Pac. 937.

(c) *Railway cars; construction and operation of.*—(See also subd. x, *infra*.) A servant who has for several months been handling various cars equipped with two kinds of self-couplers which are apt to pass each other when an attempt is made to unite them is presumed to understand the risk of such an accident. *Norfolk & W. R. Co. v. McDonald* (1891) 88 Va. 352, 13 S. E.

It will be seen that the general effect of these cases is that a servant of ordinary intelligence is presumed to have been cautioned

706. It has been held that any adult of ordinary intelligence who accepts the position of brakeman is presumed to understand the risk incident to coupling cars with double deadwoods. *Hathaway v. Michigan C. R. Co.* (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634. In this case a brakeman twenty-four years old, who had been warned in a general way as to the danger of coupling cars, was held to be affected with knowledge of the manifest risk of coupling cars with double deadwoods. The court, commenting on *Michigan C. R. Co. v. Smithson* (1881) 45 Mich. 212, 7 N. W. 791 (see § 396, note 1, subd. (d), *post*), said: "The correctness of that decision is not questioned, but admitted by the plaintiff's counsel in this case, and the only difference claimed between the two cases is that in the *Smithson Case* the coupler injured had long experience in coupling, and in the present case he had little or none at all. This fact, if admitted, cannot make this case an exception to the rule. If the character of any particular danger is so simple that it can as well be ascertained at a single view as at many, it is difficult to see how additional observation could be of any benefit to the party whose duty it is to encounter it." Later Michigan decisions to the same effect are *Dysinger v. Cincinnati, S. & M. R. Co.* (1892) 93 Mich. 646, 53 N. W. 825; *Fenton v. Duluth, S. S. & A. R. Co.* (1896) 108 Mich. 284, 66 N. W. 51. This rule holds even where the plaintiff is a brakeman temporarily employed in the absence of the regular brakeman. *East Tennessee, V. & G. R. Co. v. Turville* (1893) 97 Ala. 122, 12 So. 63. For other cases as to double deadwoods, see §§ 73, 253, note 8, 263, *ante*; § 395, note 1, subd. (b), *post*; § 396, note 1, subd. (d), *post*.

The danger caused by couplings differing so much in height that they overlapped and allowed the cars to come together is deemed to be obvious to any intelligent man. *Simms v. South Carolina R. Co.* (1886) 26 S. C. 490, 2 S. E. 486.

A switchman who has to supply himself with proper coupling pins for different drawheads on cars which he is to couple, from the pins scattered about the yard, assumes the risk of using a pin too large for the drawhead of a car,

which he finds lying thereon, and his attempts to make a coupling. *U. K. & T. R. Co. v. Hauer* (1891) 33 S. W. 1010, 1011 (Civ. App.).

A brakeman, though without experience, assumes the risk of projecting 12 inches from the ends of cars which he undertakes to couple as to leave only an inch between them when the cars are shoved together where they are in plain view, and where he has abundant opportunity to see them, his attention is directed to them, and he is told the necessity of keeping from between them. *Chas. A. E. R. Co. v. Wagner* (1896) 17 Ind. App. 28, 45 N. E. 76. Rehearing denied in (1897) 17 Ind. App. 28, 45 N. E. 1121.

The swing of a street car passing a curve is something which is so obvious that no one employed about a car can be permitted to claim ignorance of it. Hence, an employee in the sheds of a street railway assumes the risk of having his leg caught and between the ends of two cars on leading out of the shed in opposite directions, when one of the cars taken out is swung against the other another standing on the other end at a point where the tracks are elevated together. The fact that the risk to him is thus exposed has been incurred during his term of employment, and the use of longer and wider open cars cannot render the street car company liable to him for such injuries. *Goldthorpe v. Haverhill & G. Street R. Co.* (1896) 160 Mass. 554, 36 N. E. 486.

A brakeman, although inexperienced, will be presumed to know that the object of detaching an engine from a train is to let it move away from the train so as to allow the train to continue to move for a certain distance. *Gorman v. Minneapolis & St. L. R. Co.* (1889) 78 Iowa, 509, 43 N. W. 30.

The want of a fender on a street car creates an obvious risk. *Chas. A. E. R. Co. v. Wagner* (1896) 17 Ind. App. 28, 45 N. E. 76. Rehearing denied in (1897) 17 Ind. App. 28, 45 N. E. 1121. (servant had worked as conductor for a few weeks, but this element was not specifically adverted to.)

Where a machinist is summoned to a railway shop to help in making

ascertaining every fact which could have been apprehended by the senses of a person having the same opportunity as he had for exer-

engine, and it is necessary, in doing this, to couple and move some cars, there is no obligation to warn him of the danger of placing his hand upon the deadwood of one car at the very place where it had been previously struck twice by the buffer of another car which he had unsuccessfully attempted to couple to it. *Wormell v. Maine C. R. Co.* (1887) 79 Me. 397, 10 Atl. 49.

It has been held that a carpenter who had been summoned, according to a common practice, to help the painters to move a car, was chargeable with knowledge of the danger created by the fact that a running board had been laid from the top of that car to the adjoining one, and would fall when the two cars were separated. *Day v. Cleveland, C. C. & St. L. R. Co.* (1894) 137 Ind. 206, 33 N. E. 854. But the propriety of deciding such a point as a matter of law seems to be very questionable, considering that the servant was taken from another kind of work.

(d) *Locomotives: construction and operation of.*—The want of chains across the opening in an engine cab was held a risk which was obvious to a fireman. *Fancher v. New York, L. E. & W. R. Co.* (1894) 75 Hun, 350, 27 N. Y. Supp. 62 (plaintiff had been several years in the company's employ; but this circumstance was in no way relied upon). A common laborer is deemed to understand the dangers to his hand which are created by any inequalities there may be in a metal surface which he is directed to wipe. *McCain v. Chicago, B. & Q. R. Co.* (1896) 22 C. C. A. 99, 40 U. S. App. 181, 76 Fed. 125 (sliver projecting $\frac{1}{2}$ inch beyond the tire of a wheel and extending six inches along the circumference, stuck in the arm of an engine wiper).

(e) *Hand cars: construction and operation of.*—Any person who has once worked the lever of a moving hand car, or seen another do it, is presumed to know without instruction that it is dangerous to "lose the motion of the lever." *Jones v. Louisville & N. R. Co.* (1894) 95 Ky. 576, 26 S. W. 590. A section man undertaking to work the lever of a hand car by means of a crowbar used as a substitute for a broken handle is presumed, as matter of law, to have known that the application of an unusual force in this manner might result in the

breaking of the walking beam. No special skill or knowledge is required to enable a servant to appreciate such a risk. *Powers v. New York, L. E. & W. R. Co.* (1885) 98 N. Y. 274. A section hand is chargeable with knowledge of the strain which a sound handle of a lever car will probably bear, when of a given size. *East Tennessee, V. & G. R. Co. v. Smith* (1882) 9 Lea, 685.

(f) *Weight-sustaining structures.*—A knot running across a plank furnished an employee for a scaffold being obvious, he is bound to take notice of the defect and to know that it weakens and renders the plank unsafe. *Armour v. Brazee* (1901) 191 Ill. 117, 60 N. E. 904, Reversing (1900) 93 Ill. App. 235. It has been held that a servant who had been working for several years in a coal yard, and was injured by the breaking of a plank on which he was standing while trying to prise open the doors of a coal car, could not recover, as no technical skill or knowledge was necessary to enable him to understand the weight-sustaining power of a plank which was of a certain thickness and not inherently defective. *Warszawski v. McWilliams* (1901) 64 App. Div. 63, 71 N. Y. Supp. 680.

(g) *Elevated working places not protected by railings.*—The risk of injury by falling from a platform not protected by a railing is presumably obvious to any adult of ordinary intelligence. *Moulton v. Gage* (1885) 138 Mass. 390 (servant who had never done similar work before fell from a platform on the third day after he commenced the performance of his duties); *Chesapeake, O. & S. W. R. Co. v. McDowell* (1894) 16 Ky. L. Rep. 1, 24 S. W. 607 (servant here was the foreman of a railway woodshop, who was injured owing to the fact that a scantling by which he was trying to prise a pulley loose broke under his weight; but his official position is not specially adverted to as a material element).

In another case recovery was denied where a servant (experience not mentioned) was injured through the absence of a barrier round a stack of ice on which he was working. *Thorn v. New York City Ice Co.* (1887) 46 Hun, 497.

The risk of falling from a trestle on which a servant was standing, which was 8 feet high and 5 inches broad at

eising those senses in relation to the dangerous conditions caused the injury.

the top, was obvious to any adult servant. *Garnett v. Phoenix Bridge Co.* (1899) 98 Fed. 192.

Where a privy erected over a river is not boarded up on the side of the river, and a servant familiar with the structure falls into the water while using it, the risk is deemed to be a patent one. *Marshall v. Kansas City Hay Press Co.* (1897) 69 Mo. App. 256.

(h) *Unguarded openings.*—(See also subd. (j) *infra*.) An uncovered hole left in one of the floors of a building under construction creates a danger presumed to be obvious to an inexperienced laborer. *Schwartz v. Cornell* (1891) 36 N. Y. S. R. 646, 13 N. Y. Supp. 355. Full appreciation of the danger caused by an unguarded elevator well in a dark basement is established where the evidence of the servant himself shows he knew it to be unguarded, and, while feeling his way about in its neighborhood, he was looking for the well to shun it. *Taylor v. Carver Mfg. Co.* (1885) 140 Mass. 150, 3 N. E. 21 (servant had been in employment for several years, but this fact is not emphasized).

(i) *Deep water.*—No action can be maintained where a servant consented to work on a narrow plank over a river, and was jostled in. *Sullivan v. Louisville Bridge Co.* (1872) 9 Bush, 81. A workman is presumed to see and appreciate the peril of working near a dam having an angle of about 135 degrees with the surface of the water, where the current is so swift that he cannot swim out of it; demurrer to complaint sustained. *Bullivant v. Spokane* (1896) 14 Wash. 577, 45 Pac. 42.

(j) *Slippery surfaces.*—It is presumed that even an inexperienced servant can appreciate the danger of losing his footing on an icy surface. *English v. Chicago, M. & St. P. R. Co.* (1885) 24 Fed. 910 ("one of the dangers whose existence and extent everyone has equal capacity for determining"). Or that his hand will slip upon such a surface, if pressed against it at a certain angle. *Cowhill v. Roberts* (1893) 71 Hun, 127, 24 N. Y. Supp. 533 (workman's hand slipped on an ice-covered girder to which he had climbed). Or that a block of ice may slip from under him while he is standing upon it. One injured while at work filling an ice house, by the slipping of a cake of ice

from beneath him, cannot charge employer with liability for failure to make inspection of the ice to which the employee stood, since the tendency of an ice block to slip is and well known. *Shen v. Kansas Ft. S. & M. R. Co.* (1898) 76 Kan. 29.

A servant who slipped and fell was going down a winding staircase owing to the fact that loose pasteboard had been placed on the steps to protect them after they had been treated with oil, cannot charge the conditions being obvious. *McIntire v. White* (1898) 17 N. E. 170, 59 N. E. 524 (element of contributory negligence not referred to).

The risk of loosing one's foot on a slippery floor, and thus suffering from any dangerous part of the floor which happens to be in the neighborhood, is deemed to be obvious to a servant of ordinary intelligence. Contributory negligence can be had where his carelessness causes him to fall into a well filled with scalding water. *Fecher v. Pearson & Co.* (1894) 161 Mass. 426, 34 N. E. 368 (servant had been employed for five weeks, but this fact is not referred to). Or against moving machinery. *Murphy v. American Rubber Co.* (1899) 159 Mass. 266, 34 N. E. 268. A servant who caught his foot between the rim of a shaft and the floor while working for a year in the same establishment, and for three weeks in a room where the accident occurred, cannot charge the elements were not adverted to. *Khineest v. Kunhardt* (1893) 162 N. E. 230, 35 N. E. 458 (experience not referred to); *Scharenbroich v. St. Louis Fiber-Ware Co.* (1894) 59 Mich. 60 N. W. 1093 (there the foot of the servant who had worked in the defunct factory for two years slipped on the floor while he was working a lever which came into contact with a pin in the length of the employee's foot, but it scarcely be material except in so far as it bears on his opportunities of ascertaining the conditions); *Clark v. Starch Co.* (1885) 37 Hun, 389; *Storrs v. M. Starch Co.* (1901) 126 Mich. 660 N. W. 134 (servant came into contact with a revolving screw across which he was stepping); *Disano v. New England Steam Brick Co.* (1898) 20 R. I. 1. Atl. 7 (demurrer sustained to com-

The sense which is most frequently referred to is, naturally, that of sight. Numerous decisions exemplify the general principle that

which alleged that the servant slipped and fell into an unguarded hole, and which did not contain any averment of inexperience).

(k) *Saunders*. — An inexperienced employee who, on the day after his employment, slipped on the bark and sawdust which had accumulated on the floor of a mill, and fell against the uncovered jaws of the lath-cutting machine which he was operating, cannot recover on the theory that he ought to have been instructed as to the dangerous conditions which caused his injury. *Hazen v. West Superior Lumber Co.* (1895) 91 Wis. 208, 64 N. W. 857. The general danger of contact with a circular saw is obvious even to an inexperienced workman just beginning to use it. *Wheeler v. Watson Mfg. Co.* (1883) 135 Mass. 294; *Hanson v. Ludlow Mfg. Co.* (1894) 162 Mass. 187, 38 N. E. 363. See further as to these cases § 395, note 1, subd. (h) *infra*.

Any mill hand is presumed to understand the obvious risk created by a saw projecting over its frame and partly across a narrow passageway. *Stephenson v. Duncan* (1889) 73 Wis. 404, 41 N. W. 337 (experience not mentioned).

An action for breach of the duty of instruction cannot be maintained where the complaint merely shows that the servant was injured owing to the sudden jumping of a plank which threw his hand against a rip-saw, although it also is stated that he had never before used such a saw; that his only experience in such work had been with a circular saw which he had used for half a day; and that he had not done any carpentering at all until about three weeks before the accident. *Gaertner v. Schmitt* (1897) 21 App. Div. 403, 47 N. Y. Supp. 521.

(1) *Planers and similar machinery.*—In one case where the evidence was that an employee who had never worked at a planer, but knew that a board was cut when it ran through the planer, and could have seen the knives if he had looked, it was held that, even if it were assumed that the foreman was at fault for putting him to work without cautioning him, he was guilty of contributory negligence in putting his hand, without looking, on the planer, to steady himself, whereby his hand was injured by the knives. *Gossens v. Mattoon Mfg. Co.* (1899) 104 W. 406, 80 N. W. 589.

(m) Cogwheels, gearings, and other

revolving machinery.—(See also *subd.* (j), *supra*.) An adult female employee, though she has only just gone to work and is unfamiliar with machinery, is presumed to understand without instruction the danger of getting her hands caught in cogwheels on the machine she is operating. *Ruchinsky v. French* (1897) 168 Mass. 68, 46 N. E. 417. A longshoreman, although inexperienced, cannot recover for an injury caused by allowing his hand to be caught in a winch. *The Maharajah* (1889) 40 Fed. 781. A motorman who, prior to his entering the employment, had not been familiar with machinery, was held bound to appreciate, without special instructions, the risk of having his coat sleeve caught in gear wheels close to a commutator which he was cleaning, the evidence showing that he had been at work three days after having had eight days of general instructions as to his duties. *Burnell v. West Side R. Co.* (1894) 87 Wis. 387, 58 N. W. 772 (demurrer sustained).

A female employee thirty-two years old, engaged in a factory, is chargeable with knowledge of the danger of attempting to lower the sash in the frame of a window behind a rapidly revolving fan, in another frame, slightly projecting into the room where she is engaged.

Dillenberger v. Weingartner (1900) 64 N. J. L. 292, 45 Atl. 638.

(m m) *Machinery with revolving rollers*.—The absence of any duty to instruct has been asserted, in a case where an employee who had been for one year piling scraps in a rolling mill, but had had nothing to do with the machinery, was injured through attempting to clean the rollers from the wrong side the first day he was transferred to this new work. *Kean v. Detroit Copper & Brass Rolling Mills* (1887) 66 Mich. 277. 33 N. W. 395.

(n) *Shafts and set screws*.—An employee in a mill, who, acting within the scope of his duty, is ordered by the foreman to go up a ladder standing against a belt box into which a revolving shaft runs at right angles, and nail a board on the box, and in performing the service is injured by his apron and jacket catching on the shaft, which is plainly visible and is seen by him, cannot recover from his employer. *Russell v. Tillotson* (1885) 140 Mass. 201, 4 N. E. 231. No duty was owing by an employer to a

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(x) *Push poles*.—Where a servant had had charge of a stationary engine, and had stated that he was competent to be a railway fireman, but had no actual experience of railway work, and had never seen the process of "staking" cars, it was held that the danger that the piece of timber used for this purpose might slip or break was one which he was presumed to understand without instruction. *Watts v. Hart* (1893) 7 Wash. 178, 34 Pac. 423, 771. See however, § 395, note 1, subd. (t), *infra*.

(y) *Poisonous substances*.—The fact that white lead is deleterious to those who handle it in the process of manufacture is so widely known that a person who takes employment in a factory cannot, it would seem, be held excusably ignorant of its properties. See *Berry v. Atlantic White Lead & Linseed Oil Co.* (1898) 30 App. Div. 205, 51 N. Y. Supp. 602, where, however, there were other elements corroborating the conclusion that the risk was understood.

(z) *Extreme cold*.—In one case the court laid down the general doctrine that the law does not speculate upon degrees of knowledge in regard to the effects of cold weather, and held that an ignorant negro could not recover on the ground that his employer had directed him to assist in loading bales of cotton covered with ice and snow, in weather of such unprecedented rigor that his fingers became frost-bitten and had to be amputated. *Yazoo City Transp. Co. v. Smith* (1900) 78 Miss. 140, 28 So. 807. But it seems scarcely proper to impute to a person of this description, accustomed to a mild climate, the knowledge which is supposed to be possessed by everyone in colder latitudes.

(aa) *Action of gravitation on loosely cohering substances*.—In one Minnesota case the effect and operation of the force of gravitation and of a thaw upon a perpendicular bank of earth were held to be within the comprehension of an ignorant foreigner of ordinary capacity. *Olson v. McMullen* (1885) 34 Minn. 94, 24 N. W. 318. In another a verdict for the plaintiff was set aside where the injury was caused by the removal of a layer of clay from underneath a layer composed of clay, sand, and stones intermingled, the court being of opinion that no skill or science was required to enable the servant to appreciate the danger, and that it was apparent to the commonest intelligence. *Pederson v. Rushford* (1889) 41 Minn. 289, 42 N. W. 1063. In two others, complaints which showed that the injury was re-

ceived by a section hand engaged in loosening gravel on a hillside for the purpose of allowing it to slide down were held to be demurrable. *Sorenson v. Great Northern R. Co.* (1897) 68 Minn. 184, 70 N. W. 978 (court refused to ascribe any decisive weight to an allegation that the servant was unaccustomed to the work); *Reiter v. Womand & St. P. R. Co.* (1898) 72 Minn. 225, 75 N. W. 219.

The earlier Indiana cases are wholly unfavorable to the servant. In one it was held that a common laborer cannot recover under a complaint the essence of which is that he was injured by the collapse of the unshored sides of a trench dug in gravel and sand. *Lincoln v. Water Supply Co. v. White* (1890) 124 Ind. 376, 24 N. E. 747. (In the *Christie Case* [1901] 156 Ind. 172, 59 N. E. 385, *infra*, it was declared, with regard to this decision, that the servant's inability to recover was affirmed with reference to the evidence, not to the pleadings; the workman's inexperience was mentioned in the complaint, but not specifically adverted to by the court.) To the same effect is *Sorenson v. Lefayette* (1893) 134 Ind. 625, 33 N. E. 1033. (The only comment passed upon this decision in the *Christie Case* [1901] 156 Ind. 172, 59 N. E. 385, *infra*, is that the complaint showed the danger to be as obvious to the laborer as to his foreman.) A demurrer was also held to have been properly sustained in a case where it was alleged that the servant was injured while undermining a bank of gravel and clay below the stratum of earth which fell upon him. *Griffin v. Ohio & M. R. Co.* (1890) 124 Ind. 326, 24 N. E. 888. (This decision was declared in the *Christie Case* [1901] 156 Ind. 172, 59 N. E. 385, *infra*, to have been correct.) In another case a complaint was successfully demurred to, where the allegation was that the injury was received through the fall of a stratum of "black, loose, and brittle loam" which projected about 1 foot outside a 6-foot stratum of gravel which plaintiff was shoveling. *Railsback v. Wayne County Turnp. Co.* (1894) 10 Ind. App. 622, 38 N. E. 221. But the most recent expression of opinion in this state is to the effect that a common laborer is not bound under all circumstances to take notice of the liability of the unshored sides of a trench to fall in, and that his capacity for appreciating such a risk must be determined with reference to the specific facts. Upon this ground it was held that a com-

plaint was not demurrable which alleged substantially that such an employee was set to work in a trench dug through 2 feet of compact earth mixed with broken stone, and, underneath, through 4 feet of loose earth, the street having been graded at that point by filling in; that the sides of the trench, although they were weakened by the digging of several large "bell holes," as a result of the want of bracing, caved in upon the laborer; and that he had no knowledge or opportunity to acquire knowledge of the danger. *Fl. Wayne v. Christie* (1901) 156 Ind. 172, 59 N. E. 385. In stating its conclusion the court observed that "whether the work of digging a trench is dangerous or otherwise would seem to depend on a variety of circumstances;" as, for instance, the nature of the soil, the state of the weather, the season of the year, the dimensions of the trench. It was also pointed out that, while the work of excavation might be safe to the extent of justifying a workman in undertaking the employment, yet it might afterwards be rendered dangerous by lateral excavations, and that it could not be said, as a matter of law, that the additional risk thus created was assumed. Nor could it be said that the deposit of earth excavated, on the surface of the ground near the trench, created so obvious a peril that it was necessarily assumed by the plaintiff. It was for the jury to declare what inference should be drawn from this fact. Another fact for the jury to consider was the different qualities of the upper and lower strata; the court could not decide, as a matter of law, that the danger of caving in which the nature of the soil created was palpable. It seems impossible to reconcile this and the earlier cases without resorting to what an eminent English judge once spoke of as "desperate refinements."

In Tennessee it has been held that an ignorant and illiterate negro laborer must be taken to understand the danger that the sides of a ditch dug through soil which is principally composed of cinders may fall in. *Brown v. Chattanooga Electric R. Co.* (1898) 101 Tenn. 252, 47 S. W. 415 (following the Minnesota cases, *supra*).

In Wisconsin it has been laid down that any workman of ordinary intelligence, whether experienced or not, is presumed to know that, when a bank of earth is undermined by removing its foundation, it is liable to fall. *Naylor*

v. Chicago & N. W. R. Co. Wis. 661, 11 N. W. 24.

In South Dakota it has been held that there is no duty to warn a laborer that the sides of a trench or embankment of made ground are likely to cave in than the sides of a trench in natural soil, but that the fill and the natural soil are equally plain, owing to a uniformity of color. *Carlson v. S. D. Water Co.* (1895) 8 S. D. 47, 419.

A nonsuit has been granted in Iowa where a laborer was killed while shoveling sand at a place where he left an overhanging crust of sand. *Moore* (1891) 18 R. I. 513, 2 (factor of experience not admissible).

In one Texas case it was held that a servant, even though he is unskilled, is supposed to know that earth will fall, especially if it is saturated with water; and every one was denied on this ground a member of a bridge gang who never dug a well, was injured by a caving in of this nature. *Galt v. S. A. R. Co. v. Lamp* (Tex. 19). In another, when a ditch gave way and allowed timbers laid on the ground to fall on an inexperienced laborer, it was held that the defendant was not liable. An instruction that, if the laborer observed the danger, it was his duty to warn his foreman, it was said that no special skill was required to comprehend such a danger. *Texas & P. R. Co. v. French* (Tex. 96) 23 S. W. 642.

An employee who without warning goes up to a derrick standing on a clay bank and in such a position that he cannot escape contact with it, is held to have been picked down by him cannot recover for an injury caused thereby. *Sergeant Bluffs & S. Co. v. Iowa* (1895) 94 Iowa, 725, App. 15.

An employee, though inexperienced, assumes the risk in going to work on an overhanging gravel ledge and in digging a ditch for the purpose of dislodging it. *Missouri, K. & T. Ry. Co. v. Spellman* (1896) Tex. Civ. App. 298.

In a case where the servant was killed by the fall of a bank of earth, which had shown its liability to cave in, the court said that the danger was so patent that a reasonably observant person, whether

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not, would have discovered it, within the time deceased was at work on the bank, then such opportunity to know it would be held as knowledge." *Attridge v. Midland Blast Furnace Co.* (1883) 78 Mo. 564.

Any laborer on a farm is expected to know that the upper layer of a pile of straw will fall when it is undermined. *Witch v. Brainard* (1895) 108 Mich. 38, 65 N. W. 667.

A servant who goes into the mouth of an elevator bin to drag down cotton seed which has lodged therein, is presumed to understand, without any special experience, the danger that, while he is digging in the bottom of the bin the seed may slip and fall on him. *Beann v. Miller* (1901; Tex. Civ. App.) 62 S. W. 547.

An ordinary laborer in a sugar refinery cannot hold his employer liable on the ground that he was not warned against the danger that, while sugar was being drawn from a bin, it would run and thus surround to a greater or less extent any person who might be working in the bin. *Bohn v. Harbauer* (1889) 114 N. Y. 206, 21 N. E. 402. *Attingham* (1887) 46 Hun. 557.

(bb) *Leverage*.—A servant is presumed to understand the operation of the force of leverage in its simpler manifestations. *Stobba v. Fitzsimmons & C. Co.* (1895) 58 Ill. App. 427; *Romona Granite Stone Co. v. Tate* (1894) 12 Ind. App. 57, 37 N. E. 1065, 39 N. E. 529. For the facts in both these cases see § 335, subd. 9, *ante*.

(cc) *Handling of heavy objects*.—(See also subd. (aa), (bb), *supra*). To load an open flat car with lumber of uniform length, breadth, and thickness, by piling the same in parallel tiers one after another, "is to do work which common laborers can perform without more hazard to their own security than appertains to ordinary manual labor." *Sims v. East & West R. Co.* (1889) 84 Ga. 152, 10 S. E. 543. An inexperienced laborer who in piling ties in a box car ceases, at the direction of the foreman to hurry up and pile them on another, to block them in the usual manner, cannot recover for an injury caused by their falling upon him, on the theory that it was a case in which instruction should have been given. *Brown v. Oregon Lumber Co.* (1893) 24 Or. 315, 33 Pac. 557 (plaintiff had been at work only three weeks). The court said: "Necessarily, as the height of the tier increases, unless commensurate care is observed, its tendency to

fall is augmented. The risk of doing the work, however, was open to any observation. It needed no special knowledge to discover it. The piling of ties is not a work in which any peculiar knowledge or experience is involved, but is a work in which all have the same opportunity of judgment."

Since everyone is presumed to know the extent of his own lifting capacity, a recently hired employee in a mill, who ruptured himself in trying to lift a truck wheel out of a hole in the floor into which he had allowed it to run, cannot recover where it appears that the hole was necessary for drainage purposes and was in plain view. *Ferguson v. Phoenix Cotton Mills* (1901) 106 Tenn. 236, 61 S. W. 53. Compare *Worlds v. Georgia R. Co.* (1896) 99 Ga. 283, 25 S. E. 646, where a complaint was held demurrable on the ground that it showed the cause of the injury to have been the servant's miscalculating the amount of strength necessary to lift a heavy tie.

The risk that a pair of car wheels which are being loaded on a flat car by skids may slip back is assumed by a servant whose ordinary duties are those of a car washer. It is immaterial that his ignorance of English prevented him from taking advantage of a warning given by a fellow servant. *Gulitzer v. Pennsylvania R. Co.* (1889) 1 Monaghan, 72. The danger that a rail which is being loaded on a car may slip back in consequence of its striking upon a pile of snow upon the car is obvious. *Hanley v. Grand Trunk R. Co.* (1882) 62 N. H. 274.

A servant is bound to know that if a heavy iron plate is propped up by a stick which meets it at an acute angle, the stick is likely to slip on the smooth surface. *Brown v. Brown* (1888) 71 Tex. 355, 9 S. W. 261 (servant had been working six weeks, but this fact was not a material element).

The danger that an insufficiently secured brace which holds in place a heavy beam which is being raised to the perpendicular may give way under the pressure of the beam if it slips is presumed to be known to a servant, though he is inexperienced in carpentry work. *Stuart v. New Albany Mfg. Co.* (1896) 15 Ind. App. 184, 43 N. E. 901 (complaint held demurrable).

A laboring man thirty-four years old is presumed to know that, if a marble slab 3 feet wide and 5/8 inches thick, which stands in a position nearly vertical upon one side of a platform, in a

ent to a "casual observer,"² or such as could be seen "at a glance by any one." It is also laid down that, where the conditions which caused the injury, although never actually seen by the servant before the accident, were open to deduction from what was constantly before his sight, he cannot recover. The effect of any other doctrine would be to permit him to found a right of action "upon his imagination."

Any ordinary man of ordinary faculties, placed in the same situation and using his faculties in the usual way, would have perceived the danger, and which he therefore must be held to have appreciated.

His obligation to use the other senses is equally imperative, though much less frequently referred to.³ But it is clear from the cases in this line, that the law imputes, even to inexperienced servants, a much larger amount of knowledge than that which is needed to perceive the objects of the senses. The law supposes every adult employee to possess such ordinary intelligence, judgment, and discretion as enable him to appreciate any obvious danger.⁴ The master therefore has a right to assume that an adult employee possesses "that knowledge which is acquired by common experience;"⁵ that he knows of any thing which is "a matter of common knowledge or presumed to be within the common experience of all men of common education;"⁶ that he understands "those dangers which are the subject of com-

wagon, is tilted very slightly as a result of his throwing his weight on the other side of the wagon and so depressing it, the effect of the tilting will be to make the slab fall towards him. *Moten v. Pickle Marble & Granite Co.* (1896) 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 155.

Any servant of full age is presumed to understand the liability of round sticks of wood 4 feet long to slip and fall from the hooks of an upright, exposed, endless chain, upon which they are held by the force of gravity only. *Jones v. Manufacturing & Invest. Co.* (1899) 92 Mo. 565, 43 Atl. 512.

The danger that a heavy water pipe may roll off a block while it is being raised by a lever is presumed to be understood by every man of ordinary intelligence. *Johnson v. Ashland Water Co.* (1890) 77 Wis. 51, 45 N. W. 807.

A servant injured by the fall of a heavy mass of iron from a hand cart which he was helping to wheel on some loose planks laid across a pit cannot recover where the conditions of the work were perfectly familiar to him. *Chicago, B. & Q. R. Co. v. Merckes* (1890) 36 Ill. App. 195.

² *Ragon v. Toledo, A. A. & N. W. Ry. Co.* (1893) 97 Mich. 265, 56 N. W. 100.
³ *Findlay v. Russell Wheel & Lumber Co.* (1896) 108 Mich. 286, 66 N. W. 100.
⁴ *Stephenson v. Duncan* (1895) 15 Wis. 404, 41 N. W. 337.

⁵ *Goldthwait v. Harehall & Co.* (1854) 160 Mass. 34, 35, 486.

⁶ In *McLafferty v. Feltz* (Pa.) 1 Cent. Rep. 571, 2 A. 2d 100, it was held that a miner was affected with notice that gas was escaping from a well, when he could both see and smell it.

In *Thomas v. Missouri Pacific R. Co.* (1891) 109 Mo. 187, 18 S. W. 2d 100, it was held that the servant, who had been guided to an apparently safe place, was not to be held to have been guided to an apparent danger by his sense of smell. See § 403, note 1, subd. 1.

⁷ *Luebke v. Berlin Mfg. Co.* (1894) 88 Wis. 442, 60 N. W. 707.

⁸ *Ruchinsky v. French* (1890) 108 Mass. 68, 46 N. E. 417.

⁹ *De Lisle v. Ward* (1897) 160 N. H. 579, 47 N. E. 426.

knowledge, or which can be readily seen by common observation."⁹ All servants, therefore, are presumed to be acquainted to some extent with the properties of matter and the operations of the laws to which it is subject.¹⁰ To this generic conception are referable the decisions which proceed upon the hypothesis that a servant is, in some degree, at least, bound to take notice of the dangers arising from the action of gravitation under various circumstances;¹¹ from the insufficient strength of materials;¹² from slippery surfaces;¹³ from the action of extreme cold;¹⁴ from unblocked frogs;¹⁵ from obstructions beside railway tracks;¹⁶ from some of the conditions incident to the construction of railway rolling stock;¹⁷ from the want of railings to protect platforms and similar places of work;¹⁸ from the operation of various kinds of moving machinery.¹⁹

It is highly instructive to compare a portion of the decisions cited in note 1, *supra*, with those which, as will be seen by referring to the following section, have been rendered in the servant's favor upon similar states of facts. To define the precise grounds upon which the different conclusions were arrived at is, in many instances, virtually impossible.

395. Risks not deemed to be, as a matter of law, comprehended without special experience.— (See also cases cited in § 462, *post*.)—In many instances where the injured servant had had no experience, or virtually none, in dealing with conditions similar to those which he was required to encounter, it is deemed unwarrantable to take the case from the jury or override a verdict in his favor, although it may be certain that the risk to which the injury was traceable was one which he would have been conclusively presumed to appreciate, if he had been engaged for a longer time in discharging similar duties.

Smith v. Peninsular Car Works
186) 60 Mich. 501, 27 N. W. 662.

In *McGuire v. La Plata Min. & Smelting Co.* (1882) 3 *McCrury*, 393, 9 Fed. 501, the court said: "Within limits, the law will assume that everyone has knowledge of destructive forces in the world and the powers of the earth and air. Of such is the knowledge that comes to every man of sound mind, in the ordinary course of his life, that fire will burn; that water will drown; that one may fall off a precipice; and the like. Recently in this court it was said of one who mounted a push car on a railroad, and went down a steep grade to his hurt, that, knowing the grade, it was his own folly not to heed the law of gravitation; because it is known to all men of sound mind and of all de-

degrees of intelligence that wheeled vehicles go down hill with increasing speed if left to themselves."

More briefly it has been laid down that one who enters the service of another is bound to take notice of the ordinary and familiar laws of nature applicable to the subject to which the employment relates. *Worlds v. Georgia R. Co.* (1896) 99 Ga. 283, 25 S. E. 646.

¹¹ See note 1, *supra* (aa)–(cc), *supra*.

¹² See note f. *supra*. (e), (f), (w), (x), *supra*.

¹¹ See note 1, *supra*. (j), (v), *supra*.

¹⁴ See note 1, *supra* (2), *supra*.

¹⁵ See note 1, subd (1), *supra*.

¹⁵ *Id.* note 1, *supra*. *Id.*, *supra*.

¹⁷ See note 1, *supra*, subd. (c), (d), (e).

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¹ See note 1, *supra*, (g). *supra*.

¹⁰ See note 1, *supra*, (k) et seq., *supra*.

under similar circumstances, either for the defendant or for other employer.¹ In the subjoined note are collected a large number of decisions exemplifying this situation.²

"It may frequently happen that the danger attending the operation of a complicated machine, or of performing a certain service, or working in a particular position, although obvious to persons of experience and knowledge of the situation, is nevertheless not appreciated by others on account of ignorance or inexperience; and in the application of the rules already adverted to [as to assumption of risks], due regard must be had concerning the intelligence and experience of the person employed in relation to the machinery or implement at or with which he is required to serve." *Jenny Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 566, 570, 18 N. E. 30.

"The doctrine that a servant assumes all the dangers that are apparent to him when he enters the employment has no application . . . when it is apparent only to those possessing peculiar skill and knowledge in such matters." *Eddy v. Aurora Iron Min. Co.* (1890) 81 Mich. 548, 46 N. W. 17. "Risks and dangers that are apparent to the man of long experience and of a high order of intelligence may be unknown to the inexperienced and ignorant." *Bohn Mfg. Co. v. Erickson* (1893) 5 C. C. A. 341, 12 U. S. App. 260, 55 Fed. 943.

Stated in language which has a more particular reference to the duty under which the employer lies to communicate information in cases where the servant cannot work safely without it, this principle work safely without it, this principle takes the following form: The rule by which "the employee impliedly assumes the risks of the service and of such dangers as are obvious and open to ordinary observation does not embrace such risks as the employer knows, or which by the exercise of reasonable care he might have known, beforehand, that the employee by reason of his immaturity and inexperience, is ignorant of, or such as the employer knows the employee, without experience, cannot appreciate without instruction or warning." *Louisville, N. A. & C. R. Co. v. Frawley* (1886) 110 Ind. 18, 9 N. E. 594.

Whenever the servant's inexperience is a material element in the case, the trial judge should distinguish, in his instructions to the jury, between the

position of a servant who has a special knowledge of the work in question, and that of a servant who has such knowledge. *Baltimore & O. Co. v. Stricker* (1878) 51 Md. Ann. Rep. 291. An instruction to the effect that the age and intelligence of a laborer injured by machinery, his experience in the use of machinery, may be considered by the jury in an action by him for the injury, in respect to the question whether he was cognizant of the risks incurred by one working near it, is correct. *Huizaga v. Cutler & S. L. Co.* (1883) 51 Mich. 272, 16 N. W. 17. It is proper to instruct the jury that a servant assumes, besides the ordinary risks of his employment, those which should have been observed by an ordinarily skilled in the employment. *Western U. Tel. Co. v. McHugh* (1895) 58 N. J. L. 155, 32 L. Ed. 351, 33 Atl. 384. The following instruction was held appropriate in the case of a servant who was wholly inexperienced in the use of machinery, and was injured by falling against a rapidly revolving shaft about 1½ inches in diameter: "The servant, knowing the fact of machinery being in the place where he is working, may be entirely ignorant of the fact that he would incur by falling against it, coming into contact with it. In such a case it is the duty of the master not only to exercise due care, but good care toward the servant, and to inform him of the risks he undertakes." *Palace-Car Co. v. Harkins* (1893) 100 Cal. 326, 17 U. S. App. 22, 55 Fed. 943.

² (a) *Railway tracks and appliances.*—A laborer unskilled in railroad building is not necessarily charged with notice of the defective condition of a newly constructed roadbed, although he has engaged in its construction. *Colorado Midland R. Co. v. O'Brien* (1896) 16 Colo. 219, 27 Pac. 701.

A locomotive engineer is not charged with knowledge of the fact that a culvert under the roadbed of a railway is not large enough to carry off the water which may at times be expected to seek a passage. *Union P. R. Co. v. O'Brien* (1896) 161 U. S. 451, 40 L. Ed. 766, 16 Sup. Ct. Rep. 618.

An inexperienced switchman w

It will be observed that, in a portion of these cases, the specific conclusion to which the servant's inexperience points is that his failure to observe the material conditions which created the danger did

ordered to couple cars in the nighttime at a place where there is a cattle guard should be warned as to the danger he will encounter. *Fredenburg v. Northern C. R. Co.* (1889) 114 N. Y. 582, 21 N. E. 1049.

(b) *Railway cars; construction and handling of.*—An inexperienced brakeman is entitled to go to the jury where he is injured because he is not instructed as to the dangers incident to coupling cars with differently constructed coupling appliances. *Louisville, N. A. & C. R. Co. v. Frantley* (1886) 110 Ind. 18, 9 N. E. 594; *Illinois C. R. Co. v. Price* (1895) 72 Miss. 862, 18 So. 415; *Reynolds v. Boston & M. R. Co.* (1891) 64 Vt. 66, 24 Atl. 134; *Louisville & N. R. Co. v. Veach* (1898) 20 Ky. L. Rep. 403, 46 S. W. 493. The duty to instruct an inexperienced servant is especially strong, where the couplings are not only materially different from those in use on the defendant's cars, but also from those which are in general use on other lines. *Missouri P. R. Co. v. White* (1890) 76 Tex. 102, 13 S. W. 65. Compare also *Grannis v. Chicago, St. P. & K. C. R. Co.* (1890) 81 Iowa, 444, 46 N. W. 1067. An inexperienced brakeman is not, as a matter of law, chargeable with appreciation of the danger of coupling a tender with a goose-neck to a freight car with an ordinary coupler. *Hungerford v. Chicago, M. & St. P. R. Co.* (1889) 41 Minn. 444, 43 N. W. 324. A verdict for the plaintiff on the ground that he was not instructed as to the proper way of doing the work will not be disturbed where the evidence is that he was injured, while coupling cars of different construction, four days after obtaining employment as a switchman; that he had stated, when he was applying for employment, that he had had no experience in the work; and that not less than four weeks' service as a learner was needed to qualify a person to handle safely the various kinds of cars which ordinarily came into the yard. *Louisville & N. R. Co. v. Miller* (1900) 43 C. C. A. 436, 104 Fed. 124.

The fact that a brakeman accustomed to cars with single drawheads observed that two cars which he was suddenly called upon to couple had bumpers as well as drawheads does not necessarily involve the conclusion that he appre-

ciated the peculiar dangers incident to an attempt by one inexperienced in handling cars of that construction to make the coupling. *Illinois C. R. Co. v. Price* (1895) 72 Miss. 862, 18 So. 415. "If it be argued," said the court, "that the appellee must have seen the drawheads and bumpers projecting from both cars when he went in to make the coupling, hurriedly, (which cannot be said to be certainly proved), and that he saw their unlikeness to any he had ever seen and used before, he was bound to take such obvious instrumentalities, and their dissimilarity to those he knew how to use in coupling, as ample warning of the danger to which he was called to expose himself, and he should have withdrawn, it is to be answered: (1) He may have seen the drawheads and bumpers casually, and not observed them so as to form any opinion touching their construction or use. (2) He may have even observed them, and yet, in his ignorance and inexperience, he may have supposed that the drawheads would not be driven back by the impending impact of the cars as they came together, but would remain fixed, and prevent the bumpers coming together, as seems not impossible, since single drawheads are coupled with safety in the manner he employed in his attempt to couple the double drawheads in this case. Or (3), he may have reasoned, as he had a right to do, that his superior would not have sent him into an unaccustomed place of danger to do the service then required without giving him some instruction or warning, unless that coupling was to be made in exactly the same manner as he made the coupling on his employer's cars." Compare *Reynolds v. Boston & M. R. Co.* (1891) 64 Vt. 66, 24 Atl. 134, § 253, note (8), *ante*. See, however, § 394, note 1, subd. (c), *supra*.

The danger that a link in a drawhead may prove to be stuck, thus exposing a person engaged in coupling to the danger of having his fingers crushed, if he does not let it go before the cars meet, is in a sense obvious, but it is one as to which the railroad company is bound to warn an inexperienced brakeman known to be ignorant of such danger. *Bonner v. Moore* (1893) 3 Tex. Civ. A. 406, 22 S. W. 272.

Where hand brakes are in use, and

not necessarily import culpability. Usually, however, the ultimate fact established is that a jury is warranted in finding that, although the material conditions themselves were visible to him, he did

some of them have stiff and others limber staffs, differing from each other only in the size of their staffs, and the limber ones are shown to be inherently dangerous in the hands of inexperienced brakemen who do not understand how to handle them, it is the duty of the railway company either to adopt the less dangerous kind, or, if not, to warn the inexperienced operator placed in charge of the more dangerous, of their dangers. *Louisville & N. R. Co. v. Binion* (1894) 107 Ala. 645, 18 So. 75.

(c) *Locomotives: construction and operation of.*—See *Bridges v. St. Louis, I. M. & S. R. Co.* (1879) 6 Mo. App. 389, cited in § 397, note 1, subd. (b), *infra*, also this note, subd. (t), (w), *infra*.

(d) *Telegraph poles.*—In a case where a lineman, while sawing through a telegraph pole, supported his weight by grasping the section above the place where he was sawing, and the pole, when the sawing was partly completed, suddenly broke off and allowed him to fall to the ground, it was held that neither the fact that he omitted to inspect the pole for the purpose of ascertaining its soundness, nor the fact that he did his work in the manner described, can be said to show negligence, as a matter of law, where it appears that he had previously been accustomed to work on the ground, and had been assigned to this task without any instruction or warning. *Western U. Teleg. Co. v. Burgess* (1901) 47 C. C. A. 168, 108 Fed. 26.

An inexperienced employee who is ordered to dig a trench so as to shift a telegraph pole, without being notified that props are necessary to hold it in an upright position, and that another employee has been sent to fetch them, may recover for an injury caused by the fall of the pole. *East St. Louis Contracting R. Co. v. Enright* (1893) 47 Ill. App. 494.

(e) *Masonry.*—A judgment for the plaintiff, a common laborer, will be upheld where the evidence sustains a finding that the danger of the fall of an arch by which he was injured was apparent to an experienced mason, but not to a person not skilled in mason work. *Gill v. Honrighausen* (1891) 79 Wis. 634, 48 N. W. 862. An unskilled laborer who had had nothing to do with the

plans or construction of the wall cistern did not assume the risk of a fall of that wall. It cannot be assumed, from the fact that he was standing near it, that he might have seen its fall, unless there is proof that he knew its real condition before it fell. *Mulcairns v. Juncosville* (1886) 67 N. W. 24, 29 N. W. 565.

(f) *Slippery surfaces.*—The danger of slipping on a marble stairway is deemed to be obvious to an employee who has been in the defendant's system ten days, where it was only after the stairway had been tested by actual use that the employer ascertained it was dangerous. *Kline v. Abrahams* (1898) 48 App. Div. 522, 62 N. Y. Supp. 522.

(g) *Saws.*—A verdict will not be set aside which finds that a rapidly revolving saw placed under a bench used by the plaintiff, in such a position that he could not see it unless he lowered his eye to within 18 inches of the floor, and an appliance on which it was used, was improper to set an inexperienced man to work without giving him proper and reasonable instructions. *Cum v. Eyleth* (1890) 83 Me. 50, 21 Atl. 21.

The particular danger caused by the tendency of a board when warped to spring back is not, as a matter of law, obvious to an inexperienced workman just beginning to use it. *Wheelwright v. Wason Mfg. Co.* (1883) 135 Mass. 209. To same effect see *Lemser v. St. J. Furniture Mfg. Co.* (1897) 70 Mo. 209, where, however, the decision is broader, as, for aught that appears, the piece of timber which was thrown was not warped.

In another case recovery was allowed for reasons thus explained: "The general danger of contact with a circular saw in operation is of course obvious. But the particular danger by which the plaintiff was hurt is not one which is apparent. The saw teeth move with such velocity that they are indistinguishable. Objects which come in contact with the front of the saw in its ordinary use are not thrown upward, but by its action are held in contact with the table. The fact that objects which touch the opposite side of the saw will be affected in a different manner, and one attended with danger, although easily understood from explanation and readily learned

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possess that measure of skill and technical knowledge which would have enabled him to understand the consequences which might result from those conditions. A general analysis of the cases cited in note 2

experience, is not of itself plain and obvious, but is one of those obscure dangers of which an employer should give warning if he has reason to suppose that a workman who may encounter it in his work does not know of this action of the saw, and is ignorant of this particular danger." *Hanson v. Ludlow Mfg. Co.* (1894) 162 Mass. 187, 38 N. E. 363.

It is for the jury to say whether a servant having no experience in the use of a saw of peculiar construction, dangerous because pieces of timber were liable to become wedged between the saws, and thus throw the operator's hands upon them, should have been instructed as to this peculiarity. *Chilton v. Lausling Wagon Works* (1901) 128 Mich. 43, 87 N. W. 79.

(h) *Planers and similar machinery.*—Where the testimony justifies the inference that the knives of a planing machine were concealed from one doing the work assigned to an inexperienced employee, it is error to nonsuit him in an action to recover damages for an injury caused by his stepping into the knives while they were temporarily left without the protection of the hood which ordinarily covered them. *Turner v. Coldshoro Lumber Co.* (1896) 119 N. C. 367, 26 S. E. 23. An inexperienced workman who is injured a few hours after being set to work at a planer in company with an experienced operator is not, as matter of law, debarred from recovery on the ground that he should have known the danger of attempting to remove with his hand the shavings which had accumulated under the planer, while the machine was in motion, the evidence being that the knives on the inner side of the planer by which his hand was cut off were concealed from view by the tightly packed shavings. *Bennett v. Warren* (1900) 70 N. H. 564, 49 Atl. 105.

(i) *Machinery with revolving rollers.*—While the fact that if the hands are so placed between the upper portions of revolving cylinders as to be in contact with the surfaces there is danger is obvious to a man of ordinary intelligence after even a day's experience, a court will not say, as a matter of law, that the increased danger arising from their having been left on one occasion further apart by a coemployee of the plaintiff is

so patent to a new employee that the master is absolved from the duty of instruction. *Bjbjian v. Woonsocket Rubber Co.* (1895) 164 Mass. 214, 41 N. E. 265.

(j) *Cogwheels and gearings.*—An inexperienced employee who is set to work, without instructions, upon a boring machine with uncovered cogs, does not, as a matter of law, assume the risk. *Thompson v. Edward P. Allis Co.* (1895) 89 Wis. 523, 62 N. W. 527 (arm was caught in uncovered gearing, while he was feeling the shaft, according to his instructions, to see if it was hot).

(k) *Shafts and set screws.*—It is for the jury to say whether the risk of crossing a revolving shaft with two set screws projecting therefrom was appreciated by a servant who had no knowledge of machinery, and who was performing such duties that he had nothing to do with the operation of the shaft. *Roth v. Northern Pacific Lumbering Co.* (1889) 18 Or. 205, 22 Pac. 842. It cannot be said, as a matter of law, that a mere laborer charged with the duty of shoveling fat in the vicinity of an unguarded revolving shaft appreciated the risk of injury that would result from his touching the shaft, where he was unfamiliar with machinery, and was not employed in connection with the machinery or the shaft. *Johansen v. Eastman's Co.* (1899) 44 App. Div. 270, 60 N. Y. Supp. 708.

(l) *Beltting.*—It is a question for the jury whether an inexperienced servant (a carpenter) injured while attempting to place a running belt upon a pulley with a stick understood the danger incurred, and thereby assumed it. *Demars v. Glen Mfg. Co.* (1892) 67 N. H. 404, 40 Atl. 902. Whether the risk incident to shifting a belt with a stick was appreciated by a servant who was injured while doing so is a question for the jury, where the evidence is that, although he had worked for a long time about machinery, he had never had anything to do with belts, that he knew nothing about the use of a shifter, and that he had been directed by the foreman to perform the operation with a stick. *McDougall v. Ashland Sulphite Lumber Co.* (1897) 97 Wis. 382, 73 N. W. 327.

indicates that inexperienced servants have been held not to be necessarily chargeable with a knowledge of the risks incident to the using of appliances of an unfamiliar construction (subd. b); the

(m) *Machinery for the treatment of cotton*.—An employer is not, as matter of law, free from negligence in failing to instruct an inexperienced employee in regard to the danger of removing clogs from a cotton-picking machine, without stopping the beater, where the picker boss had removed clogs without stopping the beater in the presence of such employee, and had directed him to put his hand in when the machine became clogged and pull out the clog, without telling him not to do it when the beater was in motion, and the internal construction of the machine could not be seen while the beater was running. *De Costa v. Hargraves Mills* (1893) 170 Mass. 375, 49 N. E. 735. A nonsuit is erroneous where the evidence is that an inexperienced servant was injured while cleaning a "picker" machine four days after he went to work, and that he had not been notified of the danger caused by the fact that the "beater" continued to revolve by its own momentum for two or three minutes after all the rest of the machine had come to a standstill. *Hightower v. Bamberg Cotton Mills* (1896) 48 S. C. 190, 26 S. E. 222. A master who directs an inexperienced employee to tie in a bolt attached to a cotton-gin, without warning him of the attendant danger, violates his duty, although the employee knows that the saws will cut him if he comes in contact with them. *Greenville Oil & Cotton Co. v. Harkey* (1899) 20 Tex. Civ. App. 225, 48 S. W. 1005. Here the elements of danger which, according to the court, the servant could not be assumed to have understood, were the risk of doing the work without stopping the machine, and the risk that the atmospheric disturbance produced by the movements of the gin-saws and brushes might draw a coat sleeve against the saws.

(n) *Grinding machinery*.—Where an employee unskilled in the use of machinery is assigned to the work of tending a grinding machine, at the bottom of which is a spout which occasionally becomes clogged with the ground stuff which is discharged through it, he should be instructed as to the proper way of unclogging it, viz., by striking it with a heavy object, and warned against attempting to unclog it by running in his hand, and so running the risk of being struck by the machinery. *Standard Oil*

Co. v. Eiler (1901) 22 Ky. L. Rep. 61 S. W. 8.

(o) *Crushing machines*.—A servant finding that the plaintiff, a common laborer, was assigned without instruction to the work of poking brickbats into a crusher, and was injured fifteen minutes afterwards, is not inconsistent with a general verdict against the defendant. *Chicago Anderson Pressed Brick Co. v. Rembarz* (1893) 51 Ill. App. 54, affirmed in *Barnes v. Rembarz* (1894) Ill. 192, 37 N. E. 239.

(p) *Sugar-refining machines*.—An inexperienced employee was sent to work upon a rapidly revolving machine used in the refining of sugar, and was injured while cleaning it after the work was over, a verdict holding the employer liable was upheld on the ground that there was evidence tending to show that his agents put a servant to work "in a place of peculiar danger which he had no knowledge or experience, without informing him of the danger or instructing him how to avoid it." *O'Connor v. Adams* (1876) 120 N. Y. 427.

(q) *Sausage machines*.—Negligence properly inferred where an employee in a packing house, who was ordered to perform the unaccustomed work of operating a sausage machine with chopping knives, which was shoveled into a receptacle about a foot in depth above the revolving knives, was not warned that a mass of meat was sometimes formed at the top of the receptacle, the consequence being that, when he was attempting to press down what appeared to be a solid mass, his hand went through the crust and came into contact with the knives. *Richardson v. Swift & Co.* (1899) 37 C. C. A. 557, 96 Fed. 609.

(r) *Elevators*.—A jury is warranted in finding that a common laborer put in charge of an elevator should be instructed as to the manner in which it is to be operated. *Brennan v. G. & C. Co.* (1890) 118 N. Y. 489, 8 L. R. A. 810, 37 N. E. 810.

(s) *Other hoisting appliances*.—Where the latch by means of which a coal bucket was closed and opened was constructed on the scientific principle that a force pressing such a contrivance perpendicularly against a resisting face has a tendency to hold it against the surface, it was held that a com-

of adjusting of parts of machinery (subd. *l*); the action of concealed parts of machinery (subd. *g, h, m, n*); certain peculiar results or incidents in the operation of machinery (subd. *h, m, n, q, u*); the combustion of a certain kind of fuel (subd. *z*). The same note shows

laborer could not be presumed to know the result which might follow if the angle made by the latch with the surface became slightly obtuse. *Pennsylvania Coal Co. v. Kelly* (1894) 54 Ill. App. 622.

If a servant is inexperienced and ignorant of the approaches to a meal conveyor, and the apparent approaches to the same are such as are likely to lead him, on account of his inexperience and ignorance, to undertake to ascend to the meal conveyor in a certain manner, and the danger of ascending to it in that manner is not apparent to him on account of such ignorance and inexperience, and the master's foreman knows or ought to know these facts, it is his duty to instruct and caution the servant sufficiently to enable him to comprehend the dangers, and to ascend to the conveyor safely by the exercise of proper care. *Ft. Smith Oil Co. v. Storer* (1893) 58 Ark. 168, 24 S. W. 106.

(*t*) *Air suction caused by moving machinery*.—The fact that a considerable suction is produced by a cooling fan is one not readily ascertained except by a person possessed of special knowledge, and a servant who is hired merely to oil such a fan should therefore be warned of the danger to which he will be exposed if he puts his arm in a place where it will be affected by the suction. *Swift & Co. v. Foe* (1896) 66 Ill. App. 651.

Compare § 390, note 1, subd. (*q*), *infra*.

(*u*) *Hydraulic machines*.—Whether a master is negligent in placing a servant at work at a "hydraulic draw bench," without instructing him as to the difficulty or impossibility of exactly centering the valves so as to entirely stop the motion of the piston, is a question for the jury in an action for injuries sustained by the servant, just after he had begun work, by the motion of the piston after it had apparently been stopped. *Borgeson v. United States Projectile Co.* (1896) 2 App. Div. 57, 37 N. Y. Supp. 458.

(*v*) *Refrigerating machines*.—The tightening up of nuts on the generator of a refrigerating machine without reducing the pressure, when there is an

ammonia pressure of about 120 pounds which is increasing, is a dangerous work which a carpenter employed as a general laborer or handyman, but unfamiliar with and uninstructed as to the danger of the mode of operation necessary to preserve an equal strain on all parts of the generator, cannot be set to do without rendering the employer liable to him for injury resulting from an explosion caused by his lack of skill. *Ryan v. Los Angeles Ice & Cold Storage Co.* (1896) 112 Cal. 244, 32 L. R. A. 524, 44 Pac. 471.

(*w*) *Push poles*.—A servant in a roundhouse, with a limited knowledge of mechanical forces, who was injured by the coming together of two engines as a result of the breaking of a defective stick which was used to apply the power of one engine to the other for the purpose of turning the latter on a turntable, was not, as a matter of law, chargeable with a comprehension of the danger of operating the turntable in this manner. *McDonald v. Chicago, St. P. M. & Q. R. Co.* (1889) 41 Minn. 439, 43 N. W. 380. See, however, § 394, note 1, subd. (*w*), (*x*), *supra*.

(*x*) *Linemen's spurs*.—A "trimmer" employed by an electric company, who is inexperienced in climbing poles, is not, as matter of law, chargeable with notice of defects in spurs furnished him for that purpose, consisting in the spurs being set at an improper angle to the shank, and being made of soft material, since the defect is not necessarily obvious to an inexperienced person. *Indiana Natural & Illuminating Gas Co. v. Marshall* (1898) 22 Ind. App. 121, 52 N. E. 232.

(*y*) *Ice tongs*.—Ice tongs are simple tools, but a court will not say, as a matter of law, that an unskilled laborer of ordinary intelligence should have known that they were defective in that their points were too blunt to take a secure grip of the ice. *Neubauer v. Northern P. R. Co.* (1895) 60 Minn. 130, 61 N. W. 912.

(*z*) *Furnaces*.—A laborer in a quarry is not affected with knowledge that the furnace of the engine operating the hoisting apparatus is not so constructed as to prevent the escape of live cinders, which, by alighting on the blasting

that it cannot be declared, as a matter of law, that such a servant must be taken to have understood the operation of certain mechanical forces under special circumstances (subd. *s, t, u, v, w*); or that

powder, may cause an explosion. *Grant v. Drysdale* (1883) 10 Sc. Sess. Cas. 4th series, 1159.

An inexperienced fireman is not presumed to know that the use of fine and dirty coal may cause the flames to burst forth from the locomotive furnace. *Missouri, K. & T. R. Co. v. Walker* (1894; Tex. Civ. App.) 26 S. W. 513.

The danger that, if too many shavings are thrust at once into a boiler furnace, the draft will be stopped, and the gas formed by combustion will be prevented from passing off by the chimney, the probable consequence being an explosion, is not an obvious risk nor one which it can be said, as a matter of law, an inexperienced servant should understand. *La Fortune v. Jolly* (1896) 167 Mass. 170, 45 N. E. 83.

(aa) *Lime kilns*.—It is the duty of the proprietor of a lime kiln to warn an inexperienced laborer who is set to work on the top of the kiln as to the danger of falling into the fire when the stone at the base is removed, and the mass above consequently subsides. *Parkhurst v. Johnson* (1883) 50 Mich. 70, 45 Am. Rep. 28, 15 N. W. 107.

(bb) *Action of gravitation on various substances*.—The danger incident to a position under a perpendicular bank of gravel which is liable to fall at any moment is not, as matter of law, apparent to an inexperienced laborer. *Daly v. Kiel* (1901) 106 La. 170, 30 So. 254 (servant should have been warned).

One employed to operate and oil the machinery of a steam shovel used to remove shale from an embankment is not, as a matter of law, chargeable with knowledge of the danger of the falling of a bank of clay above the shale, where he is inexperienced in the work of excavation, and has nothing to do with the removal of the clay to prevent its falling. *Alton Paving, Bldg. & Fire Brick Co. v. Hudson* (1898) 176 Ill. 270, 52 N. E. 256, affirming (1897) 74 Ill. App. 612.

A complaint is not demurrable which alleges that the defendant's agent, in the exercise of the authority conferred upon him, ordered the plaintiff, without warning, into a place known to such agent to be one of extraordinary danger, by directing him to excavate earth from an embankment which, by reason of its

composition, was unusually likely to cave in, and that the plaintiff, by reason of his inexperience, was not aware of the danger to which he was exposed in undertaking the work. *Thompson v. Chicago, M. & St. P. R. Co.* (1888) 629, 14 Fed. 564. The court said: "It is true that, ordinarily, every person of mature years and common intelligence is bound to take notice of the law of gravitation, and is presumed to be aware of the danger of earth in an embankment, when undermined, will cave in and fall. But the amended complaint avers that the particular embankment at which Olsen employed was peculiarly and unusually dangerous by reason of the character of the earth, and that this peculiar and extraordinary danger was known to the plaintiff, and was not communicated to Olsen."

An inexperienced workman was, as a matter of law, guilty of negligence contributing to his injuries from giving way of the side of a ditch where he was digging alongside a heavy timber, through the weight of such timber, where he did not in fact see the danger, and dug the ditch at the place marked out for it. *Texas & R. Co. v. French* (1893; Tex. Civ. App.) 22 S. W. 866.

A servant unfamiliar with the value of excavating tunnels is not bound to know that when soil is saturated with water it has less cohesive power than when it is dry. *Quigley v. Bambrick* (1894) 58 Mo. App. 192 (another argument which operated in the servant's favor was that he was working in the dark, and therefore had no opportunity for observation).

It cannot be held, as matter of law, that the extent of the cohesive power of the soil, counteracting the operation of gravitation on the sides of a tunnel, in the manner in which that cohesive power is affected by the saturation of the soil with water, were facts constructively known to a servant who had never been engaged in the excavation of tunnels,—especially when the place where he worked was so dark as not to admit of any careful observation. *Quigley v. Bambrick* (1894) 58 Mo. App. 192.

A mason's helper who has never been engaged in excavating work is not,

pertaining to the theory and practice of engineering or mechanical construction (subd. *a, s, x, y*); or certain properties of metals (subd. *ff, gg*); or the chemical properties of substances intended to

matter of law, chargeable with knowledge of the risk of the sides of a trench collapsing by reason of the weakening effect of the water which had been running into it. *Finn v. Cassidy* (1901) 165 N. Y. 584, 53 L. R. A. 877, 59 N. E. 311, Affirming (1899) 39 App. Div. 641, 57 N. Y. Supp. 1138.

See also *Et. Wayne v. Christie* (1901) 156 Ind. 172, 59 N. E. 385, as stated in § 394, note 1, subd. (aa), *supra*.

An inexperienced miner who has received no warning is not chargeable, as a matter of law, with a comprehension of the danger that an overhanging rock in a tunnel may fall. *Hanley v. California Bridge & Constr. Co.* (1899) 127 Cal. 232, 47 L. R. A. 597, 59 Pac. 577.

While every ordinarily intelligent man must be held to know that earth will fall if undermined, an inexperienced laborer may not readily understand how far he can go with comparative safety when removing the lower layers of a stone wall. *Wolf v. Great Northern R. Co.* (1898) 72 Minn. 435, 75 N. W. 702 (distinguishing the "Gravel Pit" cases, § 394, note 1, subd. aa).

The questions of an employer's negligence and his employee's assumption of risk are for the jury in an action against the former to recover for the latter's death, caused by being suffocated by bran falling on him in a bin in which he was shoveling the bran away from the sides and towards an aperture in the center, through which it ran, where the bin was dark, and the employee was not warned of the danger and risk incident to going into a bin for that purpose, fully known by the foreman under whose direction he was working, but not open and patent or ordinarily discernible by the use of one's senses, although a movable light appliance was furnished, to be carried into the bin, if the employee had never seen it in use, and did not know what was necessary in order to make it available. *Lund v. Woodworth* (1899) 75 Minn. 501, 78 N. W. 81.

The removal of the contents of a barrel above which are piled three tiers of barrels, each weighing 300 to 400 pounds, is not an ordinary incident in the work of a laborer engaged to pile barrels in a pork-packing establishment; nor is the risk of a collapse of the pile,

owing to the weakening of the emptied barrel and the spreading of the tier in which it is placed, patent to such a laborer, where his experience is limited to a few weeks of work. *Libby, McN. & L. v. Scherman* (1892) 50 Ill. App. 123, Affirmed in (1893) 146 Ill. 541, 34 N. E. 801.

A common laborer, although chargeable with knowledge of the operation of the force of gravitation under ordinary circumstances, cannot be said, as a matter of law, to understand the risk incident to unloading from a car by the roller method a stone several tons in weight. Whether the stone under such circumstances will cause the car to tip up would depend largely upon certain conditions,—such as the gauge of the track, the width of the platform, the weight of the car, and the stone itself, and the like. The danger, therefore, is not obvious. *Higgins v. Missouri P. R. Co.* (1890) 43 Mo. App. 547.

(cc) *Handling of heavy objects.*—(See also preceding subd. *ad finem*, and subd. (ee) *infra*.) To require a gang of men to range themselves in line along a train of moving cars, and pick up from the ground and throw on a car rails weighing from 600 to 700 pounds each, running from one to another fast enough to be in position as the train passes,—especially without notifying a new and inexperienced man of the great hazard of the work,—is negligence. *Palmer v. Michigan C. R. Co.* (1892) 93 Mich. 363, 17 L. R. A. 636, 53 N. W. 397.

It cannot be said, as a matter of law, that an entirely inexperienced man relying, as he has a right to do, upon the assumption that the master knows his duty to his employees and will fulfil it properly, is chargeable, on the day he begins work, with the knowledge that the method adopted by his foreman for removing rails from a bridge is not a reasonably safe one. *Bonnet v. Galveston, H. & S. A. R. Co.* (1895) 89 Tex. 72, 33 S. W. 334, Reversing (1895) 31 S. W. 525 (removal from a railroad bridge of iron rails 20 feet long, weighing 400 pounds, was being effected by four persons carrying the same, stepping from tie to tie).

Whether the raising of an immense iron smokestack, and placing it in posi-

be used as explosives, and the conditions under which other substances not designed for such use may produce an explosion (subd. *hh*), or the poisonous properties of the fumes arising from certain

tion on a base prepared for it, is an operation which requires such special skill or knowledge that a servant previously employed as a blacksmith, who is called upon to assist in pulling upon the rope of the hoisting apparatus, is entitled to instructions as to the dangers of the work, is a question for the jury. *Consolidated Coal Co. v. Haenni* (1893) 146 Ill. 614, 35 N. E. 162, Affirming (1891) 48 Ill. App. 115.

A common laborer who is assisting in hoisting a boiler which is being removed is not chargeable, as a matter of law, with the duty of inquiring whether the manner in which it is lifted and sustained is safe or not. *Chicago Edison Co. v. Moren* (1900) 185 Ill. 571, 57 N. E. 773, Affirming (1899) 86 Ill. App. 152.

The possibility that a plank 2½ inches thick, which is held in a horizontal position with one end on a wagon bed, so that a heavy barrel may be rolled on to it, preparatory to its being gradually depressed for the purpose of making an incline plane along which to lower the barrel to the ground, may be pushed back by the movement of the barrel so far as to drop from the wagon together with the barrel, and thus injure the workman who is holding the plank, is not an open and glaring peril which is obvious to an ordinarily prudent person. *Beard v. American Car Co.* (1897) 72 Mo. App. 583.

A servant unaccustomed to such work is not, as matter of law, chargeable with knowledge of the fact that it is unsafe to handle piles with crowbars and pinch-bars. *Anderson v. Illinois C. R. Co.* (1899) 109 Iowa, 524, 80 N. W. 561.

(*dd*) Operation of grindstones.—The danger that the end of an iron bar on a grindstone on which it was being trimmed would be caught and turned down, and so bring the other end and the hand which was holding it against the stone, was deemed an apparent one to an employee who had been engaged in the factory as a common laborer for eighteen months, and was injured the first day after he was transferred to the work of operating the grindstone. *Metz v. Peninsular Car Co.* (1889) 76 Mich. 94, 42 N. W. 1078.

(*ee*) Sustaining strength of materials.—(See also subd. (*d*), (*e*), *supra*.)

The danger that a shed may fall to the weight of debris and snow is allowed to remain upon the fact that it is not one of those which are deemed within common observation. *J. v. First Nat. Bank* (1891) 79 Wis. 48 N. W. 712.

An ordinary laborer employed in a foundry, who, under the direction of the superintendent, climbed upon a plank 16 feet above ground, for the purpose of lifting an iron tank by means of tackles, the beam supporting the tackle broke as he pulled upon the rope, striking the tackle to fall, striking and throwing him to the ground, is not a matter of law, chargeable with an appreciation of the risk, where the evidence shows that he had had no experience which would enable him to form an opinion as to the weight of the tank to be lifted, the resistance it would encounter, the pressure of the soil around it, or the strength of the beam. *Frederick v. Chalmers v. Collier* (1897) 75 Ill. 194.

(*ff*) Liability of iron and steel.—The danger that chips might fly off from a steel chisel with a battered head, which was being used to cut a rail, was held to be appreciated by a trackman. *Fordyce v. Stafford* (1893) 57 Ark. 22 S. W. 161. The extent of servant's experience was not referred to, but may probably be inferred that he had been engaged for some time in the work.

The risk of being injured by a hammer breaking from a piece of iron pipe, the plaintiff was holding against the head of a bolt to receive the blows, was held to be appreciated by the plaintiff, who was a hammer by which the bolt was driven was held not to be, as matter of law, obvious to him, where the work was new to him, and there was no special evidence to show that he knew that iron pipe was more brittle and liable to break than metals ordinarily used, and that he had seen any part of it break and fly before he was injured. *Field v. Edward P. Clark Co.* (1900) 151 Mass. 151, 58 N. E. 102.

The danger that a flyer may fly from a claw-bar which is cracked and battered at the edges is not obvious to a common laborer, as a matter of law, to a mere laborer in a section gang. *Booth v. Kansas C. & N. W. Ry. Co.* (1898) 76 Mo. App. 1.

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As regards the cases in which the servant's comprehension of the

A verdict finding the employer guilty of negligence in not instructing a servant as to the dangers of holding red-hot rivets while they are being hammered into boilers will be upheld where the evidence tends to show that he was ignorant of the dangers of the work. *Mannion v. Hagan* (1896) 9 App. Div. 98, 41 N. Y. Supp. 86 (portion of rivet broke off and entered servant's eye).

(gg) *Elastic properties of copper wire.*—It cannot be presumed, as a matter of law, that the danger from the sudden recoil of a trolley wire when it is cut is known to an inexperienced man in such a sense that his employer is free from negligence in failing to inform him as to the proper manner of cutting and removing the wire. *Walker v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 606, 62 N. W. 1032.

(hh) *Explosives, use of.*—In a case where the servant injured by an explosion in a mine was apparently an inexperienced laborer, as he had been hired to work either in the mine or on the dumps, it was held proper to instruct the jury that it is the employer's duty, before using a highly dangerous explosive, to ascertain and make known to his employees the dangers to be reasonably apprehended from its use. *Bertha Zinc Co. v. Martin* (1895) 93 Va. 791, 22 S. E. 869.

Negligence is predicable of the failure to notify a workman who is not a miner and knows nothing about dynamite or other explosives, of the danger that dynamite may explode from overheating or from the jarring produced by machinery. *Mather v. Rillston* (1895) 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464.

Negligence is a warrantable inference where a man not employed to perform that particular service was ordered, without instructions, to warm a quantity of dynamite, and was injured by the explosion. *Lofrano v. New York & M. F. Water Co.* (1890) 55 Hun. 452, 8 N. Y. Supp. 717.

Where the plaintiff's work in stone quarries had consisted in removing the stone after a blast had been made, and he had no knowledge that a blow or a spark would cause dynamite to explode, he cannot be held to be guilty of contributory negligence, as a matter of law,

in not going to a safe distance while a hole in which there was an undischarged charge of dynamite was being unloaded with an iron spoon. The risk of an explosion, under such circumstances, was not obvious to a person of ordinary intelligence having little experience with dynamite. *Grimaldi v. Lane* (1901) 177 Mass. 565, 59 N. E. 451.

A workman who has been employed for a few weeks as a shoveler at a mine is not chargeable, as matter of law, with knowledge of the fact that dynamite becomes extra-hazardous if it is exposed to the weather for a considerable period (here two months). *Myrberg v. Baltimore & S. Min. & Reduction Co.* (1901) 25 Wash. 364, 65 Pac. 539 (dynamite was struck by a fellow servant and exploded).

A common laborer who has had no experience in or knowledge of the use or danger of explosives employed for loosening frozen ground which is to be excavated for the roadbed of a railroad is entitled to assume that the representative of his employer will not put him to work with a pick in a place where a blast has been set off, without taking proper precautions to guard against the consequences of a part of the blast being left unexploded, and warning him of the danger to be apprehended from this source. *Burke v. Anderson* (1895) 16 C. C. A. 442, 34 U. S. App. 132, 69 Fed. 814, distinguishing *Minneapolis v. Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525, and *Cornelson v. Eastern R. Co.* (1892) 50 Minn. 23, 52 N. W. 224, where the injured servants were experienced and hired for and engaged in the use of the explosives.

(ii) *Explosive gases.*—A servant who had begun work as assistant stillman about two months before he was killed by an explosion of the gas which issued from the manhole of a refining still when the cover was removed was held not to be, as matter of law, chargeable with notice of the danger. *Bannon v. Lutz* (1893) 158 Pa. 166, 27 Atl. 890.

(jj) *Explosions resulting from steam generated by heated metals.*—(See also § 397, note 1, subd. (h), *infra*.) A master is not, as matter of law, free from negligence in omitting to instruct

risks arising from the action of gravitation (subd. *bb*) was held to be a question for the jury, it is clear that, in some instances, the conditions involved furnish an adequate differentiating element.

a common laborer as to the danger which arises from the expansive force of steam generated by the fall of molten lead upon a sheet of ice. *Smith v. Peninsular Car Works* (1886) 60 Mich. 501, 27 N. W. 662.

The fact that molten iron will explode if it is brought into contact with rust is not one which can be appreciated without some scientific skill and special knowledge. The employer's negligence is therefore for the jury, where a servant in a foundry, after only a few weeks' experience, was ordered to pour molten metal into molds which were rusty, but was not informed that the metal while in that condition would explode upon coming into contact with rust. *Hall v. United States Radiator Co.* (1900) 52 App. Div. 90, 64 N. Y. Supp. 1002.

The explosive power of hot slag when cast into water is not presumed to be comprehended by an ordinary workman without special training or experience. *McGowan v. La Plata Mining & Smelting Co.* (1882) 3 McCrary, 393, 9 Fed. 861.

Compare *Kiras v. Nichols Chemical Co.* (1901) 59 App. Div. 73, 69 N. Y. Supp. 44, where the same doctrine seems to be taken for granted.

It is conceded that even an educated man would not be aware of the danger of an explosion from the contact of slag with water or ice. *Ribich v. Lake Superior Smelting Co.* (1900) 123 Mich. 406, 48 L. R. A. 649, 82 N. W. 279.

The danger of putting damp leaden dross into a kettle of molten lead is not, as a matter of law, obvious to a servant who has merely been engaged for three months in melting lead and dipping it out of the kettle, and who has never seen any dross melted during that period. *Redmund v. Butler* (1897) 168 Mass. 367, 41 N. E. 108.

(*kk*) *Explosions of masses of molten metal.*—The tendency of a "boil" of molten iron to explode when punctured is one which is latent as to an inexperienced person. *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524. The court said: "The evidence tended, in some degree, to show two distinct elements of danger incident to the work upon which the

plaintiff's intestate was engaged—the injury was suffered—one of ordinary observation, and capable of being measured and judged of by no special knowledge or instruction; the other, of a latent character, with nothing which could be seen and understood by the employee and uninstructed to give warning of its presence, or suggest means of avoiding it. The 'boil' of iron while in the part had sunk down considerably—3 feet, may be—into the earth, and protruded above the surface, and was liable to those engaged in cutting the trench. It was common knowledge, appreciable by inexperienced as well as experienced persons, that, if the trench were open entirely up to the melted bottom being below the lowest point of the 'boil,' the iron would immediately flow into and along the trench, thus imperiling those who stood there at the time. This was a latent and unobscured danger, which should have been sought to be guarded against by the building of a wall of earth between the trench and the 'boil,' of from 8 to 10 feet thick, the purpose being to break the flow of the iron by piercing it with a crowbar after the laborers had cut the trench. Of such a patent danger there was no duty on the defendant to give the employees warning. The other element arose from the fact, supported by the tendency of the evidence here, that the 'boil' of iron, upon being punctured, having its shell broken, immediately throws out molten metal in all directions—'explodes,' as some of the witnesses stated as to this one, though it was said to be inapt and inaccurate to use the word in this connection. Of this peril—the danger of the flying molten iron—resulting from the unseen and unappreciated causes and forces, the inexperienced man could know nothing by the exercise of common sense. It was a state of things which would not address itself to his observation, and of which he could not come to a knowledge by being instructed in regard to it."

(*ll*) *Explosions caused by contact of water with potassium.*—The danger of throwing water on potassium is not presumed to be known to persons not possessed of expert knowledge; it is apparently taken for granted

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which to distinguish the decisions from those to the opposite effect, which are cited in § 324, note 1, subd. (a), *supra*. But an examination of the cases in which the servant was allowed to recover in spite of the absence of this element renders it extremely difficult, if not

Hill v. Meyer Brothers' Drug Co. (1897) 140 Mo. 433, 41 S. W. 300.

(a) *Explosions caused by the contact of water with burning grease.*—An employee as an ash wheeler in an engine house is not chargeable with knowledge of the fact that the consequence of suddenly turning a stream of water on a burning building in which there is a large amount of grease will probably be a dangerous explosion. *Sent & Co. v. Greasey* (1900) 9 Kan. App. 303, 61 Pac. 314.

(b) *Poisonous fumes.*—If chemical experts differ as to whether certain fumes are poisonous if inhaled, it cannot be that the danger of exposure to them is so open and obvious to a common laborer that he should be deemed to have voluntarily assumed the risk as one incident to his employment. *Danper v. H. W. Jayne Chemical Co.* (1902) 147 Pa. 475, 23 Atl. 772 (defendant not free from negligence, as matter of law, in exposing the servant to the danger without warning). The court said: "It is a well-settled rule of law that an employee will be deemed to have assumed all the risks naturally and reasonably incident to his employment, and to have notice of all risks which, to a person of his experience and understanding, are or ought to be open and obvious. This is a reasonable rule, for when a man seeks employment in any particular department, of either industrial or intellectual activity, he thereby represents himself to be qualified by the necessary experience or learning, as the case may be, for the performance of the duties which he proposes to assume, and such experience or learning necessarily brings a knowledge of the ordinary risks of the employment."

But when the reason of the rule fails, the rule itself ceases to have any application. And therefore, while a physician would have no ground of complaint if his health should be permanently impaired by reason of exposure, at the call of a patient, to a contagious or infectious disease, he might recover damages for the slightest injury suffered in consequence of a defect in the floor of the house which he was invited to enter, unknown to him, but which was known or ought to have been known to

his patron; and this because there is nothing in the science of medicine, in which he professes to be learned, to affect him with notice of the latter danger. Neither is there anything in the employment of a common laborer that presupposes any scientific knowledge, such as a knowledge of the properties of acids, or that poisonous fumes are likely to be evolved in a manufacturing process in which nitric acid is used; and for that reason, the law does not presume that such laborer either possesses or professes such knowledge. And, although some of the work required to be done in the manufacture of dinitrobenzene may be mere drudgery, it cannot be said to be of such ordinary character in its surroundings as to justify a presumption that a common laborer has by experience acquired a knowledge of its attendant dangers. Without some such previous knowledge, either scientific or experimental, the dangers, if any there be, of exposure to the fumes of nitric acid, would not be open and obvious, and the laborer could not, with propriety, be deemed to have assumed such risks unknown to him as are naturally and reasonably incident to his employment." The court distinguished *Beittemuller v. Berger & E. Brewing Co.* (1888) 22 W. N. C. 33, a case in which the servant was injured by a jet of ammonia, on the ground that there the plaintiff knew the danger to which he was exposed, having previously tested it, and retreated, and that the superintendent merely assured him, at the time he was ordered to return to work, that the ammonia was not so bad as it had been, thereby impliedly admitting the existence of some danger. As the plaintiff must have observed that this statement was not true as soon as he entered the room, the real state of facts being apparent to the dullest apprehension, he was properly deemed to have assumed the risk.

A laborer who is injured by the poisonous fumes exhaled from Paris green after he has been engaged for only five days in stirring up the constituents in a vat may recover on the ground that he received no instructions as to the danger of the process and the precautions which should be taken to avoid

impossible, to avoid the conclusion that there is, upon the real conflict of opinion between the courts in respect to the knowledge which is imputable to the servant under such instances. For other similar decisions with respect to risks of dangerous nature, see § 399, *infra*.

396. Risks of which a comprehension has been imputed, as of law, to servants having special experience.—Under certain exceptional circumstances, the servant's previous experience in his employment may be the occasion of his drawing false inferences with respect to the actual conditions which exist. His experience is a positively misleading element, and tends strongly to show that he was not guilty of negligence in failing to appreciate the possibility of

injury. *For v. Peainular White Lead & Color Works* (1891) 84 Mich. 676, 48 N. W. 203.

(*See*) *Action of electricity*.—The case is for the jury, where a workman who has been in the employ of a telegraph company about one month is injured by a current of electricity which passes from an electric light wire suspended on the same pole as a telegraph wire which he is handling. *Western U. Tele. Co. v. McMullen* (1895) 58 N. J. L. 155, 32 L. R. A. 351, 33 Atl. 384.

An unskilled workman employed to dig post holes and assist in general street work should not be ordered to ascend a pole and scrape an electric wire without being instructed as to the danger to which he would be exposed if it was carrying a current of electricity. *Tedford v. Los Angeles Electric Co.* (1901) 134 Cal. 76, 54 L. R. A. 85, 66 Pac. 76.

In the two following cases, the defendant was not the plaintiff's employer; but they may usefully be cited for purposes of illustration:

Constructive knowledge of the effect of moisture in destroying the insulation of an electric light wire is not imputed to a dishwasher at a hotel. Nor has such an employee such an interest in the sufficiency of the insulation of electric-light wires that he is chargeable with negligence in failing to notice that such insulation was defective at any particular spot. *Girardi v. Electric Improvement Co.* (1895) 107 Cal. 120, 28 L. R. A. 596, 40 Pac. 108.

In *Perham v. Portland General Electric Co.* (1897) 33 Or. 151, 40 L. R. A. 799, 53 Pac. 11, the court, in discussing the contention that the plaintiff, a car

pany, was chargeable with not testing the insulation of certain electric wires, said: "It is to be noted that the deceased had no special knowledge of electricity or its effects such as is possessed by persons of average intelligence. He knew that electricity is such a force carried by wires as is used in driving cars and lighting buildings and houses, and that the wires were used for that purpose. He supposed, as is the common understanding, that the insulating material with which such wires are covered placed there for the purpose of making them safe. The result of making them safe was no knowledge of the fact, as the record discloses, that wires are used for the transmission of electricity on account of the high voltage, and cannot be insulated at any reasonable cost so as to make them safe. The insulating material sometimes used thereon affords no protection against injury. Nothing can, therefore, be claimed in this case on account of special knowledge of electrical effect possessed by the deceased. There is no pretense that he had special knowledge of electrical effect. The wires were in fact dangerous. These wires were visible, insulated, and to all appearances perfectly safe. There was nothing in them to warn the deceased of the danger of being carried over them, or that there was any danger in coming in contact with them. The danger was not a secret one, and the insulation of the wires deceptive. The fact that one who deliberately goes into a place of known or apparent danger is injured must take the consequences of his hardihood can have no application here, because there was no

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risk which caused the injury.¹ Obviously, however, experience is a factor which, as a general rule, militates against the conclusion that the servant's ignorance of the risk in question was excusable.² That conclusion has been deemed unwarrantable, and the inability to recover affirmed, as a matter of law, in the cases collected in the note below.³

apparent danger, but, on the contrary, far as the deceased, a nonexpert, could ascertain from an examination, the wires were entirely safe and in perfect condition. He had a right, therefore, to believe that the place was safe, and to assume that the defendant company had exercised due care and caution to prevent injury to him, and had not placed on the bridge, in such a position that he would likely come in contact with them, wires which it knew to be dangerous.

(pp) *Hydraulic pressure.*—A common borer in a slaughter house was held not to be, as a matter of law, chargeable with knowledge of the danger of going into a sewer hole and undertaking single handed to wash it out with a hose in which the water was under a pressure of 80 pounds to the square inch, the evidence being that, with such a pressure, it required three men to manage it properly. *Dici v. H. H. Hammond Co.* (1901) 156 Ind. 583, 60 N. E. 353.

(qq) *Ships.*—An employer is not, as a matter of law, free from negligence towards his employee, an "oiler" on a freight boat, who, while assisting, as ordered, in putting a freight boat into commission, sustained injuries from falling into an open hatchway which was invisible because of the darkness, he being wholly unacquainted with, and not informed as to, the construction of a freight boat and with the custom to leave the hatchways open when a boat is out of commission. *Brown v. Ann Arbor R. Co.* (1898) 118 Mich. 205, 76 N. W. 407.

¹ As, where the dangerous conditions consist in the unusual construction of an appliance, and that construction is so uncommon that a servant of long experience in the manipulation of such appliances may well have had no opportunity of becoming acquainted with one of that particular kind. See *Missouri P. R. Co. v. Callbreath* (1886) 66 Tex. 526, 1 S. W. 622.

A boy who has been accustomed to work with a guarded machine should be instructed if he is directed to work an unguarded one. *Reese v. Pershey*

(1894) 163 Pa. 243, 29 Atl. 907. In *Turner v. Philadelphia & R. R. Co.* (1898) 137 Pa. 118, 20 Atl. 632 it was held that the danger that a pole not supported by guys or set in the ground, but merely held in place by a pile of coal around it, may fall at any moment during the time that the removal of the coal is going on, is not a danger which is proper to one who is ignorant of the facts, and whose experience has been that such poles are, as a rule, either held in place by guys or securely set in the ground.

An instruction explaining the difference between the fact that an inexperienced servant was experienced in work in general, and the evidence in *Turner v. Philadelphia & R. R. Co.* (1898) 137 Pa. 118, 20 Atl. 632, was approved in *McCarthy v. Witting* (1900) 163 Pa. 118, 20 Atl. 632, 80 N. W. 527. The plaintiff, having been working as a car painter for some months did not put out a sign.

Refusal to allow an employee to state whether or not his employer ever told him how to operate a machine, or warned him of its danger, is not prejudicial error, where the employee had operated the machine for three years. *McCarthy v. Mulquey* (1898) 107 Iowa, 76, 77 N. W. 527.

(aa) *Railroad tracks and apparatus.*—A helper of a railroad hostler assumes the risk incident to the insufficient depth of an ash pit into which he goes under an engine for cleaning the ash pan, where its depth and nature and the amount of space and all the dangers arising from its condition are known to him both by observation and experience. *Chen v. Chicago, B. & Q. R. Co.* (1894) 56 Ill. App. 235.

(ab) *Obstructions above railway tracks.*—An experienced brakeman is presumed to understand the risk to which an employee whose duties require him to be on the top of a high car is exposed by reason of the fact that that car is behind, and not in front of, the engine, and is run under a low bridge in that position. *Maher v. Boston & A. R. Co.* (1893) 158 Mass. 36, 32 N. E. 950. An experienced brakeman who is

In many of the cases cited, the fact that the injured person possessed a certain degree of technical skill and knowledge unqu

familiar with the situation of an overhead bridge, and knows that he cannot, even on the top of an ordinary car, stand upright while passing under it, is properly nonsuited where his own evidence shows that he stood with his back to the bridge while the train was approaching it, upon a car which, from its appearance, he ought to have recognized as being of more than ordinary height. *Rock v. Retsoff Min. Co.* (1891) 40 N. Y. S. R. 556, 15 N. Y. Supp. 872.

(c) *Obstructions alongside railway tracks.*—A brakeman experienced in construction work, who is injured by striking against a tree close to a temporary track running through a forest, while he is on a construction train using the track, cannot recover. *Manning v. Chicago & W. M. R. Co.* (1895) 105 Mich. 260, 63 N. W. 312.

A skilled engineer cannot recover for an injury caused by striking his head against a bridge while leaning out of the cab of his engine, on the ground that he should have been notified that this engine was 6 inches wider than those to which he was accustomed. *Belloc v. Pennsylvania & N. Y. Canal & R. Co.* (1893) 157 Pa. 51, 27 Atl. 685.

A conductor of a street car is chargeable, as a matter of law, with comprehension of the risk of standing upon the running board of an open car in such a position as to be struck by a car upon the adjoining track, which was 37½ inches distant from the track on which his car was standing, where he had been a conductor for nine years, although he had never before worked on an open car, and the open cars were wider than the closed ones. *Fletcher v. Philadelphia Traction Co.* (1899) 190 Pa. 117, 42 Atl. 527 (no duty to instruct).

(d) *Railway cars; construction and operation of.*—An experienced brakeman is presumed to understand the danger of coupling cars with double deadwoods. *Michigan C. R. Co. v. Smithson* (1881) 45 Mich. 212, 7 N. W. 791. There the court thus discussed the liability of the railroad company: "We have had produced for our inspection, on the argument, a model of the double deadwoods which caused the injury, and it seems impossible to give to the coupler any better or more effectual notification of their presence, and of the dif

ference from those belonging to defendants than their very form surely gives of itself. The difference is very marked and striking, and quite impossible to couple the deadwoods, or to approach them with any degree of accuracy without observing it. This, whether the coupling is done daytime or in the nighttime; for night every switchman has his eyes with him, or should have it on occasions. If, therefore, a switchman were to declare that he had attempted to couple the double deadwoods, noticing how they differed from those of defendant, the conclusion would be inevitable that he had gone beyond the performance of a duty requiring great care, and that he had not used his eyes to inform him what was before him. Moreover, the business of the railroad was of itself a notification that such differences requiring attention in coupling were to be encountered by switchmen and brakemen. The fact that the Central is a great common carrier of the cars of all the railroad companies of the country, and every man employed by the defendant, if he exercises ordinary intelligence, is perfectly competent to know of the fact. He knows, to the cars of the several railroad transportation companies differ, and that at one time or another such differences may appear in the coupling. Every train is likely to consist of several kinds, and he cannot assume to pass from one to another, and that two will be alike, much less that the whole train will be. To notify him of the differences would be a trouble some and expensive, and, as above explained, could not be a work of supererogation, for any man capable of performing the duty would be wiser after the notice than before. A man who would not heed the notice, the very nature and course of the business would impart to him, and he would be protected by no notice. The duty is that which a man must of his own sight see and which cannot be mislead him; he needs no prior notice to announce a precipice which stands before it."

To the same effect, see *A. T. & N. Y. R. Co. v. Valla* (1893) 147 U. S. 223.

ably constitutes the differentiating element on which the decision hinges. With regard to others it is scarcely possible, after comparing

150, 13 Sup. Ct. Rep. 298 (double dead-woods of unusual length caused injury to a servant who had had two months' experience in coupling, and was therefore not "inexperienced"); *Northern P. R. Co. v. Blake* (1894) 11 C. C. A. 93, 27 U. S. App. 190, 63 Fed. 45 (brakeman of seventeen years' experience was denied recovery where foreign cars with double deadwoods were passing daily over the road); *Balsard v. Louisville & A. R. Co.* (1894) 106 Ala. 641, 18 So. 29, Reaffirming (1893) 96 Ala. 626, 18 L. R. A. 260, 11 So. 667 (no obligation to instruct a brakeman familiar with couplings of the ordinary type, with regard to the obvious danger incident to the handling of cars with double buffers); *Chicago, B. & Q. R. Co. v. Curtis* (1897) 51 Neb. 442, 71 N. W. 42 (held that a brakeman who has been working seven years for a company which uses cars with single deadwoods is bound to know that foreign cars equipped with double deadwoods are constantly coming on to his employer's lines).

It is error to direct a jury to find a railroad company guilty of negligence on the ground of failure to instruct a brakeman specially as to the danger of coupling cars with double deadwoods, where evidence has been given which tends to show that the plaintiff had had five years' experience. *Hughes v. Chicago, M. & St. P. R. Co.* (1891) 79 Wis. 264, 48 N. W. 259.

An experienced brakeman is chargeable, as a matter of law, with a knowledge of the risk that the drawbars of two cars may slip and pass each other when they come together on a sharp curve, and thus render it dangerous for him to attempt to couple them while standing on the inside of the curve. *Tuttle v. Detroit, G. H. & M. R. Co.* (1887) 122 U. S. 189, 30 L. ed. 1111, 7 Sup. Ct. Rep. 1166.

If the coupling links and pins used by a railway company are not as strong as they should be, their insufficient strength is a fact presumed to be known to an experienced brakeman. *Illinois C. R. Co. v. Jones* (1882) 11 Ill. App. 324. But *quære* as to the soundness of this decision.

An experienced brakeman cannot recover for an injury caused by his miscalculating the actual difference between the heights of two drawheads, he being aware that there was some dif-

ference. *Hulitt v. St. Louis, K. C. & A. R. Co.* (1878) 67 Mo. 239.

No recovery can be had for an injury received by an experienced brakeman, who while he was uncoupling a pusher engine from the rear end of a box car which was used as a caboose according to the common practice of the defendant, but which had no platform guarded by a railing, was thrown off by the jerk which accompanied the taking up of the slack by the draft engine, such a jerk being a well-known incident under such circumstances. *Davis v. Baltimore & O. R. Co.* (1893) 152 Pa. 314, 25 Atl. 498.

A brakeman of experience is bound to appreciate the perils arising from the use of brakes of an obviously peculiar construction. *Philadelphia & R. R. Co. v. Hughes* (1888) 119 Pa. 301, 13 Atl. 286.

A freight handler with three years' experience, part of whose duty it was to hook up the door of a certain freight car, and who, on the occasion when he received the injury, had looked to see that the door was all right, was held to be chargeable with knowledge of an obvious defect in one of the hooks, which caused the door to fall when the car vibrated in the course of loading it. *Cassady v. Boston & A. R. Co.* (1895) 164 Mass. 168, 41 N. E. 129.

Where an experienced brakeman knew that it was the custom of his employers to haul cars on the line, and it was part of his duties to make up a train and check every car, it was held that he could not recover for injuries caused by going at night on to a partially burnt box car, the condition of which, though apparent, he had failed to notice after the car had been in the train an entire day. *International & G. N. R. Co. v. Story* (1901; Tex. Civ. App.) 62 S. W. 430.

The risks incident to working at the coupling of cars on a trestle with a descending grade, down which the cars to be coupled were sent after being "kicked" across scales and weighed while in motion, such cars being apt to acquire considerable speed and imperil persons on the trestle, were deemed to be obvious to a servant accustomed to the work. *Woods v. St. Paul & D. R. Co.* (1888) 39 Minn. 435, 40 N. W. 519 (servant fell through opening on trestle, and was dragged by a car).

them with the decisions collected in § 394, *supra*, to avoid the conclusion that this fact carries no really controlling weight, and

There can be no recovery where a brakeman familiar with his duties was injured because he failed to look at a car which he was about to couple, and so did not notice that its load projected. *Wabash, St. L. & P. R. Co. v. Deardorff* (1883) 14 Ill. App. 401. A brakeman with four months' experience is chargeable with knowledge of the danger incident to coupling cars loaded with lumber projecting over the ends. *Lothrop v. Fitchburg R. Co.* (1890) 150 Mass. 423, 23 N. E. 227.

(c) *Locomotives: construction and operation of.*—An experienced locomotive engineer is chargeable with an appreciation of the risk incident to operating a locomotive with a pilot so high about the rails that it is likely to cause the engine to run over an animal on the track, instead of throwing it off. *Fordyce v. Edwards* (1895) 60 Ark. 438, 30 S. W. 758 (1898) 65 Ark. 98, 44 S. W. 1034.

An experienced engineer operating a hard riding locomotive apt to jar and sway is chargeable with knowledge of the increased hazard in going out on the running board while the engine is in motion. *Southern P. R. Co. v. Johnson* (1895) 16 C. C. A. 317, 44 U. S. App. 1, 69 Fed. 359.

The risk caused by using for switching purposes an ordinary road engine was held to be comprehended by an experienced yard hand in *Young v. Boston & M. R. Co.* (1898) 69 N. H. 356, 41 Atl. 268. A similar decision is rendered in *Gulf, C. & S. F. R. Co. v. Schrabbe* (1892) 1 Tex. Civ. App. 573, 21 S. W. 706, where the extent of the plaintiff's experience is not stated. Apparently he had had some; if not, the decision can scarcely be correct.

(f) *Hand cars: construction and operation of.*—There is no duty to instruct a section man of several years' experience as to the danger that a light hand car may be derailed if it is run rapidly. *Gulf, C. & S. F. R. Co. v. Williams* (1888) 72 Tex. 159, 12 S. W. 172.

An experienced railroad employee who goes upon a hand car with knowledge that a fast train is due and expected and has the right of way assumes the risk of injury. *Wright v. Southern R. Co.* (1897) 80 Fed. 260.

(g) *Weight—sustaining structures.*—An experienced carpenter employed by the hour in side-boarding an air shaft

in a building, after he has worked three others exactly like it, assumes the risk of working by standing on 15 to 17 inches wide, above the shaft, which is continually in the course of the work. *Fa. Bothe* (1893) 117 Mo. 475, 22 1113, Reversing (1890) 43 Mo. 44. A carpenter cannot recover injury caused by the fall of a built by his employer without braces to support it, since the of its construction is as obvious as to the employer, and he is capable of judging as to its sufficiency. *Pozdanski v. Szczek* (1897) 71 I. 670.

An employee who has had no experience in handling shingles has been engaged for thirty years in mills, is presumed to comprehend a plank 16 feet long, braced to the of a house with three or four shingles is not sufficiently strong to bear the weight of three men and also shingles. *Daniel v. Forsyth* (1898) Ga. 568, 32 S. E. 621.

The liability of a mullion of a window in a flat roof to break under the weight of a man is a matter of common sense required to remove the old pane is an obvious danger to a glass pane directed to go on the roof and replace the pane of glass in the window. *S. v. Eastern Hydraulic Pressed Br.* (1899) 63 N. J. L. 554, 44 Atl. 100.

A skilled workman cannot recover for an injury caused by the giving of a floor, where he has had an opportunity of seeing how the floor itself was founded were constructed. *R. Porter Mfg. Co.* (1890) 57 Hu. 10 N. Y. Supp. 774.

An experienced carpenter who goes out making any examination of a box handed to him by his vicar, who to his knowledge has no examination thereof, assumes the risk of the box not being strong enough to bear his weight. *Soutar v. apolis International Electric Co.* 68 Minn. 18, 70 N. W. 796.

A freight handler of two months' experience cannot recover for injuries caused by the breaking of a grain-car door which was being used as a platform for the transfer of grain from one car to another, the handler being that he himself and his co-workers without any express instruction from a superior, had selected the door

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tion and tested its sufficiency, and that he had fully as thorough a knowledge as anyone of the capacity of such platforms and the accidents which might happen in using them. *Pennsylvania Co. v. Lynch* (1878) 90 Ill. 333. A brakeman who uses a gang plank for the purpose of unloading a car assumes the risks caused by the want of hooks or spikes to hold it in place, where he is an experienced railroad employee, the unloading has always been done in the same manner, and he is familiar with it. *La Pierre v. Chicago & G. T. R. Co.* (1894) 99 Mich. 212, 58 N. W. 60.

An employee who has worked in a lumber yard for ten years is chargeable, although he has never been warned, with the knowledge that, if boards of unequal length are piled with their ends uneven at the front side of the pile, some of the boards will project over the others at the other side, and he can not recover for an injury caused by the breaking of an unsupported end of a board while he was standing on it. *Campbell v. Dearborn* (1900) 175 Mass. 183, 55 N. E. 1042.

(b) *Slippery surfaces*.—(See also subd. (v), *infra*.) A verdict for the plaintiff should be set aside where the evidence shows that he was a man of ordinary intelligence; that he had been employed in defendant's tin plate factory for several months; that he was familiar with the premises, and knew of the custom of applying sawdust to the floor to absorb oil which was frequently spilled thereon; that in passing over such a spot, otherwise perfectly safe, in search of a hook which should have been supplied him, he slipped, and fell into an open vat of boiling oil, and that the place where the oil was spilled was exposed, and the sawdust and open vat in plain view. *Hattaway v. Atlanta Steel & Tin-Plate Co.* (1900) 155 Ind. 507, 58 N. E. 718.

The danger that a plank resting on greased iron rails will slip under persons who are engaged in moving heavy articles while standing on it, and that those persons may consequently be precipitated to the ground, is deemed to be obvious to any of them who are familiar with the method of work. *State use of Hamlin v. Mulster* (1881) 57 Md. 287. A complaint is demurrable where it shows that the plaintiff went between piles of scantling so slippery with snow

that "a slight jar would cause them to fall," and stooped down to count the lower tiers, without taking the precaution of first ascertaining whether they were likely to receive such a jar. *Booth v. Peters* (1882) 55 Wis. 405, 13 N. W. 219. Where a servant who had for five years been employed as a mechanic in establishments similar to that of the defendant's paper mills and for some three months with defendant, before the injury, was accustomed to use in his work a pine board pivoted by a bolt at one end, and resting loosely at the other on a smooth iron plate covered with grease, he is presumed to understand the risk to which he was exposed by the continuous enlargement of the pivot hole resulting from the abrasion of the wood when the board was swung round, and by the probability that the board would slip on the plate, if by leaning over it he subjected it to lateral pressure. *Booth v. Peters* (1882) 55 Wis. 405, 13 N. W. 219. Where a servant who had for five years been employed as a mechanic in establishments similar to that of the defendant's paper mills and for some three months with defendant, before the injury, was accustomed to use in his work a pine board pivoted by a bolt at one end, and resting loosely at the other on a smooth iron plate covered with grease, he is presumed to understand the risk to which he was exposed by the continuous enlargement of the pivot hole resulting from the abrasion of the wood when the board was swung round, and by the probability that the board would slip on the plate, if by leaning over it he subjected it to lateral pressure. *Booth v. Peters* (1882) 55 Wis. 405, 13 N. W. 219.

An employee who has worked three years in a sawmill is presumed to understand the dangers which may arise from the freezing of condensed steam so as to form a layer of ice on the rollers. *Peterson v. Sherry Lumber Co.* (1895) 90 Wis. 83, 62 N. W. 948. A servant familiar with the work, who was injured by a block of ice which ran off a skidway in a packing house, cannot recover. *East St. Louis Packing & Provision Co. v. McElroy* (1888) 29 Ill. App. 504.

(c) *Saws*.—Negligence is not imputable to a master failing to notify an experienced employee that a circular saw was dangerous, where the latter, while supplying wood to the man in charge of the saw, was injured by being struck by a piece of wood caught in it. *Delaware River Iron-Ship Bldg. & Engine Works v. Nuttall* (1888) 119 Pa. 149, 13 Atl. 65. The court said: "The negligence which the plaintiff imputes to the defendant, and for which a recovery was sought and allowed in the court below, is the failure to inform the plaintiff, when he was sent to carry the lumber, that a circular saw was a dangerous machine, and the failure to provide the saw with an attachment called a spreader. As to the first of these, it must be remembered that the work Nuttall was asked to do was simply that

certain inferences upon this point (see general remarks in *ante*), a collation of the authorities renders it either very d

of a bearer of burdens; work which is done by cheap and unskilled labor. He was a mechanic, and had for weeks been working in the same room in which this saw was operated. All that could have been told him by way of warning was, that there was a possibility of injury from a flying stick, but that during many years no such accident had happened in the defendant's works. That the omission of such a warning to a mechanic under the circumstances of this case was a failure in duty on the part of the employer is simply preposterous."

There is no obligation to instruct an employee who has worked during six seasons in sawmills and for the defendant six months, that a board lying on the dead rollers may be shoved forward and to one side by another board coming from the live rollers, and that if it is thus brought in contact with a revolving circular saw close by it may be thrown off the saw, and injure anyone who may be operating it. *Mississippi River Logging Co. v. Schneider* (1896) 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. 195. The court thus laid down the law: "If, however, it may be assumed that there was failure of duty here by the master with respect to the safeguard, its absence was an open, obvious fact. That it was wanting should have been observed by one of even slight experience in the business; certainly by one in the exercise of that ordinary care that the law casts upon the servant. The defendant in error was a man of mature years. He had had some six years' experience in this business. He was of ordinary intelligence and was no novice. He knew the operation and the use of every piece of machinery employed. He knew that the service was a dangerous one, and that even with the utmost care accidents would occur. He knew that material striking the revolving saw would be hurled with great force towards the operator. What warning from the master could have given him better instruction than he had,—instruction acquired by the experience of six years in the vicinity of dangerous machinery?"

An employee, after working for three years in a sawmill with a machine called an "edger," assumes the risk of the improper location of the iron band or guard placed above the saws of an

edger to prevent boards or from being thrown back. *Pike Sherry Lumber Co.* (1895) 90 W. 62 N. W. 948. An employee of years' experience is chargeable with knowledge of the risk that a board left after sawing off the strips may come into contact with an unguarded circular saw used by *Tennely v. Boston Wtg. Co.* (1890) Mass. 323, 49 N. E. 654. After months' experience in operating a servant will be deemed to understand the risk created by the fact that there was no guard behind it to keep the wood away from it, and no shield in front of it to prevent such block being thrown against the operator. *United States Rolling Stock Co. v. Wick* (1889) 35 Ill. App. 474. A servant cannot recover for personal injury received in the use of a "hand" in a sawmill, where he had been working in the mill for more than a year, and upon this machine for four years when injured, and its dangers were apparent to a casual observer. *Hobbs v. Wilson* (1892) 5 Wash. 160, 31 P. 469.

A complaint is demurrable which shows that the employee, after working for six months in operating a band, allowed his hand to come in contact with it while looping up a cord which an electric drop light was suspended. *Everhard v. Diamond Co.* (1899) 98 Fed. 555.

No action can be maintained by an experienced employee in a sawmill in removing the sawdust which was falling from the sawdust carrier below a running at a high speed, and extending in an unguarded condition several feet below a table on which it was placed his hand in contact with the saw. *Anderson v. C. N. Nelson & Co.* (1896) 67 Minn. 79, 69 N. W. 100.

A servant thirty-five years old with fourteen years' experience in making assumes the danger of letting his hand come in contact with a saw 4 feet in diameter, cracked and bent from the outside, on a large iron frame for the purpose of cutting it in half. *Erdman v. Illinois Steel Co.* (1898) Wis. 6, 69 N. W. 993.

An employee of nine years' experience, who, with full knowledge of the location of a machine at which he was employed, and of the relative strength of hard and soft wood, continues to

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employment after a change in the character of the plates in which a saw runs from hard to soft wood, assumes the risk incident to the use of such plates. *Freeman v. Dennison Mfg. Co.* (1899) 40 App. Div. 99, 57 N. Y. Supp. 478.

(j) *Planers and similar machinery.*—The risk of having the hand caught by revolving knives in a planing machine while it is being oiled is a danger patent to a servant who had been working for ten months on other planing machines of a different construction, and for two months on the one in question. *Idaho Lumber Co. v. Bithen* (1892) 57 Ark. 76, 20 S. W. 808.

To an employee who has had four or five years' general experience, and has been three months in the employment where he is injured, the risk resulting from the absence of a guard to prevent the hands of the operator from being thrown against the knives of a jointer by the reaction of the pieces of timber is deemed to be obvious. *Guedthofer v. Erusting* (1899) 23 Ind. App. 188, 55 N. E. 113.

An employee is chargeable with comprehension of the risk of having the fingers cut by the knives of an unguarded "jointer" working along a slot in a table, where he had worked at other machines for sixteen years, and at a planer of the same kind for a week some years before the accident. *Rudd v. Bell* (1887) 13 Ont. Rep. 47.

(k) *Machinery with revolving rollers.*—A woman who has been employed for three and a half months in a laundry, and for one month on an ironing machine, cannot recover for injuries caused by her hands being drawn between the rollers of the machine. *Doolittle v. Paff* (1900) 92 Ill. App. 301. The failure to instruct cannot be relied on as a ground of action, where an employee, after working about three weeks, was injured while assisting to put a new covering cloth on the upper roller of an ironing machine. *Connolly v. Eldridge* (1894) 160 Mass. 566, 36 N. E. 469. It is not negligent to omit to warn an adult female employee who has been working several months in a laundry, and has been engaged for two months in cleaning a revolving cylinder, that, if a part of the cloth which she wraps around her hand while she is doing this work is allowed to hang down it is likely to be taken up by the cylinder and

to draw her hand into the machine. *Hoyle v. Excelsior Steam Laundry Co.* (1894) 95 Ga. 34, 21 S. E. 1001.

It may reasonably be assumed that a woman of full age, whose hand was injured by being caught in the rollers of a drying machine in a steam laundry, was not in need of any instructions, where the machine was similar to those which she had been handling for two years. *A fortiori* is such an assumption warrantable where the person in charge of the machine questioned her as to her familiarity with it before starting it, and watched her operate it, until satisfied that she was a skilled operator. *Kennan v. Waters* (1897) 181 Pa. 247, 37 Atl. 342.

Where the space between the rollers of a drying machine is increased or diminished by raising or lowering a weight, a servant who has been operating the machine for nineteen months is presumed to be capable of understanding the effect of this process, and cannot recover if, on a certain occasion when he returned after a temporary absence, he was injured owing to his failure to notice that the distance between the rollers was greater than it was before he ceased work. *Standtke v. Scrifts Conde Co.* (1900) 53 App. Div. 500, 65 N. Y. Supp. 942.

Where a servant has been working for eighteen months in various industrial employments, some of them requiring the operation of machinery, there is no obligation to instruct him as to the danger of having his fingers caught between the rollers of a "jigger" and the cloth which is being wound about it. *Richstain v. Washington Mills Co.* (1893) 157 Mass. 538, 32 N. E. 908.

An employee who has had over two years' experience in working a snuff mill is presumed to comprehend the danger arising from the jumping movement of the rollers, which occurs when the tobacco is wetted. *Johnson v. Devroe Snuff Co.* (1898) 62 N. J. L. 417, 41 Atl. 936.

The risk of having the arm caught in a spindle used in making steel cores to be employed in casting iron water pipes is obvious to a man of ordinary comprehension who has been engaged in similar work for several months. *Dougherty v. West Superior Iron & Steel Co.* (1894) 88 Wis. 343, 60 N. W. 274.

cases cited, the precise evidential significance attached to the fact of experience cannot be gauged with any precision. Under su

A skilled workman, foreman of the rollers in a rolling mill, who steps on a tub near the rollers and slips off upon them, cannot recover. *Shaw v. Sheldon* (1886) 103 N. Y. 667, 9 N. E. 183.

(1) *Cogwheels and gearings.*—To an adult who has worked many years round machinery, the risk created by uncovered gears in a sawing machine is presumed to be obvious. *Williams v. J. G. Wagner Co.* (1901) 110 Wis. 456, 86 N. W. 157. After working one year on a machine with an unboxed gearing, a servant is chargeable with a comprehension of the risk of being injured by that gearing. *Collins v. Lacanor Car Co.* (1895) 68 N. H. 196, 38 Atl. 1047. A machinist who had had five years' general experience, and had operated for two weeks the particular machine which injured him, was held unable to recover where, without looking, he put out his hand to take hold of the lever by which the machine was stopped, and it was caught in a gearing a few inches away from the lever. *Foley v. Potter Mach. Works* (1889) 149 Mass. 294, 4 L. R. A. 51, 21 N. E. 304.

In a case where the injury was received on the day that the servant began to operate the machine in question, but it appeared from the evidence that he had been doing various jobs in connection with the machinery in the same establishment for several years, it was held that negligence was not predicable of the omission to instruct him that cogwheels in plain sight were uncovered, or that if he got his hands in the cogs he would be hurt, or that if he attempted to grasp a lever near the cogs without looking he was liable to be injured. *Wilson v. Massachusetts Cotton Mills* (1897) 169 Mass. 67, 47 N. E. 506. An experienced employee who has worked for four months in a room in which a loom having unprotected gearing is situated assumes the risk of injury from being pushed against such gearing by a person passing him in the aisle. *Goodridge v. Washington Mills Co.* (1893) 160 Mass. 234, 35 N. E. 484.

(m) *Shafts, set screws, etc.*—An experienced workman not shown to have been under full age or of less than average understanding assumes the risk of his glove catching on the set screw of a machine used for reeling wire, while reaching in his hand to get the wire for the purpose of taking the reel from the

block. *Donahue v. Washburn Mfg. Co.* (1897) 169 Mass. 574, 47 N. E. 842. A machinist will be presumed to know that the collar of an axle used on his master's premises is kept in place by such a common set screw, and recover on the theory that he have been warned as to the danger which he was exposed by being work near a shaft on which there was such a screw. *Goodhue v. Emory Mills* (1888) 146 Mass. 576; *Koehn v. National Mach. Co.* (1895) 13 C. C. A. 656, 65 Fed. 940.

The danger of being caught by a screw in a shaft visible when the shaft is at rest, but not when it is in motion, is not one of those with regard to which there is a duty to instruct a novice who has been a sailor for many years and has never handled or had close contact with such machinery, but has worked near a shaft in a factory. *Rooncy v. Seawood Cordage Co.* (1894) 161 Mass. 576, 35 N. E. 789.

A servant who had worked for some time in mills cannot recover for injury caused by his apron and catching on a revolving shaft if he was standing on a ladder beside the shaft to replace a board on the belt by which it ran. *Russell v. T. & J. Co.* (1885) 140 Mass. 201, 4 N. E. 101. Holmes, J., said: "The plaintiff cannot pretend that he was ignorant of the danger of a revolving shaft, or that the order to him carried any suggestion that he should put the ladder in such a position as he might deem best, nor that there was anything in the form of it that would lead him to suppose that it would harm or disturb his judgment; but he must have had sufficient intelligence—for that is what it comes to—see that he was less likely to be in contact with the shaft if he had been behind the barrier of the belt box between the shaft and the belt; or, if he took a worse position to keep away from the danger which he knew. As it is not suggested that he was a man of manifest inferior intellect, we think that the foreman was not bound to assume that the plaintiff would be so stupid as to neglect himself by whatever precaution was necessary."

In a case where a rope which was carrying a weight was caught in a pulley and it appeared that he had been in other establishments

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same kind as the defendant's, and that for two days before the accident he had been engaged in work which gave him an opportunity of ascertaining the conditions, and that a co-servant had warned him of the danger, it was held that the defendant was entitled to an instruction that, if the risk was a permanent, visible one, the servant could not recover. *Stone v. Oregon City Mfg. Co.* (1870) 4 Or. 52. The danger of being caught by a friction clutch pulley on a rapidly revolving shaft, while a belt is being adjusted, is presumed to be understood by a servant whose duties are to look after the machinery and make the necessary repairs, and who has been working about a year in mills of the same kind as the defendant's. *Illinois River Paper Co. v. Albert* (1893) 49 Ill. App. 363.

(n) *Spinning mules*.—An experienced spinner cannot recover for injuries to his hand, received while he was reaching out to stop his spinning mule when the electric lights had gone out, where he had worked for defendant for four months, during which time the electric lights had gone out several times. *Kelly v. Calumet Woolen Co.* (1900) 177 Mass. 128, 58 N. E. 182.

(o) *Machinery operating vertically*.—A servant who has been operating a stamping machine for three years is presumed to understand any obvious risks which result from the manner in which it is constructed. *Towney v. Boagran* (1893) 158 Mass. 232, 33 N. E. 396 (servant had worked for three years on a machine with no guard to prevent the descent of a headblock).

(p) *Grinding machines*.—Where a servant was "truing" a grindstone by holding a piece of gas pipe against it, and the gas pipe and his hand were drawn between the stone and a "rest" extending across and in front of the stone and on which the gas pipe rested, he cannot recover if the evidence shows that he had long been familiar with the work. *Smith v. Beaudry* (1900) 175 Mass. 286, 56 N. E. 596.

An employee who has worked in a shop for four years as a machinist assumes the risks of using an emery wheel, arising from such obvious defects as that it is not properly encased, that it is made of an inferior kind of stone, that it has no rest, and that it is run at an excessive speed. *Brig v.*

Chicago & W. M. R. Co. (1893) 98 Mich. 222, 57 N. W. 118.

(q) *Windlasses*.—A seaman cannot recover for an injury sustained through a defective windlass, where he was of full age, had been to sea on vessels of the same kind for many years, and was familiar with that kind of a windlass, and observed it and its condition before entering upon the voyage. *Anderson v. Clark* (1892) 155 Mass. 368, 29 N. E. 589.

An employee in a car repair shop, who was mortally injured by a blow received from the revolving handle of a windlass, defective because it has no ratchet, but which he endeavored to stop, was guilty of such negligence and voluntary assumption of an obvious risk as will bar a recovery by his personal representative for his death, where he was a man of mature years and experience, and had worked in the shop some time, although the precise work in which he was engaged was not familiar to him. *Channaham v. Lynn & B. Street R. Co.* (1898) 170 Mass. 298, 49 N. E. 440.

(r) *Ventilating fans*.—No action can be maintained by a female employee who, after six months of service, had her hand caught by a fan inserted in the frame of a window, while she was attempting to lower the sash. *Dillonberger v. Weingartner* (1900) 64 N. J. L. 292, 45 Atl. 638.

(s) *Automatic starting of machinery*.

An experienced employee who knows that a lever on the machine at which he is working is liable to slip when there is a jar, and to throw the machine into gear and set it in motion, cannot recover for an injury resulting from such an occurrence while he is loosening a screw on the machine with a wrench. *Bailey v. Howell* (1901) 82 Minn. 382, 85 N. W. 167.

(t) *Steam pressure*.—An employee of a railroad company, who had been a locomotive fireman for six months, and had run a stationary engine before that time, must be taken to be familiar with the action of steam, and the liability of the glass tube of the boiler to burst from the pressure upon it from within, and all the danger resulting therefrom. *Fuller v. New York, N. H. & H. R. Co.* (1900) 175 Mass. 424, 56 N. E. 574. As the effect of steam pressure is a matter of common knowledge, an em-

sections. It cannot be said that they have established any doctrines, except, perhaps, in respect to a few of the more fre-

ployee in charge of a boiler, one of whose duties was to keep the blow pipe in order, is presumed to have understood the risk of the parting of the blow pipe as the steam was turned into it, at the point where the vertical section entered the elbow connecting it with the horizontal section, the result being that the horizontal section flew up and struck him, where a common laborer who, shortly before the accident, had disconnected the pipe at the elbow in order to clean it, informed him that there was only one thread on the pipe, and that it was barely caught in the elbow, and was instructed by him to replace it in the same condition. *Mackey v. Newberry Furnace Co.* (1899) 119 Mich. 552, 78 N. W. 783.

An experienced engineer who, without ascertaining the condition of the stop-cock between the boiler and a supply pipe, proceeds to remove the pipe while steam is up, is negligent. *Bischoff v. St. Paul Bethel Assn.* (1901) 82 Minn. 165, 84 N. W. 731.

(u) *Furnaces*.—A boiler inspector who represented that he possessed the requisite experience to perform such work, and saw and knew the conditions surrounding him, cannot recover for an injury sustained by falling into the combustion chamber, in which were hot ashes and burning soot. *Westville Coal Co. v. Milka* (1897) 75 Ill. App. 638.

(v) *Ladders*.—An experienced mechanic who mounted a ladder standing upon the floor of a factory, and was thrown from it to his injury, by reason of its slipping from beneath him, is guilty of contributory fault in failing to observe the absence of spikes to hold it in place, since the defect was open and obvious. *Borden v. Daisy Roller Mill Co.* (1898) 98 Wis. 407, 74 N. W. 91.

(w) *Bars for lifting, etc.*—A machinist of twenty years' experience is presumed to be aware that a pinch bar may slip upon a rail, if its heel becomes dull. *Holt v. Chicago, M. & St. P. R. Co.* (1896) 94 Wis. 596, 69 N. W. 352. Where a claw-bar slips while a section hand is putting a spike, and strikes him in the head, he cannot recover. *Louisville, E. & St. L. Consol. R. Co. v. Allen* (1893) 47 Ill. App. 465 (servant here presumably had some experience at

all events, but no specific reference made to this element).

(x) *Push poles*.—A brakeman familiar with switching cars with push poles used in that capacity cannot recover from his employer for personal injuries received in the use of a push pole of green wood, 8 feet in length, only 5 inches thick at the end and 3 inches thick at the other end, and not iron bound in any place which he picked up and placed in the engine, and at the place of the accident threw from the engine and pinched his hand, and used in the work in which he was injured. *Maul v. Queen Anne's* (1899) 1 Penn. (Del.) 561, 42 A. 2d 101.

(y) *Kettles*.—An experienced employee in a candy factory, well acquainted with a furnace used to melt sugar, which has no rings belonging to it, and is not adapted for the use of kettles of different sizes, is guilty of contributory negligence in not observing the risk that a ring belonging to a kettle, selected by him and laid upon the furnace in use, may cling to the full of melted sugar, and fall upon the floor while he is removing the kettle. The equally obvious fact that it happened in this particular is immaterial. *Barnard v. Schrafft* (1897) 168 Mo. 211, 46 N. E. 621.

(z) *Action of electricity*.—An employer is not bound to instruct an experienced lineman as to the danger of touching live electric wires. *Junon v. South Electric Light & P. Co.* (1899) 70 Mo. 29, 8 N. W. 988.

The fact that the upper switch of an electric lamp is wanting is obvious to an experienced lineman. *W. & S. Southwestern Electric Light & Power Co.* (1897) 68 Mo. App. 38.

(aa) *Condensation of steam*.—The danger of working in a mill where steam from a leak is so abundant as to make it difficult to see is presumed to be understood by a skilled craftsman. *Peterson v. Sherry Lumber Co.* (1890) 90 Wis. 83, 62 N. W. 948.

(bb) *Action of gravitation upon loose substances*.—An employee of years' experience, excavating at the base of a frozen sand bank, assumes the risk of injury by its falling down upon him where he knows that blasting has been resorted to, to break down the

and any danger more frequent.

and the danger of its falling is open and

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95 Wis. 333, 70 N. W. 662 (plaintiff ad-

mitted that "he did not look to see").

A bricklayer engaged in building a

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(1898) 62 N. J. L. 30, 11 Atl. 364

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caused by the collapse of an unshored

trench 13 feet deep. *Walker v. Scott*

(1901) Kan., 64 Pac. 615. Reversing

recurring situations and conditions. In much the larger number of instances they are, as precedents, valuable merely by way of analogy.

and the danger of its falling is open and obvious, *Larsson v. McClure* (1897) 95 Wis. 333, 70 N. W. 662 (plaintiff admitted that "he did not look to see"). A bricklayer engaged in building a sewer in a trench in which the bracing was done after consultation with him, must be held to have assumed the risk of the caving in of the bank at a point where the sheathing was not driven down to within 2 or 3 feet of the bottom of the trench, caused by the penetration of water, aided by the jar of a blast, where he had had experience in such work, and where he returned after the explosion, looked at the bank as he passed down into the trench, and was just resuming work when it fell upon him. *Curley v. Hoff* (1899) 62 N. J. L. 758, 42 Atl. 731. A servant experienced in excavating work was held to understand as well as his employer the danger incident to being in an unshored trench dug where there was a layer of quicksand and underneath layers of hard earth and gravel. *Reagan v. Pala* (1898) 62 N. J. L. 30, 11 Atl. 364 court expressly referred to the fact that the inexperience of the servant was not relied on by his counsel. A laborer who has previously worked at quarrying stone, mining, and digging wells cannot recover for an injury caused by the collapse of an unshored trench 13 feet deep. *Walker v. Scott* (1901) Kan., 64 Pac. 615. Reversing (1900) 10 Kan. App. 413, 61 Pac. 1091. The danger that an unshored trench four feet deep may cave in is presumed to be appreciated by an employee who has been engaged for three years in laying service pipes and taking up street mains. *Foley v. Grand Rapids Gas-light Co.* (1901) 127 Mich. 671, 87 N. W. 53. A railway company is not liable for the death of a shoveler caused by the falling of a bank of earth upon him, where he has been for a year engaged in the same duties, and the ordinary method of work has been to undermine the bank and allow it to fall to the bottom of the excavation. *Rasmussen v. Chicago, R. I. & P. R. Co.* (1884) 65 Iowa, 236, 21 N. W. 583.

The risk of injury to a person shoveling coal at night in an uncovered coal yard, from the falling away of a frozen crust of soft coal overhanging the coal bank, is assumed by an employee who has worked four years in the day gang, and four years in the night gang, and is thoroughly familiar with all the surroundings. *Cassey v. Grand Trunk R. Co.* (1894) 68 N. H. 162, 44 Atl. 92.

An experienced miner who voluntarily prosecutes the work of sinking a shaft in a mine assumes the risk of a cave in while timbering the shaft, where he knows more of the shaft and the character of the ground than his employer, and believes that it can be timbered before it will cave in. *Stiles v. Richie* (1896) 8 Colo. App. 343, 46 Pac. 694.

Case Handling of heavy objects. (See also subd. (22), *infra*.) Where a workman who has been engaged for a considerable time in unloading logs from cars on to a skidway removes the obstacle which holds a log in its place on a car, and thus sets it rolling towards him while he is in such a position that he cannot escape from it into the "dodge hole" provided as a refuge, no recovery can be had for his death consequent upon such action. *Gulf, R. & C. R. Co. v. Hernandez* (1898) Tex. Civ. App. 45 S. W. 197. The risk of being struck by a log which slipped on a log deck, the skids of which were unprovided with any stops or barriers to prevent such accidents when the saw carriage was in motion, was held to have been assumed by a servant who had worked about sawmills, a portion of the time inside, and who had rolled logs with a cant hook, though not on to a saw carriage. *Shulky v. Marquette Lumber Co.* (1900) 107 Wis. 250, 83 N. W. 514.

From the nature of his employment a section foreman is presumed to have a full appreciation of the danger of handling a heavy body like a rail with insufficient appliances, and he cannot recover if, in trying to straighten the rail without the proper implement, it strikes and injures him. *Texas & P. R. Co. v. Bradford* (1886) 66 Tex. 732, 59 Am. Rep. 739, 2 S. W. 595.

An employee twenty-five years of age, experienced in handling freight in a warehouse, is chargeable with knowledge of the dangers involved in moving across an uneven floor a millstone which, on account of the bulge on one of its surfaces, is heavier on that side. *Walsh v. St. Paul & D. R. Co.* (1880) 27 Minn. 367, 8 N. W. 145.

397. Risks not deemed to be, as a matter of law, within the comprehension of servants having some experience.— In the note below

A carpenter of ten years' experience cannot recover for an injury due to the fact that one end of a beam slipped into the mortise prepared for it so far that the other end slipped off of its support, and, falling upon a scaffold, broke it down. *Smith v. Tammelauser* (1895) 63 Minn. 98, 65 N. W. 122.

It has been held that an employee of a lumber company, who had been at work for three weeks, could not recover for injuries caused by the fall of an unusually long piece of lumber from a truck to which it had not been secured as it should have been. *Buchholz v. Brunswick Lumber Co.* (1894) 101 Va. 535, 19 S. E. 756.

That the moving by hand of heavy and unwieldy pieces of iron, on their edges, requires care to prevent their falling on the workmen, is deemed to be manifest to an employee who has been engaged in work of the same general character, though the pieces of iron are larger and heavier than usual. *Cunningham v. Ft. Pitt Bridge Work.* (1901) 197 Pa. 625, 47 Atl. 846.

A servant who has had experience in handling heavy objects, and, while engaged with others in unloading by hand heavy iron beams from a wagon on which he has helped to load them, is injured by one of them in a manner not explained by the evidence, is presumed to know as much about the danger as anyone. *Nepher v. Whitehead* (1900) 123 Mich. 255, 81 N. W. 1083.

It is not negligence for one superintending the handling of a heavy stone, to fail to give specific instructions to experienced workmen to be careful not to get their hands or feet under the stone as they are letting it down. *La Belle v. Montague* (1899) 174 Mass. 453, 54 N. E. 859. The insecure position of a large stone left standing on its edge without props is presumed to be known to a servant engaged in the specific work of loading and unloading stones and placing them in his employer's yard; and he cannot recover for injuries caused by its falling on him when he was about to attach the "dogs" to it. *Salem Bedford Stone Co. v. Hobbs* (1894) 11 Ind. App. 27, 38 N. E. 538.

An experienced longshoreman who obeys an order to get into a position where he can push a draft of goods towards the middle of the hatchway, instead of pulling it, as he would prefer

to do, cannot recover for an injury caused by the bale of goods, which from the cargo piled behind him being a risk which he is presumed to comprehend. *O'Connell v. Clark* 22 App. Div. 466, 48 N. Y. Supp. 222, 36 N. Y. S. R. 852, 13 N. Y. Supp. 1001. *Inflammable and explosive.* The danger that might be in making a varnish may be caused by the heat of a furnace in an unventilated room is presumed to be understood by a skilled workman fully acquainted with the process of manufacture. *Standard Oil Co.* (1899) 38 App. Div. 621, 56 N. Y. Supp. 273. A servant who has worked for a year and half in a petroleum refinery is presumed to have acquired sufficient knowledge of the nature and properties of the products to understand that its products are inflammable—especially under a condenser—great heat—of generating explosive gases, and that it is unsafe to bring into contact with those gases which are being evolved. *Bonfield v. Standard Oil Co.* (1894) 75 Hun. 209, 27 Supp. 16 (no duty to instruct). The presumption can be maintained for the death of an experienced miner killed by an explosion due to his carrying a lantern past an oil well from which escaped a smell and hear gas caused by the explosion. *McInerney v. Fisher* (1885) 1 Cent. Rep. 571, 2 Atl. 60.

An employer is not liable for an injury to an employee, sustained while painting the inside of a tank with black varnish, through the ignition of the varnish from a torch held by a fellow workman, where the employee had continued for twelve years as a part of the employee's duty to paint the tanks. *Luons v. Tonnage & Lightage Co.* (1894) 163 Mass. 158, 39 N. E. 800.

(cc) *Inflammable dust.* — A servant who has been engaged for three years in certain work is chargeable with knowledge of the inflammability of the material incident to such work, if it is a matter of common knowledge. *O'Reilly v. Bunker Fertilizer Co.* (1899) 174 Mass. 202, 54 N. E. 531.

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(ff) *Explosives; use of.* — A servant familiar with the incidents of blasting rock with dynamite is presumed to understand that occasionally some of the charges remain unexploded in the broken pieces of rock. *Stalder v. Huntingdon* (1899) 153 Ind. 354, 55 N. E. 88.

A servant who has been employed in various mines for two years, and in defendant's mine for three months, is presumed to understand the extent of the danger incident to using as a tamping bar a piece of gas pipe plugged with wood. *King v. Morgan* (1901) 48 C. C. A. 407, 109 Fed. 446.

Since an experienced miner who for extra compensation undertakes to draw the pillars and stubs at a cross-entry in a mine has at least as much knowledge as his employer as to the danger of the fall of rocks from the roof when blasting, he assumes the risk thereof. *Watson v. Kansas & T. Coal Co.* (1893) 52 Mo. App. 366. A servant who, after having been engaged for a considerable time in a mine, goes to work upon a narrow roadway in a mine above a precipice about 75 feet high, in the business of blasting down and cutting away under a precipice immediately above him, assumes the risk that the fall of rocks shaken loose by the blasting may knock him off from such roadway. *Brown v. Tonic Iron Co.* (1893) 9 Utah, 291, 34 Pac. 61.

An employee who for several months has been engaged in trimming or filling cars with ore in a cut or slope of a mine, and who knows of frequent blastings and that loose rock and ore often fall from the roofs and sides, assumes the risk of such an occurrence while he is engaged in erecting a scaffold. *Paul v. Florence Min. Co.* (1891) 80 Wis. 350, 50 N. W. 189.

(gg) *Insufficiency of the number of servants in a given instance.* — As a carpenter is presumed to know something by experience about the weight of timber and the capacity of a certain number of men to handle it, he cannot recover for injuries received while he was helping to load a heavy piece on a car with a gang of four men, his own testimony being that he thought this number sufficient. *Brown v. Southern R. Co.* (1901) 128 N. C. 387, 38 S. E. 914. A servant who had been engaged for a long time in such work was held capable of judging the number of employees necessary to perform safely the work of unloading rails from a push car. *Southern Kansas R. Co. v. Drake* (1894) 53 Kan. 1, 35 Pac. 825.

In a case where a section man was injured while assisting the other laborers to lift a hand car off the track when a train was approaching, the defendant is entitled to an instruction that the plaintiff cannot recover if the weight of the car and the number of men necessary to handle it were open and patent to common observation. *St. Louis, A. & T. R. Co. v. Loman* (1892) 82 Tex. 143, 18 S. W. 334 (experience not specifically mentioned here, nor, so far as appears, relevant upon).

The risk caused by the insufficient number of servants assigned to the task of hoisting a heavy timber was held to be patent to a laborer in a bridge repairing gang. *Texas & P. R. Co. v. Rogers* (1893) 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378. In this case the servant's experience was not expressly adverted to, but it may perhaps be inferred, from the duties in which he was engaged, that he had had some experience. At all events it is difficult to concede that a raw workman can be charged, as a matter of law, with the possession of the knowledge here imputed.

(hh) *Operation of mines.* — (See also subd. (hh), (ff), *supra*.) The danger of working in an insufficiently timbered shaft is imminent and obvious to an experienced miner, especially after he has been once injured by a falling stone. *Horbach v. Home Min. Co.* (1894) 53 Kan. 731, 37 Pac. 122.

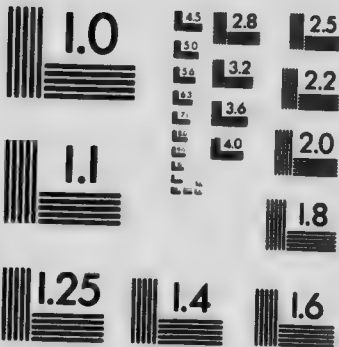
A servant who has worked in the defendant's mine four months, and in mines similarly constructed for ten years, accepts all such risks as may result from the manner in which the tunnel which serves as an exit from the mine is constructed, and from the system on which the empty and loaded cars are operated therein; and he cannot recover for an injury received in attempting to climb on to a loaded car on one track to escape being run over by a train of empty cars on the other track, which, to his knowledge, might pass at any moment. *Fisher v. Boone Valley Coal & R. Co.* (1901) 113 Iowa, 94, 84 N. W. 970.

An experienced coal miner having sole charge of the ventilation of the mine, and who knows better than any other employee the character and location of wooden buildings at its entrance, and the danger of smoke being carried into the mine in case of their burning, assumes the risk of being suffocated thereby. *Coal Creek Min. Co. v. Davis* (1891) 90 Tenn. 711, 18 S. W. 387.



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collected some cases in which the ignorance of experienced servants was held to be excusable.¹

An examination of these cases shows that, if we except such as that in subd. (a) of the note, which is preferably referred to in consideration that the accident was due to conditions which occurred, the rationale of all the decisions cited is that the particular kind of technical knowledge acquired by the servant was not of a character that the only reasonable inference was that he was incompetent to understand, and should have understood, the risks of

In *Heath v. Whitecast Coal & Min. Co.* (1885) 65 Iowa, 737, 23 N. W. 148, the court thought that an experienced miner was chargeable with knowledge of the want of some system to prevent the escape of cars on the grades in the entries, but reversed the judgment for the plaintiff on another ground.

(ii) *Quarries*.—In *Reed v. Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186, the plaintiff was called away from his regular work to split stones in a quarry by means of wedges, and, while so engaged, a piece broke off and fell upon him. The court in discussing the question whether the circumstances required a warning said: "The only possible concealed risk arose from the presence of seams in the stone in the quarry. Stockmeyer was no novice in this work. He was a man of mature age, of ordinary intelligence, and for several years had been employed in and about quarries. His testimony shows beyond contention that, for some two months during his previous employment by Reed, he had worked at channelling stone; that he knew generally of the existence of seams throughout all the quarries in the neighborhood, and that the stone was liable to break by reason of the seams during the progress of the work of channelling and of cutting out the stone. He did not, it is true, know of seams in this particular block of stone; nor could Dreihoble or the defendant in error know; and for the like reason,—that it was covered with earth and dust. He, however, knew the fact that seams existed in stone throughout the quarries, and the danger therefrom, and had equal opportunity with the master and Dreihoble of ascertaining the existence of seams in this particular stone, for he, with Dreihoble, had been at work upon it prior to the injury. All the warning that could have been required of the master, or of the vice prin-

cipal acting for the master, was the attention of the servant to the possible existence of seams in this particular stone. But Stockmeyer knew that fact from his general knowledge of the character of the quarries. It was of which he was bound to take notice. No warning could make the danger manifest to him."

(jj) *Erection of buildings*.—The employer is not bound to warn an experienced workman engaged in the construction of a building, of temporary conditions incidental to construction against which such workman should be upon his guard. *Beique v. L...* (1897) 169 Mass. 541, 48 N. E. 100. The fact that a roof will be in a dangerous condition up to the time when a certain piece shall have been placed is presumed to be known to a workman familiar with the construction. *Callahan v. Mullen* (1895) 60 Ill. App. 497.

(kk) *Demolition of structure*.—The cause of action is stated by a declaration framed upon the theory that it was the negligence to direct a laborer accustomed to such work to take down a structure fourteen years old, without having an examination made to see whether the operation could be safely performed. The presumption is that he understood what was necessary to be done in that the work might be safely executed. *Wright v. Dunlop* (1893) 20 S. C. Cas. 4th Series, 363 (demurrer sustained).

(ll) *Work on ships*.—(See also (oi), (oc), *supra*.) Handling the cargo at the bow of a tug is a risk assumed by a man employed to do general work on the deck, although he has never previously handled any line but that at the stern. *Williams v. Churchill* 137 Mass. 243, 50 Am. Rep. 304, also § 404, *infra*.

(a) *Railway cars; construction and operation of*.—The necessity for un-

by the conditions which caused the injury. It is evident, therefore, that these decisions are, in the last analysis, illustrations of the same class of situations as those exemplified in § 395, *ante*.

C. MINORITY AS A DIFFERENTIATING ELEMENT; SIGNIFICANCE OF.

For other cases bearing upon the extent of the knowledge which is imputed to minor servants, see §§ 219, 318, *ante*, and chapter xxv., *post*.

398. Generally.—It has already been shown (§ 291, *ante*) that, where the injured servant is a minor, the defense is not aided by the

a car furnished with an ordinary coupler to one furnished with a "Miller" coupler is not such a common occurrence that even an experienced brakeman who has never observed such an occurrence can be said, as a matter of law, to know that the lateral motion of which a "Miller" coupler is capable will sometimes cause it to slip past an ordinary coupler, and thus allow the two cars to come together. *Russell v. Minneapolis & St. L. R. Co.* (1884) 32 Minn. 230, 20 N. W. 147.

(b) *Construction and operation of locomotives.*—Where an engine having too high a pilot was derailed by a collision with a horse, it was held to be for the jury to say whether the engineer, an experienced employee, understood the risk of such an eventuality. *Fordyce v. Edwards* (1895) 60 Ark. 438, 30 S. W. 758.

As a locomotive engineer is not presumed to have knowledge of defects in his engine which arise from its being constructed on wrong mechanical principles, it is not error, in an action for his death caused by the derailment of the locomotive, to refuse to charge the jury that, if they believed that the engine was topheavy or unequally balanced, that the boiler was unduly elevated above the rails, that such condition of the engine was the proximate cause of deceased's death, and that the defective condition of the engine was open to observation, they should find for defendant. *Galveston, H. & S. A. R. Co. v. Smith* (1900) 24 Tex. Civ. App. 127, 57 S. W. 999.

The fact that a locomotive wheel was open to the inspection of a fireman, and was so worn as to be more than ordinarily dangerous, will not defeat his action for an injury due to the defect, since he is not an expert, and it is a

matter of special skill to determine how much wear such a wheel will stand. *Bridges v. St. Louis, I. M. & S. R. Co.* (1879) 6 Mo. App. 789.

(c) *Weight-sustaining structures.*—Although an employee had been accustomed to work on the "traveler" containing the engine and other appliances by which the girders for an elevated railway trestle were hoisted, and may have seen that it was constantly being moved forward on the trestle before the span on which it was to rest was properly braced and bolted, he was not, as matter of law, chargeable with knowledge of the danger that, while the "traveler" was being moved forward, its weight might communicate a swaying movement to the imperfectly secured span and cause it to fall. *Davidson v. Cornell* (1892) 132 N. Y. 228, 30 N. E. 573.

A carpenter of ordinary skill is not chargeable, as matter of law, with knowledge of the fact that hemlock boards $\frac{1}{2}$ of an inch in thickness are unfit to use for the supports of a scaffold in cold wet weather, inasmuch as such timber becomes very brittle when exposed to rain and frost. *Twomey v. Swift* (1895) 163 Mass. 273, 39 N. E. 1018.

One engaged on the construction of a scaffold between piers in a river, for the erection of a bridge, though an efficient laborer, is not, as matter of law, chargeable with a comprehension of the risk of collapse of the scaffold from improper driving of the piles and bracing of the structure. *Pursley v. Edge Moor Bridge Works* (1900) 56 App. Div. 71, 67 N. Y. Supp. 719. Affirmed in (1901) 168 N. Y. 589, 60 N. E. 1119.

(d) *Masonry.*—Whether plaintiffs assumed the risk of putting terra cotta coping on a wall without having it bound together with iron ties, or were

presumption which is entertained in respect to an adult, that who enter any given employment appreciate the ordinary risks it involves. Speaking more generally and without reference to particular class of risks, it may be said that the fact of minor creases, to a greater or less extent, the probability that his faculties of observation and comprehension are more limited than those of a typical person of ordinary intelligence, whose supposed capacity of appreciating dangers furnishes the juridical standard by which the existence or absence of obligatory knowledge is tested. The oblique effect of this consideration, when viewed in relation to the common law system of jury trials, is that the range of circumstances

not in the exercise of ordinary care, is a question for the jury, where there is evidence that they knew nothing about any irons, and relied entirely on the foreman, and were not familiar with the kind of terra cotta they were using, which projected more than that they had been accustomed to, although there is evidence that they were of more than ordinary skill and experience as masons. *Gibson v. Sullivan* (1895) 144 Mass. 557, 42 N. E. 110 (part of coping fell).

(c) *Machinery*.—It is for the jury to say whether a man who, before hiring himself to the defendant, had worked for about a year in the picker room of a cotton mill, but who testifies that he knew nothing of the internal construction of a picker, should have been instructed as to the risk of removing clogs of cotton from the machine while the beater was in motion, especially where it is also in evidence that the picker boss had, in his presence, removed clogs without stopping the machinery, and had thus set an example which it might have been dangerous for the plaintiff to follow. *De Costa v. Harqueres Mills* (1898) 170 Mass. 375, 49 N. E. 735.

A servant who is familiar with machinery as an operator, but has no technical knowledge of its properties such as is possessed by a mechanical engineer, is not chargeable with knowledge of the danger of running a grind-stone at a certain high rate of speed. *Helfenstein v. Medart* (1896) 136 Mo. 595, 36 S. W. 863. Affirmed in Banc in 136 Mo. 619, 37 S. W. 829. Affirmed on Rehearing in 136 Mo. 619, 38 S. W. 294.

Whether a workman of average intelligence, who, after working off and on for two or three months in positions which gave him an opportunity of becoming acquainted with shafting, was directed for the first time to assist in

placing a parted belt by standing on a platform suspended beneath a revolving shaft, and holding one end of the belt so that it formed a loop over the shaft, with no special instruction other than "to hold the belt off the shaft," and to "be sure and put it on the plain piece of shaft,"—have been instructed that his fall would do so would render the belt liable "crawl" towards the pulley, or have inferred the existence of pulling set screws in the hub of a pulley easily seen in the dim light, from knowledge of the manner in which pulleys in the shop were secured to shafting,—is a question for the jury in an action against the employer for the death of the employee, caused by his snatched from the platform by the belt which wound around the hub of the pulley on each side of and over the set screws. *Lintott v. Nashua Iron & Co.* (1899) 69 N. H. 628, 44 N. E. 100.

(f) *Elevators*.—In a case where an employee was injured by an elevator falling to the bottom of the shaft, well, owing to its having been overloaded, it appeared that he was informed as to how much the elevator would carry, or that, if overloaded, the ropes supporting it would slip over the grooves and the elevator would fall. That he had been running a similar elevator for seven years, and knew the force of its various parts. It was held that a request for an instruction that there was no sufficient evidence that the plaintiff did not assume the risk of injury he sustained was properly refused, such a risk not being within the comprehension of any servant not a mechanic. *Sullivan v. Thorndike* (1899) 175 Mass. 41, 55 N. E. 47.

(g) *Action of gravitation on loose substances*.—A common laborer

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which obligatory knowledge can be imputed, as a matter of law, is more restricted in cases where the injured person was a minor, than in those where he was of full age, at the time when the cause of action arose. In this respect the element of minority operates in precisely the same manner as that of inexperience.

The hypothesis is that a minor is inferior to an adult as respects both the ability to obtain material information and the ability to draw deductions from such information as may be obtained.¹ But an examination of the decisions collated in the next section shows very clearly that it is the latter description of inferiority which is most frequently the real differentiating factor in the case. That is to say,

in a trench where he was told to work, and having no discretion as to where he should stand, had a right to rely upon the inspection of the shoring and of the condition of the sides of the trench, made by his superiors after each blast before allowing the workmen to again enter the trench, and was not, as a matter of law, charged with the decision of the question whether there was danger, although it is also in evidence that he had worked a good deal in trenches; that he knew the nature of the soil and the depth of the trench; that blasting was done to remove rock from the bottom, and that small quantities of earth frequently fell from the sides. *Conn v. Marlborough* (1895) 164 Mass. 206, 41 N. E. 238.

Whether an employee who had had considerable experience in working in trenches was guilty of negligence in working in a deep and unshored trench, the sides of which caved in upon him, was held to be a question for the jury in *Bartolomeo v. McKnight* (1901) 178 Mass. 242, 59 N. E. 304.

An experienced workman engaged in digging a ditch under the direction of a superintendent does not, as a matter of law, assume the risk from the existence of cracks in the earth causing the ditch to cave in, in the absence of evidence showing that cracks like the one in question are liable to occur in digging and blasting trenches for sewers, and, if so, frequently, and whether he should have anticipated it. *McCoy v. Westborough* (1899) 172 Mass. 504, 52 N. E. 1064.

(h) *Explosions resulting from steam generated by heated metals.*—(See also § 395, note 1, subd. (ff), *ante*.) In *Dyer v. Brown* (1901) 64 App. Div. 89, 71 N. Y. Supp. 623, the jury was held

to be justified in finding that a case in which instructions as to the danger should have been given was established by evidence which showed that plaintiff's intestate, an experienced molder employed by defendant, after completion of his regular work, under direction of the superintendent and foreman, who were experienced molders, went to where they had arranged defective castings, and started to fill holes therein with molten metal, when an explosion occurred, caused by rust and damp in the holes, injuring intestate, who had never done or seen such work before, and did not know of the effect of rust or damp thereon.

(i) *Methods of handling heavy objects.*—Whether an employee who was injured by reason of his compliance with an order of his superintendent to get on and hold down a timber transported on a truck, with its narrow sides at the top and bottom, had had sufficient experience to enable him to comprehend the risk, is a question for the jury, where he had worked at logging a few months in each winter for several years. *Gannon v. Seacomet Mills* (1896) 165 Mass. 221, 43 N. E. 82.

An instruction in an action for personal injuries to a minor employee from a defective machine, that he was bound to see patent and obvious defects, and assumed all risks thereof, and was guilty of contributory negligence in continuing to work when he should have known of such defects in the machine, was properly refused as calling for the application to a minor's conduct of the rule applicable where minority and inexperience are not factors. *Blumenthal v. Craig* (1897) 26 C. C. A. 427, 55 U. S. App. 8, 81 Fed. 320.

the inference that the danger created by certain conditions, as the conditions themselves, was known to the servant, is less drawn where he is a minor than where he is an adult.²

The epithet "obvious," or one of its equivalents, is quite frequently used to designate and characterize the risks which a minor is conclusively presumed to understand.³ So, also, it is sometimes said that the mere fact of infancy is of no importance, where the danger which the injury resulted were of such a kind that they were obvious to the senses of a boy as to those of a man.⁴ But in view of the

"The supreme court of Missouri considered the doctrine to be well settled by the authorities 'that, although the machinery, or that part of it complained of as especially dangerous, is visible, yet if, by reason of the youth and inexperience of the servant, he is not aware of the danger to which he is exposed in operating it or approaching near to it, it is the duty of the master to apprise him of the danger, if known to him.'" *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298.

In *Louisville & N. R. Co. v. Boland* (1892) 96 Ala. 626, 18 L. R. A. 260, 11 So. 667, it was said: "The duty of the master in cases of latent defects, to explain, is the same whether the servant be a minor or an intelligent adult; the difference being, however, that as great diligence in observing and comprehending the dangers is not to be expected of the young and inexperienced."

A servant may ordinarily be expected to know when his tools need repairs, but in the absence of experience and instruction a lad cannot be expected to know intuitively, or as fully as his experienced master; and it is reasonable that he should be warned against such deterioration of them as endangers his safety,—especially when it is of such a nature as requires instruction to arrest his attention or excite his apprehension. *Heavey v. Hudson River Water Power & Paper Co.* (1890) 57 Hun. 339, 10 N. Y. Supp. 585.

The mere general knowledge possessed by a minor that when he engages in a given employment he will be exposed to certain dangers which are not incident to other employments does not constitute that full appreciation of the dangers which will absolve the master of the obligation of instructing him as to the particular nature of the perils to which he will be exposed. *Nadau v. White River Lumber Co.* (1890) 76 Wis. 120, 43 N. W. 1135.

Where the danger to which the injury

was due was not necessarily obvious, and some reflection and judgment were needed to appreciate the consequence of a defect, the defendant is not liable in an action by a minor servant to charge that if the injured person had knowledge of the defective condition of the appliance in question there would be no recovery. *McCarraher v. St. Louis & N. O. R. Co.* (1890) 120 N. Y. 526, 24 N. E. 383 (effective car). In a case where a boy of eighteen was injured by an upward guard rail, it was held improper to charge the jury that the plaintiff had knowledge of the fact that there was a blocking was knowledge of the danger. *Davis v. St. Louis & N. O. R. Co.* (1890) 53 Ark. 117, 7 N. E. 283, 13 S. W. 801.

The evidence of the plaintiff—of seventeen working as a brakeman—that he was not informed of the incident to the business, and of a fellow employee that he did not explain the danger of the danger to the plaintiff, was sufficient to sustain a finding that the employment was dangerous. *Texas & Ft. S. R. Co. v. Preacher* (1900) 100 Tex. 1, 10 S. W. 593 (Civ. App.).

²In the following cases the servant was held chargeable with knowledge of the risks described by the words in brackets: *Williamson v. Sheldon Mfg. Co.* (1893) 66 Vt. 327, 29 Atl. 669 (rent); *Crowley v. Pacific Mills* (1888) 148 Mass. 228, 19 N. E. 344 (oil); *Downey v. Sawyer* (1892) 157 Cal. 418, 32 N. E. 654 [obvious]; *Bull v. Gutta Percha & Rubber Mfg. Co.* (1893) 113 N. Y. 540, 21 N. E. 717; *Orr* (1893) 140 N. Y. 450, 35 N. E. 176 [plain and obvious]; *Toledo, S. & K. C. R. Co. v. Trimble* (1893) 100 Ohio App. 333, 35 N. E. 716 [open and obvious]; *Fones v. Phillips* (1882) 17, 43 Am. Rep. 264 [patent].

⁴*O'Keefe v. National Folding Paper Co.* (1895) 66 Conn. 38, 587.

that the capacity of minors is a variable quantity (compare next section), it is manifest that, in the present connection, these vague epithets are even less serviceable for purposes of differentiation than they are in cases where the injured person is an adult.

399. Cases illustrating the capacity for appreciating dangers, which is imputed to minor servants.—If the mental and physical capacity of minors for ascertaining dangerous conditions and estimating the extent to which they affect his personal safety could be assumed to be, in the language of mathematics, a constant quantity, as it is, theoretically at all events, in the case of adults, it would be feasible and proper to arrange the authorities with reference to the predicaments indicated by the section headings used under the preceding subtitle. But as the significance attributed to minority varies considerably according to the actual age of the servant, and it is therefore necessary to take into account many degrees both of natural intelligence and of acquired knowledge, conjoined in an endless series of different combinations, classification on these lines is manifestly an impossibility. The difficulties of arrangement are still further augmented by the fact that, speaking generally, minor servants are less able than adults to take advantage of the opportunities of observation which they may have obtained in the course of their employment,—though it must be admitted that there is little or nothing in the cases which bears upon this precise aspect of their obligatory knowledge. Upon the whole, therefore, it would seem that the only course open to a commentator is to exhibit the views of the courts by bringing together in a single note all the decisions which involve the question whether or not the servant was chargeable with an appreciation of the risk to which his injury was due. In doing this it will be necessary to anticipate to some extent the doctrines illustrated in the two following subtitles. For the purpose of facilitating comparison, the decisions are distributed into groups similar to those found in the other extended notes to this chapter.¹

¹(a) *Defective railway tracks.*—The risk of the derailment of a construction train operating on an unfinished track is deemed to be appreciated by a youth nineteen years of age who engages in the work of delivering ties. *Evansville & R. R. Co. v. Henderson* (1893) 134 Ind. 636, 33 N. E. 1021.

A verdict has been sustained which held the company liable for an omission to instruct a youth of eighteen years who had been injured, after working four months as a brakeman, through having his foot caught in an unblocked

guard rail. *Davis v. St. Louis, I. M. & S. R. Co.* (1890) 53 Ark. 117, 7 L. R. A. 283, 13 S. W. 801. The court said: "Service about the unblocked rails was attended with danger, and the knowledge of the fact that the rails were unblocked did not necessarily imply knowledge of the attendant danger. Knowledge of the danger was itself a question of fact."

(b) *Obstructions above railway tracks.*—A minor brakeman who had passed under an overhead bridge daily for three weeks before he was struck by it was

400. Effect of cases discussed.—The only general principle seems possible to extract from the decisions in which an appren-

held to have assumed the risk. *De Witt v. Pacific R. Co.* (1872) 50 Mo. 302.

The question whether a servant who was struck by a steam pipe extending over a track while he was standing on the top of a car should have appreciated the risk is for the jury, where the evidence is that he was about sixteen years old, and had been hired about six months before the accident to serve as errand boy, and to act as brakeman, if he had time, on cars switched to the defendant's buildings; that he had never before worked round railway station or cars; and that he had passed this pipe about a dozen times, but never when he was on the top of a car. *Ream v. United States Leather Co.* (1900) 107 Wis. 305, 83 N. W. 473.

(c) *Construction and operation of railroad cars.*—In several cases it has been held that minors hiring themselves out to do such work must be taken to appreciate the risks incident to coupling cars under ordinary circumstances. See § 291, note (5), *ante*.

A brakeman over twenty years of age who has been working in a yard for one year, and has been engaged in switching for two months, is presumed to understand all the ordinary risks of the service, such as that of coupling cars over the ends of which iron rails project, where it is customary for rails to so project. *McIntosh v. Missouri P. R. Co.* (1894) 58 Mo. App. 281. It has been held that there is no duty to instruct a minor of sixteen when he is assigned to the new duty of catching and climbing on moving cars. *Worthington v. Go-forth* (1899) 124 Ala. 656, 26 So. 531.

In *Yeager v. Burlington, C. R. & V. R. Co.* (1894) 93 Iowa, 1, 61 N. W. 215, a verdict was held to have been properly directed for the defendant, where an un-instructed youth of nineteen years who, to the knowledge of the company's officers, had had no previous experience, was injured on the day he began work, while attempting to mount a moving car by the sideladder.

It is error to direct a verdict for a defendant railway company, where a youth who has received no instruction is injured on the day he begins work, while engaged in the performance of such a dangerous duty as the making of a "kicking switch." *Williams v. South &*

North Ala. R. Co. (1890) 91 Ala. 80, 77.

In an action by an employee so years old for personal injuries while coupling cars, it is a question for the jury whether the service is dangerous and its danger so obscure that the plaintiff's information so immature as to render it to give him instructions. *Allen v. P. R. Co.* (1894) 94 O. 26 S. E. 763. (The report does not state what experience the plaintiff had. Whether a had seventeen years' experience as a brakeman should be instructed in the duty of coupling cars is a question for the jury. *Stans v. West R. Co.* (1889) 84 Ga. 152, 543. A jury is justified in finding it was negligent to omit to give instruction where a minor of seventeen years employed as a messenger in a railway was ordered to couple cars. *Todd v. Ft. S. R. Co.* (1890) 129 O. Civ. App. 59 S. W. 593. A jury is warranted in finding that a boy of fifteen who had been employed to put up vegetable crates, and was then transferred to the work of pushing cars on a side track, should have been instructed as to the dangers incident to the kind of work. *Camp v. Hall* (1900) Fla. 535, 22 So. 792.

There is no error in permitting a minor brakeman to testify that the time of injury complained of he never observed that cars or engines were constructed with double dead ends. *Louisville, N. A. & C. R. Co. v. Hall* (1886) 110 Ind. 18, 9 N. E. 594.

(d) *Push cars.*—In *York v. City, C. & S. P. Co.* (1893) 117 Vt. 22 S. W. 1081, the duty of going down a grade to fetch a car was pronounced to be one of the simplest character, and the trial was held to have rightly directed a verdict for the defendant, where a boy of sixteen years of age was injured while performing that duty, although the injury occurred on the same day that he began work.

(e) *Weight-sustaining structure.*—An employee sixteen years old cannot be said, as a matter of law, to know the peril to which he is exposed while sent up to a platform on which the boards liable to turn over, where

of the risk has been imputed, as a matter of law, to minor servants is that which we find briefly formulated in a Kentucky case, *viz.*, that a

never been sent there before, and is not cautioned in regard to the danger. *Hutcheson v. California Horseshoe Co.* (1894) 105 Cal. 77, 38 Pac. 535. See also next subdivision.

(f) *Dangerous gangways.*—A servant over seventeen years old and of ordinary intelligence who slips on a slippery plank which surrounds a vat, and falls into it, while he is lowering certain materials into the coloring fluid, cannot recover on the ground that he was not instructed as to the dangers of his work. *Pessy v. Newichawnick Co.* (1900) 94 Me. 61, 46 Atl. 806.

Whether a boy sixteen years old who has been engaged in the same work for several months can recover for injuries caused by his falling into a mill race, while he was propelling a rickety wheel barrow across a narrow foot bridge, was held to be a question for the jury in *Luchke v. Berlin Mach. Works* (1894) 88 Wis. 442, 60 N. W. 711. But in a later case involving somewhat similar circumstances it was held that a servant eighteen years old, of ordinary intelligence, assumed the risk of injury from wheeling dirt over a timber 10 inches wide and 10 or 12 inches from the ground, in a wheelbarrow whose axle did not run true, his own testimony being that he knew that, if he lost his balance, and the barrow ran off, he was liable to fall. *Casen v. Chicago, St. P. M. & O. R. Co.* (1896) 20 W. 113, 62 N. W. 624 (no dissent). The earlier case was referred to recently only for the general principle, and down in it, no attempt being made to reconcile the decisions.

(g) *Unsound structures.*—A girl sixteen years old, of reasonable intelligence and judgment for one of her age, who is entirely familiar with the conditions, as a result of six months' work for the defendant, assumes the risk of continuing in service as a cook in a kitchen, the floor of which is covered with pieces of board placed over steam pipes in the form of an inverted V, extending 5 inches from the floor, as the danger of falling over such an obstacle is open and manifest. *Herald v. Pfister* (1896) 92 Wis. 417, 66 N. W. 355.

(h) *Slippery surfaces.*—A minor who for four weeks has been working on a block 14 inches square and 5 inches in thickness, placed on a wet, greasy, and slippery floor by himself, assumes the

risk and danger of the slipping of the block on the greasy floor, the result being that his hand is involuntarily thrown into the cylinders of a chopping machine. *Canaday Packing Co. v. Harlan* (1901) 514, R. A. 258, 45 C. C. A. 515, 106 Fed. 645.

In *Williamson v. Sheldon Marble Co.* (1893) 66 Vt. 427, 29 Atl. 669, a verdict was held to have been rightly directed for the defendant where a boy of sixteen years (experience not stated) had been killed through the "apparent" danger of slipping on a sheet of ice which had formed on a rock in a quarry. See also subd. (g), *infra*.

(i) *Saws.*—(See also subd. (x), *infra*.) Where a servant who was within one month and a half of twenty-one years of age had worked a little with a circular saw before entering the defendant's employment, and the accident happened on the tenth day after he began work, it was held that he could not recover on the theory that he ought to have been instructed, as the danger that the hand of a workman pressing against a circular saw a stick which, as he knows, is liable to be thrown up and back, will be carried against the saw, is obvious. *Wilson v. Steel Edge Stamping & Refining Co.* (1895) 163 Mass. 315, 39 N. E. 1039. A youth nineteen years of age who had for three years been operating machinery, and had been running a certain split saw for three days when his hand was injured by coming into contact with it, is presumed to have appreciated all the ordinary dangers accompanying its use, and cannot recover damages. *Prentiss v. Kent Furniture Mfg. Co.* (1886) 63 Mich. 478, 30 N. W. 109. The case should be taken from the jury where a youth eighteen years old, who had acquired some knowledge of mechanics during his employment in a pulp mill and his apprenticeship to a plumber, is seeking to recover on the ground that he should have been instructed as to the danger of allowing his fingers to come in contact with a buzz planer. Such a danger is obvious to a much younger boy. *Mackin v. Alaska Refrigerator Co.* (1894) 100 Mich. 276, 58 N. W. 999. The danger of contact with a circular saw over which he has to reach in the course of his employment is assumed by a lad eighteen years old who had been instructed how

minor who has reached years of discretion is bound to take note of the ordinary operation of familiar natural laws, and to govern

himself to do the work, and had worked three years in other factories. *Schlurmann v. Hammond Typewriter Co.* (1895) 41 Misc. 546, 32 N. Y. Supp. 748. A boy of sixteen who has had sufficient experience at other factories to enable him to understand the working of a buzzsaw cannot recover for an injury to his hand on the ground that he should have been instructed as to its use. *Ogley v. Miles*, (1893) 139 N. Y. 458, 34 N. E. 1059. A youth of seventeen years who is injured because he attempts to adjust a piece of rubber in a vise without moving it back from a saw, where the danger is perfectly obvious and he has been warned to look out for his fingers, is guilty of such contributory negligence as to prevent recovery, even though he has not been fully warned of the danger. *Burke v. Thomson Meter Co.* (1892) 45 N. Y. S. R. 272, 18 N. Y. Supp. 436. In a case where a youth eighteen years old who had held himself out as being competent to do ordinary work, and had been for three months engaged in piling wood in a sawmill, was injured on the first day that he was set to work upon a circular saw, owing to the fact that the want of two teeth caused it to jump, it was held that he could not recover. *Michael v. Stanley* (1892) 75 Md. 464, 23 Atl. 1094. A boy fifteen years old who, after working four months in the same room with a certain saw, stumbles and comes into contact with it, while carrying pieces of timber, cannot recover. *Journeau v. E. H. Stafford Co.* (1899) 122 Mich. 396, 81 N. W. 259. The danger of sawing a plank with a circular saw is presumed to be appreciated by a boy of fourteen, where he has used it three or four times, and admits that he knew that, if his hands touched it, they would be injured. *Hettchen v. Chipman* (1898) 87 Md. 729, 41 Atl. 65.

Whether or not failure to warn a boy of nineteen employed in a sawmill, of the danger from a circular saw set in a table over which he was required to throw blocks of wood, was such negligence as to render the employer liable for the loss of the boy's fingers from coming in contact with the saw, is for the jury upon evidence that the saw extended above the top of the table about 3 inches, and was partially covered with sawdust, and ran very swiftly, being scarcely visible, and that throwing things over the table when the saw was

running was "pretty risky" and had not previously performed so, although he had some knowledge of the existence of the saw and had had considerable experience in working in mills. *Egan v. Sawyer & A. L. Co.* (1896) 94 Wis. 137, 68 N. W. 100. A verdict finding the foreman of a defendant negligent in omitting to warn a youth of nineteen suddenly called to fill the place of the regular operator as to the dangers of an "edger" saw, not be disturbed, although it appears that he had been working for a considerable time close to the saw, in trimming and cutting off the lumber which was trimmed by it. *James v. Rapids Lumber Co.* (1898) 50 La. Ann. 717, 44 A. 33, 23 So. 469 (in this case, it should be noted that the court explicitly declared that the plaintiff's minority was not an element in the conclusion reached, as he was apparently a full-grown man, and there was no evidence to show that the defendant was aware of his minority). Where a youth seven years old who has had an experience of several years in sawmill work is injured a day and a half after beginning to use a circular saw in a manner which he declares to be unfamiliar, it is for the jury to say whether he knew or ought to have known of the particular danger involved in such use. *Hanson v. Ludlow Lumber Co.* (1894) 162 Mass. 187, 38 N. E. 100. A verdict against the employer was allowed to stand, where he had failed to instruct as to the dangers of a circular saw a youth of seventeen years who had no experience in the use of such a machine. *Smith v. Irwin* (1889) 57 J. L. 508, 18 Atl. 852. An inexperienced employee of seventeen does not, as a matter of law, understand the risk of a "bolting saw" without a carrying attachment, after using it three years without such attachment, when he had been on it at any time while employed the same. *Olmscheid v. Nelson & Co. Lumber Co.* (1896) 66 Minn. 61, 68 N. W. 605.

Whether an employer is negligent in failing to instruct a boy sixteen years of age unfamiliar with machinery, as to the dangers of removing a tub placed underneath a rapidly revolving saw, to catch the scraps and sawdust which fall from it is a question for the jury. *Wright v. Bousfield* (1896) 65 Minn. 355, 68 N. W. 45. An inexperienced boy of

teen, even after he has been told how to saw blocks by means of a circular saw, without a saw-rest, is not, as matter of law, chargeable with knowledge of the special danger that a block may bound out, and force his hand under the saw, if the block is not pushed squarely against the saw. *Jurria v. Cook Wrench Co.* (1900) 177 Mass. 179, 58 N. E. 587. A boy fourteen years of age, injured on the first day he went to work, by the contact of his hand with a buzz-saw, was held unable to recover in *McLean v. Mathison* (1895) 12 Misc. 214, 33 N. Y. Supp. 263. But *quære* as to the correctness of this case.

Putting a belt on a pulley within a few inches of a rapidly revolving saw is a work of too great hazard to require any servant to do, however skillful or experienced, and the danger is not one which a minor can be said to appreciate in such a sense as to charge him with assuming the responsibility for an injury received in obeying an order to fasten a belt under such circumstances. *Nelson Mfg. Co. v. Stoltzenburg* (1895) 39 Ill. App. 628.

(j) *Planers and other cutting machinery.*—(See also subd. (x), *infra*.) A youth nineteen years old who has been engaged for three weeks in the work of carrying off dressed lumber after it has passed through a planer cannot recover for an injury to his hand, resulting from its contact with the knives, while he is putting a hood in position. *Crown v. Orr* (1893) 140 N. Y. 450, 35 N. E. 618. Reversing (1893) 71 Hun. 613, 24 N. Y. Supp. 620.

A youth seventeen years of age who has worked several years in a carriage factory and two months on a planer is presumed to appreciate the danger that, in attempting to walk backwards piled alongside the planer, he will slip, and so fall upon the machine. *Lakel v. Ferguson* (1889) 25 N. Y. S. R. 960, 5 N. Y. Supp. 774. Affirmed in (1889) 117 N. Y. 658, 22 N. E. 1134. In *Palmer v. Harrison* (1885) 57 Mich. 182, 23 N. W. 624, a case of injury to a boy of sixteen, caused by contact of his hand with revolving knives of a jointer, it was held that a verdict for the defendant had rightly been directed, for the reason that no notice or warning could have helped him. The evidence showed that he had worked in the shop where the jointer was located for two weeks previous to receiving his injury, and had seen the machine in which the accident occurred every day during the period, both stand-

ing still and when in use, and that he knew all about its location and use, and worked about it every day. He himself testified that he knew the danger was there; that, if he came into contact with it he would be injured; and that if he had looked at it he would have known whether it was running or not.

A boy of fifteen years who has been engaged for several weeks in pushing wooden rails against revolving knives is charged with knowledge of the danger of permitting his hand to come under them. *Bohn Mfg. Co. v. Erickson* (1893) 5 C. C. A. 341, 12 U. S. App. 260, 55 Fed. 943.

A verdict in favor of a minor of eighteen who is injured in handling a "pony planer," in the use of which he has had no practical experience except such as he has acquired on a few previous occasions during the period of two months which has elapsed since he entered the employment, will not be set aside. *Verdell v. Grant's Harbor Commercial Co.* (1876) 115 Cal. 517, 47 Pac. 364.

In *Fones v. Phillips* (1882) 39 Ark. 17, 43 Am. Rep. 264, the court reasoned upon the assumption that it was for the jury to say whether recovery could be had by a boy of fourteen years who had been instructed as to the proper manner of operating a planer, but was injured on the third day after he began work, through allowing his hand to come into contact with the knives while he was removing chips, a position which required him to work with his back to the machine, and which involved a danger as to which he had received no caution. In *Adams v. Climer* (1893) 1 Mary. (Del.) 80, 36 Atl. 1104, it was left to the jury to say whether the manipulation of a pony-planer with knives running at the rate of 3,500 to 4,500 revolutions a minute involved dangers which were latent as respects a youth sixteen years of age, after two and a half months of experience in the use of it.

The danger of permitting one's finger to be caught in a tuft of hay about to pass between the knives of a hay cutter is perfectly apparent to a servant of twenty years, without instruction, even though he has never done any work of the same description before the day when the injury is received. *Stuart v. West End Street R. Co.* (1895) 163 Mass. 391, 40 N. E. 180.

A comprehension of the danger of having his fingers caught between the cylinders of a "skiving machine," and thus drawn against the knife, was imputed to a boy of sixteen who had been told that

if he got his fingers in he would be hurt and that he must look out about his fingers. *Pratt v. Proctor* (1891) 153 Mass. 333, 26 N. E. 1002. See also subd. (x), *infra*.

(d) *Cogwheels and gears*. (See also subd. (x), *infra*.) In a case where a youth of seventeen had been engaged for one month in cranking away the finished products of a machine, and was injured the first day he was set to work on the machine itself by some uncovered gearing, it was held that the risk was apparent. *Cunningham v. Both Iron Works* (1899) 92 Me. 501, 43 Atl. 166.

A verdict has been held to be rightly directed for the defendant where a servant sixteen years old was injured by coming into contact with moving cogwheels the same day that he began work. *Dunnehy v. Sawyer* (1892) 157 Mass. 418, 32 N. E. 654.

A paper cutter in defendant's mill injured by being caught in an unguarded gearing in a machine was held unable to recover, where the evidence was that he had worked in another paper mill for two years, five weeks of which he was employed as a paper cutter; that he was sixteen years old, and understood the danger of working around machinery; and that he was caught in the machine while changing his clothes, preparatory to going home. *Hobbs v. Thibault* (1900) 107 Wis. 216, 83 N. W. 360.

An employee sixteen years old who has worked sufficiently long to become acquainted with the conditions cannot recover for an injury caused by his slipping from a box on which he was standing, and so coming into contact with a cogwheel. *Fitzgerald v. Elsas Paper Co.* (1900) 30 Misc. 438, 62 N. Y. Supp. 597.

It has been held that a boy fifteen years of age who undertook to operate a machine having unguarded cogwheels assumed the resulting risk, where he had worked for several months in the same room with the machine, but was injured, owing to the absence of the guards, two days after he had been transferred to the work of feeding it. *E. S. Higgins Carpet Co. v. O'Keefe* (1897) 25 C. C. A. 220, 51 U. S. App. 1, 79 Fed. 900. No specific reference was made by the court to the experience obtained before the transfer to the new work, and, apparently, recovery was denied independently of this element.

An employer may properly assume that even a boy of fourteen years need not be told that, if he puts his fingers into gearing, they will be crushed.

S. Lee v. Superior Mfg. Co. (1891) Mass. 476, 30 N. E. 73.

In a case where an unskilled thirteen years old was injured in three months' work, by placing his hands where it came into contact with cogwheels, it was held that in the defendant's case it was not expected. *White v. Wither and Co.* (1890) 78 Hun. 381, 42 N. Y. 188, (1892) 131 N. Y. 616, 30 N. E. 100.

A boy twelve years old was injured by contact with cogwheels while putting into place a cogwheel belonging to the machine, and on the theory that he should be instructed as to the dangers of the machine. *Buckley v. Gutta Percha Mfg. Co.* (1889) 113 N. Y. 171, 30 N. E. 717.

In another case it was held that negligence was predicable of the defendant in instructing a boy twelve years old after he had worked for two years in the room with the cogwheel. *Merchants' Woolen Co. v. Merchants' Woolen Co.* (1889) Mass. 182, 15 N. E. 579. The boy having been set aside there was a trial upon a somewhat different theory, and another verdict for the plaintiff rendered. This was sustained. *Mass.* 152, 6 L. R. A. 733, 23 N. E. 829 on the ground that the defendant was for the jury, because the master was aware that the boy possessed below average intelligence, and had sent him on an errand requiring haste, to a lighted place, where the cogwheel was likely to catch his clothes, and the plaintiff, although he had been in the room which contained the machine, and was undoubtedly familiar with it in a general way, had never been near them as to have had occasion to consider the risk of his clothing caught in it.

A female employee of less than twenty one years of precise age not known who had been working some time on a machine (not specified, but used for cutting), was held to understand the risk of contact with it. *O'Keefe v. Eagle Pencil Co.* (1889) 25 C. C. A. 217, 6 N. Y. Supp. 501, App. 1 (1890) 119 N. Y. 631, 23 N. E. 100.

In *Rummel v. Dilworth Pencil Co.* (1890) 131 Pa. 509, 19 Atl. 315, the plaintiff was a lad of about sixteen years, having very little acquaintance with the business or its dangers, who went into the employ of the defendant on Tuesday, and was injured on Wednesday.

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uninstructed, and
the master was
placing a cogwheel
on the machine
for the plaintiff
who was a boy
of two years of
age. The court
held that the
master was
negligent in not
instructing the
boy about the
danger of the
cogwheel. *See*
Perkins v. P.
13 N. Y. (1901)

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Perkins v. P.
13 N. Y. (1901)

of less than
the age of the
plaintiff. The
court held that
the master was
negligent in not
instructing the
boy about the
danger of the
cogwheel. *See*
Perkins v. P.
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Perkins v. P.
13 N. Y. (1901)

in the same week. He was employed as a "drag down," but was hurt while performing the duties of a "roller," in opening and closing the gate between the first and second pairs of rollers. The cogwheels by which the rollers were moved were covered along the whole length of the train, except at the point over which Rummel had to reach to open and close the gate. If they had been covered at that point the accident could not have happened. The court said: "In view of the youth and want of experience in the business on the part of Rummel, it was necessarily a question for the jury whether his employer had sufficiently warned and instructed him about the dangers of the employment, and how to avoid them, or had done all that was reasonably necessary to protect him from injury." In *Cummins v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506, it was held proper, and a master negligent in not instructing a boy of fourteen, injured the second day after he began work in a very noisy room, his duties requiring him to break strands of hemp at intervals, an operation which brought his hands very close to the cogs of another machine very close to the one he was working with. According to the court in *Cummins v. Merchants' Woolen Co.* (1888) 146 Mass. 182, 15 N. E. 579, the controlling factor in this case was the short time the servant had been at work.

In *Nadlau v. White River Lumber Co.* (1890) 76 Wis. 120, 43 N. W. 1135, a verdict for the plaintiff was upheld, in a case where the injury was received only five days after the servant began work, on the ground that the owner of a saw-mill who hires an inexperienced youth nineteen years of age to do work which requires him to keep moving along a narrow alley-way only 19 inches in width, with revolving cogwheels behind him, is bound to warn him as to the nature of the perils to which he will be exposed.

A boy twelve years of age who is injured by an uncovered cogwheel, while attempting to replace a roller in a flax-scutching machine, should not be non-suited, where he testifies that he had never worked round the machine before the day of the accident, that he received no instructions as to the proper manner of handling it, and that, having been suddenly called upon to put the roller in its place, he did this in the same way that he had seen his fellow-servants do it. *Young v. Keith* (1873) 34 U. C. Q. B. 212.

The question whether a boy ten years of age was sufficiently old to be employed in uncovered machinery after having worked for three weeks had a sufficient understanding of the hazard of the employment to for his recovery was held to be a question for the jury in *Boyle v. Smithfield Mfg. Co.* (1861) 20 Conn. 518.

Evidence that there was a shadow over the box of a wheel which a boy sixteen years of age was examining when his hand was drawn into the wheel is admissible as proof of the negligence, and as a fact to be considered in determining whether the boy was negligent, and thereon assumed, the risk, and whether the master was negligent in not guarding the wheel and in not warning the plaintiff of danger. *Kucera v. Merrill Lumber Co.* (1890) 94 Wis. 637, 65 N. W. 374.

In a case where a youth sixteen years old, on the twelfth day after beginning to work again in a mill in which he had once before been employed, caught his clothes in cogs while he was removing slabs, it was held that he could show the changes made in the arrangements of the mill as bearing upon his want of familiarity with them when hurt. *Hutcheon v. Cutler & S. Lumber Co.* (1883) 51 Mich. 272, 16 N. W. 644.

The following instructions formulated in *Cummins v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506, were expressly approved in *Schoon v. Latta Wg. Co.* (1873) 113 Mass. 396, as "carefully guarding the rights of employers and employees," in a case involving facts similar to those above. Upon the new trial of the case at bar, the jury should be instructed that the defendants had the legal right to use their machinery without fencing or boxing it, unless by so doing they exposed persons in their employment or other persons who came upon the premises by their procurement or invitation, to danger of which they gave no sufficient notice; that if, by the fact that the cogs were in sight, and the danger from them apparent, the jury should be satisfied that the plaintiff had reasonable notice of the peril to which he was exposed, and, understanding it, chose to undertake the employment which exposed him to it, he cannot recover; but that if, on the other hand, they should be satisfied that the defendants knew or had reason to know the peril to which he would be exposed, and did not give him any sufficient or reasonable notice of it, and if he, without any negligence on his own part, from inexperience or reliance upon the direc-

tions given him, failed to perceive or appreciate the risk, and was injured in consequence, they would be responsible to him in this action."

(1) *Mangles and ironing machines.*— (See also subd. (x), *infra*.) There is no duty to warn an inexperienced girl seventeen years of age as to the danger of injuring her hands by bringing them into contact with the rollers of a mangle. *O'Hare v. Keeler* (1897) 22 App. Div. 191, 48 N. Y. Supp. 376 (injured after working about one hour). A girl seventeen years old, of ordinary intelligence, employed to work at a mangle, is chargeable with a knowledge of the risk of her hand being caught between the heated cylinders of the mangle. *Greef Bros. v. Brown* (1898) 7 Kan. App. 394, 51 Pac. 926 (accident occurred two days after she began work). Recovery has been denied to a girl sixteen years of age whose hand was caught between the rollers of a mangle after she had been working two weeks in the laundry, and for three or four days on the mangle. *Id.* A girl sixteen years of age who has been working for two weeks in a laundry, and for three days at a mangle, cannot recover for injuries caused by catching her hand in the rollers of the mangle. *Jones v. Roberts* (1894) 57 Ill. App. 56. Since the wrinkling of the canvas which surrounds the rollers of a mangle is a constantly recurring obvious defect connected with the daily use of the machine, a female operative sixteen years old who has worked six months in the laundry and six weeks on the mangle assumes the risk of having her hand drawn between the rollers as a result of that wrinkling. *Walsh v. Commercial Steam Laundry Co.* (1895) 11 Misc. 3, 31 N. Y. Supp. 833. A girl fifteen years old and of ordinary intelligence is presumed, after ten days' work with the machine, to understand the risk of having her hand caught between the roller and jacket of a mangle operated by her. *Groth v. Thomann* (1901) 110 Wis. 488, 86 N. W. 178.

The fact that a girl fourteen years old, who is injured by having her hand drawn between the ironing rollers in a laundry, has received no instructions as to the dangers of the work, will not entitle her to recover, where, at the time of the accident, she had been feeding the machine for a period of six weeks. *Hickey v. Taaffe* (1887) 105 N. Y. 26, 12 N. E. 286 (held that plaintiff should have been nonsuited).

A girl of fourteen who had worked in a laundry ten days, but was injured the

first day she was assigned to the machine in question, was not, as matter of fact, guilty of contributory negligence in not understanding that a piece of machinery which had been partially torn loose from a mangle which she was feeding was liable to catch her hand and draw it into the machine, where the evidence showed that the injury was due to the want of repairs, and not to the ordinary care incident to the operation of the machine. *Fitzhenry v. Lamson* (1897) 19 App. Div. 54, 45 N. Y. Supp. 875.

It is for the jury to say whether a girl of fourteen years, hired to feed paper in a mangle in a paper mill, should have been instructed how to perform the duty of carrying off the paper, to which she was transferred two weeks after entering the service. *Allen v. ...* (1898) 115 Mich. 484, 73 N. W. 55. In another case a minor eighteen years of age who had been working round the rollers of a mangle for three months was held chargeable with an appreciation of the risk of having his hand drawn between the rollers to which he was feeding sheets. *Gordon v. Reynolds's Co.* (1888) 47 Hun. 278.

Whether instruction should be given is a question for the jury. It is not error to instruct the jury that an inexperienced girl of fifteen years of age, who had been working away from the particular branch of employment in which she was engaged, and had her hands caught in the rollers of an ironing machine, on the first day that she operated it. *Coffey v. ...* (1897) 21 Misc. 663, 47 N. Y. Supp. 1105. Distinguishing *Hickey v. ...* (1887) 105 N. Y. 26, 12 N. E. 286, on the ground that the servant had acquired some experience.

The case is for the jury where an inexperienced girl fifteen years of age was put at work passing linen through the rollers of a machine which was not guarded before it to prevent the operator's hand from getting caught, and was not guarded at the time of the accident, was given no warning, and was posing that the rollers were too close together to permit her hands to get between, allowed one of her hands to be caught. *Levy v. Clark* (1899) 90 Atl. 146, 44 Atl. 990.

In *Grizzle v. Frost* (1863) 3 Fost. 622, where a girl of sixteen was injured by the rollers of a machine for carding hemp, Cockburn, Ch. J., left the determination of the employer's responsibility to the jury, charging them as follows: "I am of opinion that if the owners of the dangerous machinery, by their fore-

employ a young person about it quite inexperienced in its use, either without proper directions as to its use, or with directions which are improper and which are likely to lead to danger of which the young person is not aware, and of which they are aware—as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery.” This ruling was never questioned in any court of review.

(m) *Other machinery with revolving rollers.*—There is no duty to instruct a youth nineteen years old and of ordinary intelligence as to the obvious danger of getting his fingers squeezed while feeding scrap rubber into a machine containing two revolving cylinders about $\frac{1}{4}$ to $\frac{3}{4}$ of an inch apart. *Sullivan v. Simplex Electrical Co.* (1901) 178 Mass. 35, 59 N. E. 645, holding that the fact of the master's vice principal having told the boy that he might use his fingers to press down the rubber did not relieve him of his duty to safeguard himself.

After having operated a kneading machine for three years, a youth of eighteen is presumed to appreciate the danger of being injured by slipping and falling against the rollers. *McCarthy v. Mulgrew* (1898) 107 Iowa, 76, 77 N. W. 527.

A servant nineteen years old is presumed to appreciate, without instruction, a danger so “open to the senses” as that of putting his hand between the rollers used to flatten boiler-plates, where, although he has only just begun to operate the machine, he has been working in sight of it for two years. *Berger v. St. Paul, M. & M. R. Co.* (1888) 39 Minn. 78, 38 N. W. 814 (verdict for plaintiff set aside).

In a case where a box on which an inexperienced boy of fourteen years was standing while he fed a “cake-crusher” slipped or turned under him, and the arm which he threw out to save himself was caught in the rollers, it was held to be a question for the jury whether he appreciated the danger, and failed to use the caution appropriate to the circumstances. *Emma Cotton Seed Oil Co. v. Hale* (1892) 56 Ark. 232, 19 S. W. 600.

A verdict for the plaintiff, a youth of twenty years, was set aside in *Nugent v. Kauffman Mill Co.* (1895) 131 Mo. 241, 33 S. W. 428, where, after working for six months near machinery with moving rollers, he allowed his hand to be drawn between them. The court said: “It would be a thing of folly to say that de-

fendant was negligent because he failed to tell the plaintiff, a young man twenty years of age, that the revolving cylinders or rollers onto which he had been feeding wheat and sweepings from the mill floor, for six months, in order that it might be pulverized to flour, would be dangerous to the hands if they came in contact with them.

A boy eighteen years old is presumed to understand, without any special skill or experience, that if he gets his fingers into the rolls of a straw cutter they will be caught thereby, and that, if they are caught, they will be injured. *Roth v. S. E. Barrett Mfg. Co.* (1897) 96 Wis. 615, 71 N. W. 1034.

Where a boy of sixteen who was feeding corn stalks to the rollers of a machine for extracting the pith put his hand between two sets of rollers in an attempt to remove a stalk that had jammed, the result being that his hand was crushed, it was held that the failure to warn him of the danger of so doing was not negligence. *Marsden Co. v. Johnson* (1899) 89 Ill. App. 100.

A boy fifteen years of age who has worked for three years with a machine with revolving iron rollers placed within $\frac{3}{4}$ of an inch of each other is presumed to appreciate the risk incident to its use. *McCarthy v. Mulgrew* (1898) 107 Iowa, 76, 77 N. W. 527.

A master is not bound to give an intelligent boy of fifteen years warning that his hand, if inserted too far between a belt of felting and a hot cylinder over which it runs, will be drawn in and brought into contact with the cylinder. *Lowcock v. Franklin Paper Co.* (1897) 169 Mass. 313, 47 N. E. 1000.

It is not negligence to omit telling a seventeen-year old boy of more than usual enterprise and intelligence, employed on a “drier” machine five or six weeks, who understands the danger of getting his hands drawn in the machine, knows that if they are drawn in they will be burned, and that cloth of various sizes frequently passes through the machine, in which he knows that there are tears of various sizes and shapes, that there are liable to be holes also in the cloth, although he testifies that he had seen no holes in the cloth, and that his hand was caught in a hole and drawn into the machine, where others testify that the holes frequently occur. *Shine v. Corbecco Mfg. Co.* (1899) 173 Mass. 558, 54 N. E. 245.

A master is, as a matter of law, free from negligence in failing to give in-

structions to a youth who has worked for six months on a machine substantially the same as that which causes the injury, and nearly one month on the latter, in reference to the danger of injury from allowing his hands to be caught between a roll of cloth and one of the cylinders between which it has to be passed. *Crowley v. Pacific Mills* (1889) 118 Mass. 228, 19 N. E. 344 (verdict for defendant should have been directed).

In *Kaillen v. Northwestern Bedding Co.* (1891) 46 Minn. 187, 48 N. W. 779, the contention of defendant was that the danger of allowing the hand to come in contact with revolving rollers was self-evident to anyone who used his senses, and that, in the exercise of ordinary intelligence, the plaintiff, a boy fourteen and a half years old, ought to have known that if his hand came in contact with the rollers it would be drawn in. The court said: "At first sight the position of defendant seems plausible; but when we consider the fact that the surface of the rollers was smooth, and the space between them very small, we think it not improbable that there may be a great many boys, and even men of ordinary intelligence, without experience with machinery, and with a limited knowledge of the principles of mechanics, who, while knowing and seeing that the rollers drew in wool compressed almost to the thinness of paper, would yet, like this boy, fail to realize or appreciate that they would suddenly compress and draw in, as quickly as it came in the slightest contact with them, an object like the hand or fingers, many times thicker than the aperture between the rollers. . . . While the facts do not make out a very strong case for the plaintiff, yet we are not prepared to say, as matters of law, that the defendant owed this boy no duty to caution him as to the danger of allowing his hand to come in contact with these rollers, and that he ought to have understood this without being told."

(n) *Shafts and set screws.*—(See also subd. (x), *infra*.) An employee eighteen years old who had been working for three weeks in the machine shop where he was injured, and had previously been operating weaving machines to which power was communicated by shafting, was held to have assumed the risk from a projecting set screw as a part of the machinery with which he had to do in his work, although his attention had not been particularly called thereto. *Demers v. Marshall* (1899) 172 Mass. 548, 52 N.

E. 1066, on Second Appeal (1900) Mass. 9, 59 N. E. 451.

A servant of nineteen years with experience as a factory worker for four and a half days' experience, defendant's mill, was held unable to recover for injuries resulting from cloth being caught in a set screw while he was operating a machine drawn to the shaft, the evidence being that the nature of his work had been explained to him by the foreman, and that he noticed that the shaft was not turned smoothly. *Kreider v. Wisconsin Paper & Pulp Co.* (1901) 110 W. 86 N. W. 662.

An intelligent boy of seventeen years, accustomed to working about machinery, cannot recover for injuries received while leaning over a revolving shaft, drawing up buckets from a lower level, by his loose shirt catching upon the shaft. *Kelly v. Barber Asphalt Co.* (1892) 93 Ky. 363, 20 S. W. 271.

A verdict against a master who failed to give an inexperienced servant, fifteen years old, special instructions as to the danger of coming into contact with a set screw will not be disturbed. *Keller v. Gaskill* (1894) 9 Ind. App. 36 N. E. 303, Second Appeal (1895) Ind. App. 502, 50 N. E. 363.

It is not a conclusion of law from the fact that a servant, seventeen years old, who had been working three weeks before the accident, was aware of the existence of a set screw on a revolving shaft, and was "sprightly" for one year, that he was aware of the risk of danger of passing over the shaft while it was in motion. *Dorling v. Allen* (1874) 74 Mo. 13, 41 Am. Rep. 298, (1880) 102 Mo. 293, (1890) 102 Mo. 213, 14 751.

(o) *Belting.*—The danger involved in attempting to remove an ink from a printing press by getting into the frame of the press, while the shaft through which motion is communicated to the machine is revolved on the pulley and the shifter left unsecured, open and obvious, and therefore assumed to be appreciated, without instructions, by an employee, seventeen years old, after he has been working round the machine for several months, and has removed the rollers several times. *Leroy v. Biglow* (1893) Ind. App. 677, 34 N. E. 128 (roller came in contact with the shifting lever and the belt onto the tight pulley).

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over which it hangs, is negligence.
Trebbald v. Yelle (1897) Rap. Jud. Que-
bec, 6 B. R. 334.

Where a girl seventeen years old em-
ployed in a spinning room was injured
by the parting of a belt, the fact that
she was present when the ends of the
belt were laced would not impute knowl-
edge that the belt was laced in an un-
safe manner, and hence would not show
that she assumed the risk of such acci-
dent. *McGar v. National & P. Worsted*
Mills, (1901) 22 R. 1. 347, 47 Atl. 1092.

In *Cleveland Rolling Mill Co. v. Cor-
rigan* (1889) 46 Ohio St. 283, 3 L. R.
A. 385, 20 N. E. 466, the court affirmed
a verdict absolving from the charge of
contributory negligence a youth fourteen
years of age who, without instructions,
had been put to work only a few days be-
fore the accident, in close proximity to a
revolving shaft from which hung a loose
belt, the result being that his foot was
caught in the belt and whirled round the
shaft.

(p) *Pulleys*.—It is error to give an
instruction which permits the jury to
find for a minor servant over fourteen
years of age and with six months' ex-
perience, provided they find that he was
directed to go up a ladder and put a belt
on a pulley without being notified of the
danger of doing so. It cannot be as-
sumed that a person of that age and
that experience is incapable of forming
a judgment as to the risks of such an
act. *Greenway v. Conroy* (1894) 160
Pa. 185, 28 Atl. 692.

The danger of one's sleeve being caught
by a pulley made of rags, the ends of
which are left loose, is not so obvious
that an employee fifteen years old who
has had no experience in handling ma-
chinery, and has never worked near the
pulley, is, as matter of law, chargeable
with a comprehension of the risk of
being caught while holding a belt on the
pulley to assist in its repair. *Dodd v.*
Bell (1897) 15 App. Div. 258, 44 N. Y.
Supp. 198.

(q) *Grinding machines*.—The failure
to warn a new employee about fifteen
years of age as to the danger of putting
her hand into the interior of a chocolate-
grinding machine in which scrapers were
revolving may be properly found to be
negligence. *O'Connor v. Barker & Co.*
(1898) 25 App. Div. 121, 49 N. Y. Supp.
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(r) *Carding machines*.—In *Tinkham*

v. Sawyer (1891) 153 Mass. 485, 27 N.
E. 6, the court was "unable to discover
in this case any ground on which it can
be held that the defendants are liable,"
under the following state of evidence.
The plaintiff at the time of the accident
was somewhat over sixteen years of age,
and of at least ordinary intelligence, and
had been in the employ of the defendants
about a month. Up to the forenoon of
the day before the accident, he had been
attending to cards in the carding room
of the defendants' mill. He was then
set to work to help tend the machine on
which he was injured, the accident oc-
curring about the middle of the forenoon
of the next day. He was told by the
man who set him to work on it that the
machine was a dangerous one, and not
to touch it when in motion. This was
repeated to him by the man who was
running the machine. He himself testi-
fied that he knew the machine was dan-
gerous when it was going, and that it
was going at the time of the accident.
During the day and more that he worked
on the machine, he helped to clean it a
number of times, and had therefore the
knowledge thus acquired, in addition to
the warning and instruction which he
had received. He had to sprinkle the
wool with oil before it was put into the
machine, and this made the floor very
slippery, so that, as he testified, he had
to walk carefully. It was a part of his
duty to gather up the wool from the
floor as it was blown out of the machine,
and put it back, so that it would go
through the machine again. The open-
ing out of which the wool came was
about 2 feet from the floor, and was 4
feet horizontally by 1 foot in height.
Two or 3 inches inside of it was a large
revolving cylinder with teeth in it. At
the time of the accident he was gather-
ing up wool from the floor so near to
the machine, as he testified, that if he
slipped he would go into it. He did slip,
and his arm went into the opening and
the injury complained of resulted.

A bright boy seventeen years old em-
ployed to spread wool, and cautioned
against allowing his hand to be caught
in the teeth of a revolving roller, as-
sumes the risk in that respect, where
there is no hidden danger and the ma-
chine is simple in construction and
operation, although he has only worked
on the machine a few days before the
accident occurs. *O'Connor v. Whittall*
(1897), 169 Mass. 563, 48 N. E. 844.

A verdict has been set aside, which
found a master negligent in failing to

instruct a minor fifteen years old who had been working four days at the time when he was injured through allowing his shirt sleeves to rest on the rough surface of the card cloth on the revolving cylinder of a carding machine, the result being that the sleeve, and with it his arm, was drawn between the rollers. *Truntle v. North Star Woollen-Mill Co.* (1894) 57 Minn. 52, 58 N. W. 832.

(s) *Cotton pickers.*—In *De Souza v. Stafford Mills* (1892) 155 Mass. 476, 30 N. E. 81, the court held that, upon the whole case, a verdict for the defendant should have been directed, where the plaintiff, who was a foreigner nineteen years old, speaking no English, and had been working only sixteen days, had his hand drawn into the roller of a beater picker and mutilated by the beater, which revolved at a high rate of speed behind the rollers. Since this danger was obvious, and the plaintiff also knew that the beater revolved in close proximity to the rollers, the principle was applicable that it is not a breach of duty to omit to give instructions as to elements of danger which may be appreciated by a person of the plaintiff's age after a brief period of experience in the work.

(t) *Machinery operating vertically.*—A jury is justified in finding that one who employs a boy between fourteen and fifteen years of age at a steam-power punching machine is guilty of negligence in failing to notify him that, if he keeps his foot on the treadle, the press will keep coming down and going up, and to tell him how to take his work from the press after it is punched. *Armstrong v. Forg* (1895) 162 Mass. 544, 39 N. E. 190 (accident happened just after the boy began work). The failure of a master to caution a boy of sixteen years who is operating a punching machine, against the danger from the slippery condition of the floor, does not render him liable for injuries to the boy's hand from its coming into contact, on the first day that he worked, with the lever by which the punch was released, as he attempted to save himself from falling when his stool, which he placed in a tilted position, slipped on the floor, where the condition of the floor and the danger from slipping were perfectly apparent. *Kochler v. Syracuse Specialty Mfg. Co.* (1896) 12 App. Div. 50, 42 N. Y. Supp. 182, 1105.

No duty to instruct can be predicated where a boy of fifteen was injured by catching his hand under the die of a ma-

chine for stamping numbers on plates, and his evidence showed he had operated similar machinery and was aware that, as long as his foot on the lever for the machine into gear, it would cooperate. *Wahl v. Chatillon* (App. Div. 554, 67 N. Y. Supp. 100).

A boy fourteen years of age, he was unfamiliar with the machine, was injured on the second day he began work, was held to be, as well as an adult, the danger to his hand caught under a stamping machine. *O'Keefe v. Thorn* (Monaghan, 73, 16 Atl. 737).

A girl sixteen years old in the act of using a card-cutting machine of which has a tendency to descend when she places her foot on the treadle, cannot recover for injuries sustained by the descending knife, where she has been in the master's service for six years and operating the machine for six years. *Reardon v. New York Consolidated Co.* (1884) 19 Jones & S. 134.

Whatever danger is incident to the work of removing the margins of calendars by a knife applied to the counterpoise weight is presumed apparent to a bright boy of fifteen years. *Malsky v. Schumacher* (7 Misc. 8, 27 N. Y. Supp. 331 (affirmance of complaint held proper)).

An inexperienced boy sixteen years of age who had his hand caught under a plunger of a brick-moulding machine was allowed to recover in *Chicago Pressed Brick Co. v. L.* (1891) 41 Ill. App. 324, Aff. (1892) 140 Ill. 334, 29 N. E. 100.

Whether the duty of instructing an ignorant foreigner sixteen years of age as to the proper way of pushing pieces of clay into the machine where they were pressed by a plunger was adequately performed is a jury question, where the evidence is that the boy was told that he should kick them with his foot, and was not warned of the danger of pressing his foot so he entered the cylinder. *Addicks v. C.* (1899) 62 N. J. L. 786, 43 Atl. 100.

(u) *Machinery in cordage factories.*—Where plaintiff, an inexperienced boy less than thirteen years of age, was injured while operating a bobbin in a cordage factory, and the evidence tends to show that she was not instructed as to the general operation of the machine, or as to the danger

dent thereto, the question of the master's negligence is for the jury. *Donovan v. O'Connell & S. Cordage Co.* (1900) 22 Ky. L. Rep. 777, 58 S. W. 798.

(v) *Thread-forming machines.*—In a case where injury was received on the first day that the plaintiff began to operate a machine which formed by compression the thread of screw caps for tin cans, it was held warrantable to render a general verdict in his favor, where it is also specially found that he was only thirteen years of age, and was working under an agreement with his mother that he should not operate any machinery; that he was placed at work at a certain machine; that he had no previous knowledge of its character; and that no warning or instruction was given him. *National Enameling & Stamping Co. v. Brady* (1901) 93 Md. 646, 49 Atl. 845.

(w) *Sewing machines.*—A Quebec case recognizes the duty to instruct a young girl (age not stated) as to the danger of having her hair caught in moving machinery. *Parent v. Schloman* (1897) Rap. Jud. Quebec, 12 C. S. 283 (she had gone under a sewing-machine table to replace the band).

(x) *Risks incurred in cleaning, etc., machinery in motion.*—In one case it was laid down in general language that oiling dangerous machinery while in motion was contributory negligence, even though the servant was a boy (age not stated). *Sutton v. Stead* (1897) 3 Times L. R. 499.

A superintendent who orders a servant eighteen years old who has been working several days, to oil a band saw while it is in motion, the operation being effected by pouring oil into a cup in front of and above the saw, is not bound to warn him of the obvious danger that his hand may come in contact with the saw if he attempts to reach round from behind the saw. *Battle v. George G. Page Box Co.* (1900) 175 Mass. 318, 56 N. E. 533. The rule under which a master is required to instruct a minor of tender years who is set to work on a dangerous machine has no application where a boy seventeen years old is injured by unfenced cogwheels which he is engaged in oiling, after he has been already doing this work for a year and ten months. *Sanborn v. Atchison, T. & S. P. R. Co.* (1886) 35 Kan. 292, 10 Pac. 860 (sustaining a demurrer to the evidence). A verdict has been set aside by which it was found that an employer

was negligent in having failed to caution an inexperienced youth nineteen years of age, who had been injured after five days of work, as to the dangers of allowing the ends of a piece of cotton waste with which he is wiping the top of a machine to hang down so that they are liable to be caught in uncovered cogwheels revolving underneath. *Atlas Engine Works v. Randall* (1884) 100 Ind. 293, 50 Am. Rep. 798. A complaint should be dismissed which is framed on the theory that a master was negligent in failing to instruct a youth of eighteen years who has worked for him three years, as to the danger of cleaning a revolving shaft. *Smith v. Martin* (1891) 39 N. Y. S. R. 126, 14 N. Y. Supp. 935.

In *Stewart v. Patrick* (1892) 5 Ind. App. 50, 30 N. E. 814, it was held that a general verdict for the plaintiff would not stand where the jury had found specially, in answer to interrogatories, that the appellee was a bright, intelligent boy sixteen years of age; that he had knowledge of the dangerous condition of the machine (a planer) he was operating, and knew that he must be careful in order to avoid injury; that he had received from the appellants some instruction and caution as to the use of the machine and its hazards, though not as much as they should have imparted to him; that he had been using the machine from five to eight weeks before the injury, and that he had no other experience in connection with such machinery; that he was hurt by the machine while wiping its platform, in front of the revolving knives, with pieces of cotton waste; that it was not necessary for the appellee to do this in the performance of his duty in operating the machine; that he knew how to stop the machine and could easily have done so; that he was not ordered or directed by the appellants to do the work in which he was so engaged when his fingers came in contact with the revolving knives.

A boy twelve years old employed to take lumber away from a flooring machine and load it on a wagon, who is injured in attempting, under orders of the foreman of the mill, to oil dangerous machinery while in motion and without proper instructions, may recover damages from his employer, even though he may have been doing this work for some time before the accident happened. *Hinckley v. Horawoosky* (1890) 133 Ill. 359, 3 L. R. A. 490, 24 N. E. 421. Affirming (1889) 33 Ill. App. 259. The controlling feature here was the essential danger

the work, not that it was outside the scope of the plaintiff's employment, as in the cases cited in chapter XXV., *post*.

A verdict is not improper which declares an employer to be liable for injuries received by a girl thirteen years of age, who testifies that she was not instructed as to the manner in which a wheel at the end of a spinning frame might be cleaned safely by giving a peculiar motion to another part of the machinery, and thereby securing a partial revolution of the wheel. *Glover v. Dwight Mfg. Co.* (1888) 148 Mass. 22, 18 N. E. 597 (plaintiff had been working four weeks, but the injury was received when she was trying for the first time to clean the machine). A court cannot say, as a matter of law, that a boy twelve years old does not need instruction as to the danger of having his hand drawn between cogwheels, where his only experience had been with cogwheels arranged in a manner much less likely to lead to an accident of that kind. *Chapin v. Bodger Paper Co.* (1892) 83 Wis. 193, 53 N. W. 452 (a case where the plaintiff, after working for a year in oiling a single row of cogwheels, was set to work upon a double row). The danger incident to wiping the cogs of a gearing is not so plain and open to a boy of fourteen years wholly unacquainted with the working or use of machinery, that he can be held, as a matter of law, to have assumed the risks attendant thereon, where he has received no caution or warning from the master. *Neilon v. Marinette & M. Paper Co.* (1890) 75 Wis. 579, 44 N. W. 772. Whether a boy (age not stated) ought, in the exercise of reasonable prudence, to have anticipated an accident due to the starting of a sand elevator by another while he was engaged in cleaning out the boat, was held to be for the jury upon evidence that no such accident had ever happened before. *Hess v. Admont Mfg. Co.* (1896) 96 Minn. 79, 68 N. W. 774.

In a case where the injury was received not in the ordinary operation of the machine, but while the cylinder was being waxed, it was held that the danger of having her arm caught between two cylinders of a mangle revolving toward each other is not, as matter of law, obvious to a girl of thirteen years. *Kilheary v. Thackery* (1895) 165 Pa. 584, 30 Atl. 1013.

A complaint is not demurrable which alleges in effect that the plaintiff, a minor sixteen years of age, was without skill and experience in handling ma-

chinery, that this fact was known to the defendant, and that the plaintiff was injured by reason of the defendant's failure to instruct him to work in wiping that part of the machinery without any warning as to the danger of doing this while the machine was in motion. *White v. San Antonio Works Co.* (1895) 9 Tex. Civ. App. 29 S. W. 252. Whether a boy twelve years old fully appreciated the danger involved in oiling a machine which carried cogwheels after working for six months is a question for the jury. *B. F. Avery & Son v. Meek* (1895) 45 S. W. 355, holding that the plaintiff's knowledge of the danger of the machinery, which, as the court had decided in a previous appeal (1894) 96 Ky. 337, must be imputed to the plaintiff, did not necessarily imply that he realized the actual danger to which he was exposed in doing the act in which the injury resulted.

In *Fisk v. Central P. R. Co.* (1892) 72 Cal. 38, 13 Pac. 141, the court, *arguendo*, that it was the duty of the master to warn a child about ten years of age as to the danger of working as cleaning a drill in a lathe.

(v) *Air suction produced by machinery.*—It is for the jury to determine whether instruction should be given, where a boy of fourteen years had previously been engaged for years in a spinning room in such work as was suited to his capacity, had thus obtained some knowledge of machinery in the factory, was to undertake the essentially new work of standing on an ordinary lathe and holding a belt away from the driving shaft, to prevent it from coming while it was being mended, and thus occupied being one in which he was exposed to a considerable danger produced by the rapid motion of the drum and the belt which came in contact with the gearing of a water wheel. *Colchester Mills* (1893) 137 Atl. 269. "It is evident," the court, "that this is not a case in which it can be said, as matter of law, that the plaintiff was negligent in the service the plaintiff was called upon to render, or was not such as to require him to take it, or that his contract duty to perform, or that the service had come within the line of his employment if his advancing years and experience had prepared him to take it. It had not come within the line of his employment if it was beyond his capacity. It was proper . . . to treat the negligence of the defendant's negligence in

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fifteen working on a farm, as to the danger that while helping to put new trucks under a wheat binder the machine may tip over. *Wagner v. Plano Mfg. Co.* (1901) 110 Wis. 48, 85 N. W. 613.

There is no presumption that a lad eighteen years old who has usually been employed as a cook in a lumber camp, but who, at the time of the accident, had been engaged for five days in "skidding logs," appreciates the danger of undertaking to stop a rolling log by a "back cant." *Wolski v. Knapp-Stout & Co. Co.* (1895) 90 Wis. 178, 63 N. W. 87 (verdict for defendant set aside).

(jj) *Action of moisture in softening timber*.—A nonsuit should not be granted in a case where the plaintiff, a boy fifteen years of age, without any previous experience, fell into a vat of heated liquor, owing to the fact that the end of a wooden pole had become soggy with use and slipped on the surface of a movable pipe which he was pushing. Under such circumstances the jury might properly find that he ought to have been instructed as to the proper treatment of the pole in case the end should become soft. *Healey v. Hudson River Water Power & Paper Co.* (1899) 57 Hun, 339, 10 N. Y. Supp. 585.

(kk) *Furnaces*.—A blacksmith who fails to warn an apprentice fifteen years old, of the danger arising from heaping fresh coal on the furnace without the precaution of taking measures to prevent the gases thereby generated from escaping into the bellows, is liable for injuries to him from the bursting of the bellows by such gas. *Reisert v. Williams* (1892) 51 Mo. App. 13.

(ll) *Inflammable fluids*.—A complaint is not demurrable which alleges that the employer, knowing that the clothing of a young and inexperienced boy had become saturated with dangerous and inflammable oils and gases in the course of his employment, ordered him to warm himself at a hot stove, not only without instructions as to the hazard arising therefrom, but with an assurance that his clothes were no more liable while in that condition to take fire than if wet with water, the result being that the boy's clothing ignited, and he was burned to death. *Wallace v. Standard Oil Co.* (1895) 66 Fed. 260.

It is for the jury to say whether a boy fourteen years of age who was burnt to death, after working three days, by the ignition of a vat of turpentine into which it was his duty to insert heated spoons for the purpose of removing a

coating of grease, should have been instructed as to the temperature at which it was safe to insert the spoons in the liquid. *Latorre v. Central Stamping Co.* (1896) 9 App. Div. 145, 41 N. Y. Supp. 99.

(mm) *Poisonous vapors*.—It has been held that a demurrer was properly sustained to a complaint which alleged substantially that the plaintiff, a youth nineteen years old, had been taken away from the duties which he was hired to perform, and temporarily put to work in placing colored paper saturated with poison into a box heated with steam; that the vaporization of the poison resulting from the heat caused it to be absorbed into the plaintiff's system to his injury; that such steaming of the paper was not usual in the defendant's establishment; that the defendant knew, or ought to have known, the effect which the process would have upon the person employed in the work; and that the defendant failed to give the plaintiff notice of the poisonous nature of said work, or of the effect of said employment. The grounds of this ruling were that it was not alleged that the paper bore the appearance of being poisoned, or that it was of a kind in the manufacture of which poison is commonly used, or that the defendant had neglected to submit it to proper examination. So far as appeared, the plaintiff's means of determining whether the paper was poisoned were as good as the defendant's. If it were not so, the complaint should have stated the facts which made the difference. *O'Keefe v. National Folding Box & Paper Co.* (1895) 66 Conn. 38, 33 Atl. 587. It seems scarcely possible to suppose that any court which has discarded the old doctrines of technical pleading would reach a similar conclusion under similar circumstances; but the decision, even when considered with reference to those doctrines, seems to the present writer to be of very doubtful correctness. The essential effect of the complaint, it is submitted, is that the defendant knew, or ought to have known, that he was directing the plaintiff to do work which involved a latent danger of which he had neither actual nor constructive notice. That allegations which fairly convey this meaning state a good cause of action is indisputable.

(nn) *Action of electricity*.—The fact that the rollers used for finishing paper in a paper mill generate a strong current of electricity as they revolve, and that this current tends to draw frag-

self accordingly.¹ This conception has been further elaborated following passage of a judgment in which the supreme court of Massachusetts was discussing the right of a boy twelve years of age to recover for injuries caused by contact with an unguarded gear.

"In determining the master's duty in such a case the inquiry is: What instruction does the servant appear to need? Is there any reason to believe him ignorant of anything which, for his protection, he ought to know, or incapable of appreciating the risks from the dangers which surround him? In the absence of anything to show the contrary, the master has a right to assume that he knows those facts of common knowledge and experience with which ordinary persons of his age and appearance are familiar. In hiring a boy twelve years of age and apparent average intelligence, an employer is not called upon to tell him

of the dangers of the rollers, and thus endangers the arms of a person who may be holding such fragments in the vicinity of the rollers, cannot be declared, as a matter of law, to be within the comprehension of a boy fifteen years old. *Wyman v. Orr* (1900) 47 App. Div. 136, 62 N. Y. Supp. 195 (plaintiff was suddenly jerked round by the action of the current as he was backing out with an armful of paper).

(oo) *Operation of mines.*—A boy of nineteen who has usually been engaged in other work, and is assigned to the essentially hazardous duty of moving cars along a descending tramway from a coal mine to a place where the cars are emptied by machinery, should be warned of the cars becoming uncontrollable from the steepness of the grades. *Alabama C. Coal & Coke Co. v. Pitts* (1892) 98 Ala. 285, 13 So. 135 (complaint alleging that servant had been struck by a tippie pole released prematurely by the shock of the car was held to show good cause of action).

In *Jones v. Florence Min. Co.* (1886) 66 Wis. 268, 57 Am. Rep. 269, 28 N. W. 207, the evidence showed that the plaintiff was less than fifteen years old when he entered into the employment of the defendant, and that up to the date of his injury he had been engaged above ground at work which was apparently not hazardous. There was no evidence that he ever before worked under ground in a mine, or that he was at all familiar with the dangers of such employment. That the work under ground was not considered proper work for a boy of his age to perform was a fair inference from

the fact that the defendant's captain boss both testified that he had hidden him to go down into the mine for any purpose. The other evidence showed that the mine was a dangerous place to work in, from the fact that blows were constantly going on in it, and the consequence of such blasting was to loosen the ore and rock in the sides of the mine so that there was danger from the falling of such rock. The court said that, upon the evidence, the question should be submitted to the jury, whether the plaintiff was of sufficient age and experience, or had sufficient information from the captain or pit boss, or from any other source, to comprehend the dangers incident to work in the mine.

(pp) *Work on ships.*—In *W. Churchill* (1884) 137 Mass. 281, 20 Rep. 304, it was urged that the plaintiff was under age and inexperienced, and that the behavior of a leader of a tug rope was a hidden danger, as the plaintiff was over nineteen years old, had lived on the sea since he was a child, had been to sea twelve years, and had been on this boat four months, at the time which it took his brother-in-law to get promoted, the court held that taking these facts in connection with the nature of the employment which he had accepted, the master had a right to assume that the plaintiff knew the dangers of the work, and to order him to handle a line, and to order him to work without special warning or instruction, and that a verdict for the defendant was rightly been directed.

Kelly v. Barber Asphalt Co. (1893) 93 Ky. 363, 20 S. W. 271.

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if he holds his hand in fire, it will be burned, or strikes it with a sharp instrument, it will be cut, or thrusts it between the teeth of revolving cog-wheels in the gearing of a mill, it will be crushed. From infancy and through childhood, as well as in later life, we are all making observations and experiments with material substances, and every person of ordinary faculties acquires knowledge at an early age of those familiar facts which force themselves on our attention through our senses."² Manifestly, however, the criterion thus suggested is too indefinite to be of much real service to settling the ultimate question which is involved, *viz.*, the extent of the respective province of courts and juries in drawing inferences from the testimony. That there is room for a very wide difference of opinion as to the theoretical acquaintance which minors shall be assumed to possess with the properties of matter and the results of the operation of physical laws is abundantly demonstrated by the cases cited in the note to the preceding section. In regard to many groups of facts, conclusions have been arrived at which are either flatly contradictory, or are only susceptible of being reconciled by ascribing to certain minute differentiating factors a significance which seems to be entirely disproportionate to their actual importance.

D. SERVANT'S MEANS OR OPPORTUNITIES OF KNOWLEDGE.

401. Generally.—The reports contain a large number of cases exemplifying the operation of a principle which may be formulated thus: A servant will be affirmed or denied to be chargeable with knowledge of a given risk, according as it is considered that a reasonably observant person possessing his natural and acquired capacity for observation would or would not have ascertained the existence of that risk, if he had made a proper use of the means or opportunities of knowledge which were available before the injury in suit was received by him.¹ The scope and effect of this principle will be discussed in the ensuing sections.

If there is any evidence going to show that the servant had an op-

¹*Chick v. Merchants' Woolen Co.* (1890) 151 Mass. 152, 6 L. R. A. 733, 23 N. E. 829. See § 399, note 1, subd. (k), *supra*.

²Knowledge may be inferred from "opportunities of obtaining that knowledge in the exercise of ordinary care." *Mulderson v. Illinois C. R. Co.* (1874) 59 Iowa, 615; *Wells v. Burlington, C. R. & N. R. Co.* (1881) 56 Iowa, 520, 9 N. W. 364. Opportunity of knowledge of a defect is legally equivalent to knowledge, wherever an ordinarily observant

man in his everyday use of the appliance could not fail to notice it. *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 77, 36 Am. Rep. 454. A servant "assumes all risks which naturally arise from the conduct of the business, and those risks which the exercise of his opportunities of inspection while giving diligent attention to such service would have disclosed to him." *Baltimore & O. S. W. R. Co. v. Welsh* (1897) 17 Ind. App. 505, 47 N. E. 182.

A master has the right to rest on the

portunity of ascertaining the existence of the risk in question, the employer is entitled to have the jury instructed to the effect that a servant not having an opportunity to know of a risk is presumed not to know of it.²

The risks to which the doctrines discussed in the following section are peculiarly, if not exclusively, applicable, are those belonging to the classes designated by the term "obvious," or one of the others which are used to express the idea that their existence and character were ascertainable, without any special examination, by a ordinarily intelligent person who made a proper use of his sight and other senses.³

It is manifest that, in many instances, facts which tend to show that a servant had means or opportunities of ascertaining the existence of certain general conditions may, by changing the logical point, be viewed as evidence which indicates that he had, in the

probability that any servant will know what is generally to be seen by his own observation, or by information from those who are on the spot working with him, and who may fairly be expected to do their duty. *Batterson v. Chicago & N. T. R. Co.* (1884) 53 Mich. 125, 18 N. W. 584. "The courts decline to hold the master liable when the defects in the machinery are perfectly obvious to anyone, and the servant has had the time and opportunity to consider and appreciate the extent of the risk." *Moore v. St. Louis Wire Mill Co.* (1893) 55 Mo. App. 491. It is the duty of a servant to improve every opportunity furnished by his employer to learn about his duties and their accompanying dangers. *Bathuray v. Michigan C. R. Co.* (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634.

² *St. Louis & S. F. R. Co. v. Marker* (1883) 41 Ark. 542 (railway laborer had his leg caught in a cattle guard, while sitting on the side of a car).

In a case where a railway servant was injured by a low overhead bridge, it was held that the defendant had no cause to complain of the following instructions: (1) That if the servant knew or had opportunity to inform himself of the condition of the bridge and of the position of the braces and their proximity to the top of the caboose, he could not recover; and (2) that "if he had a fair opportunity for acquiring a knowledge of the condition of the bridge and its danger while passing thereunder, if there was any, but ignored such knowledge or opportunity, and neglected to avail him-

self thereof, he cannot derive any advantage from such ignorance or knowledge, but his rights are terminated the same as if he possessed knowledge he might have acquired by the reasonable exercise of his faculties." *St. Louis, Ft. S. & W. R. Co. v. Harris* (1887) 37 Kan. 701, 16 Pac. 116.

³ The positive aspect of this doctrine is exemplified by such passages as the following: "The duty to observe and make himself acquainted with the obvious dangers to which he was exposed by his employment was imposed upon him by the fact that he was employed by the defendant and was to be paid for his services. The opportunity to observe and acquire a knowledge of the dangers had been enjoyed by him for many days. Under such circumstances a fair legal presumption is that he improved the opportunity to observe and discharged the duty towards himself and his employer which his contract required of him." *Boyd v. Harris* (1887) 176 Pa. 484, 35 Atl. 222.

The negative significance of this position is indicated by the ruling in *Boyd v. Harris*, which is not error, in a case where a man was injured by the want of care between the ends of ties, to refuse to give the instruction that a servant had an opportunity to know of such risks had an opportunity to observe. *Rock & W. R. Co. v. Moschen* (1899) 109 U. S. App. 511, 12 U. S. App. 511, 1009, where the court emphasized the fact that the servant is under a duty to notice only of such "obvious" defects which he had an opportunity of observing and neglected to observe during the course of the performance of his duties.

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of his employment, acquired that combination of special knowledge and aptitudes, mental and physical, which the law assumes to be the result of experience in any given line of work. See subtitle B, *supra*. Sometimes it is not very easy to ascertain, from the wording of the opinions, which of these alternative conceptions it was intended to rely upon as the rationale of the decision. Indeed, it seems safe to say that the possibility of considering evidence of this sort under two aspects has not been fully apprehended, or at all events, not remembered in particular cases, by some of the courts. Owing to the uncertainty engendered by obscurity of language, and by the failure of judges to appreciate or to bear in mind the double significance of such evidence, it is often a matter of difficulty to determine the category to which a given decision belongs. This difficulty the writer has endeavored to surmount to the best of his ability, though, he fears, not with entire success.

402. No opportunities of obtaining knowledge before the time of the accident.—In any case which involves the question whether the servant had an opportunity of ascertaining the existence of dangerous conditions, it is necessary to determine, in the first place, whether he had ever, at any time prior to the conjuncture when the accident occurred, been in such a situation with respect to those conditions that, supposing the circumstances to have been favorable, he might possibly have discovered the peril to which he was subjected by their existence. If the evidence is fairly susceptible of the construction that he had never been in such a situation, the master's responsibility is established in so far as it depends upon this element, and the plaintiff is entitled to recover unless it shall be demonstrated that he ought to have taken notice of the danger at, or just before, the moment when he was injured.¹

¹ (a) *Railway tracks*.—A switchman who steps into a hole in an unsurfaced track cannot be declared, as a matter of law, to have known of the existence of the hole, or of its depth, if he had worked theretofore in another part of the switch yard, which was surfaced, and testified he had never walked along this particular track before. *Gulf, C. & S. F. R. Co. v. Warner* (1899) 22 Tex. Civ. App. 167, 54 S. W. 1064.

A brakeman upon entering the employ of a railway company is not chargeable with notice of the risk of a hole 5 inches deep between the ties. *San Antonio & A. P. R. Co. v. Parr* (1894) 7 Tex. Civ. App. 26 S. W. 861.

On the ground that the constructive

knowledge of the plaintiff, a brakeman, depended upon a variety of hypothetical circumstances which it was necessary to establish by specific evidence, it was held in one case that he was not, as a matter of law, bound to take notice of the danger created by a sheet of ice formed by water which had dripped on the track from a defective engine pipe. *Flynn v. Wabash, St. L. & P. R. Co.* (1885) 18 Ill. App. 235.

(b) *Obstructions above railway tracks*.—A brakeman is not, as a matter of law, chargeable with notice of the risk of coming in contact with an overhead bridge which is so low as not to admit of the passage of a person standing upright on the top of a "T", and

402a. Sufficiency or insufficiency of opportunities actually observed before the accident.—Supposing the evidence to be of such a nature that a jury would not be justified in finding that the servant had the opportunity whatever to discover the dangerous conditions, the next stage in the investigation is to determine whether the opportunities which it is apparent that he had were sufficient to render a person of his natural and acquired capacity for observation chargeable

with negligence, which is not guarded by telltales or other signals, where he is on his first trip. *Fitzgerald v. New York C. & H. R. R. Co.* (1899) 37 App. Div. 127, 55 N. Y. Supp. 1124.

The fact that other railway companies have maintained some of their overhead bridges so low as to be dangerous is not sufficient to charge a brakeman with notice that there is such a bridge on his own line. *Louisville, N. A. & C. R. Co. v. Wright* (1888) 115 Ind. 378, 16 N. E. 145.

(c) *Obstructions beside railway tracks.*—A brakeman making his first trip over the road is not bound, as a matter of law, to know the danger caused by structures near the track, which are few and exceptional. *Seaton v. Boston & A. R. Co.* (1888) 147 Mass. 481, 18 N. E. 209 (see further, as to this case, § 404, *infra*).

A brakeman who was not familiar with the surroundings, and had had no opportunity to make himself familiar with them, was held not to be chargeable with notice of the risk of being struck by a fish chute adjoining a part of the main track outside the defendant's yards. A distinction was taken between such a structure and similar structures near side tracks. For the latter kind, trainmen are bound to look out, as they are usually necessary in the conduct of the business of a railway company. *Phelps v. Chicago & W. M. R. Co.* (1899) 122 Mich. 171, 81 N. W. 101, 84 N. W. 66.

In the absence of evidence showing that he had ever switched a car on the track in question, or had some other reason for apprehending the special risk from which the injury resulted, it will not be held, as a matter of law, that a switchman was chargeable with notice of the fact that a building occupied by a customer was close to a siding constructed solely for the purpose of reaching it. *Street v. Michigan C. R. Co.* (1891) 87 Mich. 539, 49 N. W. 882.

A jury is justified in finding that a brakeman was not chargeable with no-

tice of the danger caused by a structure near the track, where there is no evidence to show that his duties had, at a time prior to his being struck by it, put him into a position to have observed the position of the structure with reference to the track. *Illinois & St. L. R. Co. v. Whalen* (1886) 19 Ill. App. 116.

Evidence as to the construction of chutes on defendant's road on which an injured servant was employed is competent as showing his knowledge of the dangerous proximity of the chutes to the track. But evidence as to the construction of stock chutes on other railways on which he had never worked is incompetent, where it is not shown that he had worked on that part of the railway where such stock chutes were erected. *Keist v. Chicago & W. M. R. Co.* (1899) 110 Iowa, 32, 81 N. W. 19, also § 404, note 5, *infra*.

(d) *Railway cars; construction and operation of.*—In *Wedge and v. Chicago & N. W. R. Co.* (1878) 44 Wis. 481, the absence of evidence that the plaintiff had ever before been in charge of a car which injured him was held to be a ground for inferring want of opportunity to learn its defects.

It is for the jury to determine whether a railroad switchman is guilty of negligence in not knowing of telephone poles upon coal cars extending beyond the deck of the car, and, in that event, where the cars arrived in the yard after dark and shortly before the plaintiff was injured, and he was in proximity to them when the foreman instructed them, and during that time he was engaged in blocking the wheels of the plaintiff's joining car. *George v. Clark* (1888) 118 U. S. 374, 56 U. S. App. 505, 808. See also *Candon v. Missouri R. Co.* (1883) 78 Mo. 574 (§ 402, *infra*).

The danger of coupling to a passenger locomotive with a "neck" attachment is not one of which a brakeman who has, according to his testimony, seen no locomotives

knowledge of those conditions. The most important of the evidential elements which determine the answer to this question are these:

(a) The natural capacity of the servant for taking advantage of the chances for observation which presented themselves. This element is often emphasized in cases where the injured servant was a minor.

his five or six months of service on freight trains, except those with the ordinary drawhead attachment, must be presumed, as a matter of law, to appreciate. *Galveston, H. & S. A. R. Co. v. Garrett* (1889) 73 Tex. 262, 13 S. W. 62.

(e) *Unguarded openings*.—Where the testimony of the plaintiff in an action to recover for an injury resulting from his stepping into an unguarded opening in the floor of defendant's sawmill showed that he had worked in the mill only an hour before the injury, and then not in the vicinity of the opening; that he had never worked in such a mill before, and was given no instruction—it is error to instruct the jury, in effect, that, if the hole was in plain sight, plaintiff was bound to see it. *Nyback v. Champagne Lumber Co.* (1901) 48 C. C. A. 632, 169 Fed. 732.

(f) *Machinery*.—A court cannot say as a matter of law, that a servant was negligent in not observing the peculiar perils incident to heading in the dark a new machine which he had never before seen. *Walsh v. Port Vale Co.* (1872) 110 Mass. 23.

The case is for the jury where an employee in a manufactory, having had occasion to go through a passage-way between two machines, struck his leg against an iron rod projecting from one of the machines, the evidence being that he had never used the passage before, but had seen it used by operatives and overseers; that the light in the passage-way was insufficient, and the signal ray in color between the machines and the rod tended to render the obstruction visible; and that the plaintiff had looked for obstructions, but saw none. *Edwards v. Tilton Mills* (1901) 70 N. H. 571, 50 Atl. 102.

A foundry hand who is suddenly called upon to assist in raising a heavy weight by means of a crane which is defective in having no "dog" for holding the weight when raised to the desired height, its place being supplied by inserting an iron spike in the cogwheels, is not necessarily negligent because he catches his finger in the wheel while thus using the spike, if it appears that, although he had been working several

years in the foundry, he was employed in another shop where the cranes were operated differently, and that he had never seen this particular crane operated before. *Dziabinski v. J. L. Mott Iron Works* (1900) 56 App. Div. 58, 67 N. Y. Supp. 256.

A servant injured by the fall of a loose wheel from a bucket used in unloading a ship is not chargeable with knowledge of the defect, where he had had no opportunity to examine the appliance. *Morton v. Ziobrowski* (1900) 91 Ill. App. 162, affirmed in 192 Ill. 328, 61 N. E. 413.

(g) *Vehicles*.—A servant who, at the master's direction, loaded a wagon with lumber, and was injured by the breaking down of a wheel, is not, as a matter of law, chargeable with a knowledge of the risk, when he had never used the wagon. *Bosch v. Ross Lumber Co.* (1899) 103 Wis. 221, 79 N. W. 213 (the defendant imperfectly used that the case was one for the application of the principle that the duties of all simple appliances are presumed to be known to the servant).

(h) *Ladders*.—The servant's knowledge of the risk is for the injury where he was injured by the overturning of a ladder of a certain kind due to the use of a common round stick for a lever with which to tip it, the evidence being that this particular ladder had never before been seen by the plaintiff, and that he did not know there was anything wrong with it or the lever. *Trickett v. Vermont Lumber Co.* (1898) 172 Mass. 131, 51 N. E. 493.

(i) *Mines*.—It cannot be said, as a matter of law, that an employee in a mine, visiting a low, narrow passage for the first time, and carrying no other light than a miner's lamp, ought to have observed that the grade of the drift was sufficient to cause a loaded car to run by its own momentum on an iron track. *Consolidated Coal Co. v. Bruce* (1894) 150 Ill. 449, 37 N. E. 912, affirming (1893) 47 Ill. App. 141.

(j) *Banks of earth, etc.*—An employee engaged in the morning of the day when he was injured by the collapse of a bank of earth which he was excavating may

See § 399, note 1, *supra*. But in respect to adults also it is noted that, in view of the fact that some men have greater power of observation than others, and a stronger desire to investigate and understand, knowledge cannot be imputed to a servant, as a matter of law, on the ground that some persons having the same opportunity of observation as he had would have ascertained the existence of dangerous conditions.¹

(b) The acquired capacity of the servant for taking advantage of the chances for observation which presented themselves. It is obvious that, in many instances, a court will be justified in declaring a matter of law, that an experienced servant having the chances for observation disclosed by the evidence ought to have discovered the danger, although that conclusion would not be a necessary one if he had been inexperienced in the employment. Cases illustrating situations analogous to each of those discussed in §§ 394-396, *supra*, will be found in various subdivisions of note 1 to the following section.

(c) The length of the period during which the chances for observation presented themselves. See next paragraph.

(d) The number of occasions on which those chances presented themselves. This and the element last mentioned must always be considered together, since the material question to be ultimately decided is really whether the servant had been so often in a position where he might have observed the danger that his failure to observe it must be pronounced culpable in point of law. Usually, of course, the number of actual chances for observation will be found to have been greater when the period available for observation was a long one than when it was a short one. But manifestly there is no necessary or invariable relation between these two circumstances.²

properly be found to have been excusably ignorant of the dangerous condition in which it was, owing to the fact that iron wedges had been driven the night before into the top, and that afterwards there had been a heavy fall of rain. *Thomas v. Ross* (1896) 21 C. C. A. 444, 41 U. S. App. 574, 75 Fed. 552. A laborer who had been engaged in excavating a bank for about five hours before it fell on him was not chargeable with knowledge of a dangerous crack in it which was not visible from the place where he was at work. *Elledge v. National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720.

(k) *Formation of ice.*—A brakeman's general knowledge of the physical conditions in the vicinity of a tank is not conclusive upon the question of his neg-

ligence in a case where the injury was due to his slipping on a sheet of ice formed by water leaking from the tank, and it was shown that there had been no ice there until a few days before the accident, and that he had not been in the place since then in that part of the tank. *McFall v. Iowa C. R. Co.* (1896) 100 Iowa, 723, 65 N. W. 321.

¹ *Ingerman v. Moore* (1891) 90 Cal. 410, 27 Pac. 306 (for facts, see note 1, subd. (r), *infra*).

² In *Hulchan v. Green Bay, W. & N. P. R. Co.* (1883) 58 Wis. 319, 17 N. W. 17, it was urged that the complainant was demurrable for the reason that, in his averments, he showed that the servant, a brakeman, had been for several years in the employment of the defendant, and that he was necessarily chargeable with know-

so it is recognized that the powers of investigation and discovery are a matter of opportunity and the existence of the

advantage of the servant. It is obvious that, in declaring, as the law does, that the chances of observation are not to be considered if he had been in a position of observation, the law is not to be understood as for observation.

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cases presented. It is always, it is said, to be understood that the law is not to be understood as for observation.

Usually, of course, it will be found that the law is not to be understood as for observation.

the injury was a short of the track. There had been no work before the accident. The plaintiff was not working at the time of the accident. (1895) 90 Cal. 1. (1891) 90 Cal. 1. See § 402.

Ban. W. & St. R. Co. v. W. W. W. 319, 17 N. W. 2d 1. The complaint was that, as the servant, a few years in the past, he was with knowledge

that can be safely affirmed in this connection is that, if the chances occur every day in the regular course of the servant's employment,—and this is the most common predicament to be reviewed—his ignorance of the danger becomes less and less excusable as the period available for observation is prolonged. The decisions in which the effect of this element is discussed are far more numerous than any other class of cases which turn upon the servant's opportunities of knowledge, and, as will be amply apparent from an examination of the following section, are, if not absolutely irreconcilable, only reconcilable by the aid of wire-drawn distinctions.

(e) The character of the servant's duties, whether favorable or unfavorable for the purposes of observation. With respect to this element, it would appear that a large number of the cases which have been decided in the servant's favor proceed upon a principle which may be enunciated thus: If it was not a recognized fact of the functions of the servant to look out for dangerous conditions of the same kind as those which caused the injury (see §§ 414 *et seq.*, *infra*), and his chances of observation were merely such as were casually afforded by occasional proximity to the defective instrumentality, it is for the jury to determine whether he ought to have discovered the conditions. But a comparison of the rulings upon virtually identical groups of concrete facts shows very clearly that some of the courts, even if they accept this principle as theoretically correct,—which cannot be affirmed with certainty,—construe it in such a sense that it is of very little advantage to the servant.³

Considered under another aspect, this element is also suggestive of the principle that knowledge ought not to be imputed, as a matter of law, when it is a reasonable inference from the testimony that the servant could not, without unduly neglecting or delaying the performance of his work, utilize the opportunities of observation which were afforded by his local relations to the dangerous conditions.⁴ But it

of the existence of the obstructions on the track by which he was injured while coupling cars at a certain station. But this contention did not prevail, the court being of opinion that there was no averment inconsistent with the hypothesis that, when injured, the plaintiff was coupling cars at that station for the first time, and then first became aware that the obstructions complained of were on or near the track. Whether he ought to have known of the obstructions was a question to be determined by the evidence.

³ Contrast especially the antagonistic

decisions cited in § 402, note 1, subd. (a)-(c), *infra*.

⁴ The risks assumed by the servant are "those risks which the exercise of his opportunities for inspection, while giving diligent attention to such service, would have disclosed to him." *Trans. & R. R. Co. v. Henderson* (1893) 134 Ind. 636, 33 N. E. 1021.

The servant cannot recover without making it appear that the defect was "of such a nature as not to be discoverable in the reasonable and ordinary exercise of diligence in the course of his duty." *Central R. & Bkg. Co. v. Kenney* (1877)

is apparent from an examination of the cases that this principle has been very differently construed by various judges. By so doing it seems to be, for practical purposes, wholly ignored.⁵

In any case where the defect was a concealed one, it is obvious that a servant who has had nothing to do with the operations which caused that defect cannot be charged with knowledge of its existence simply because he was required to work near that part of the plant while

58 Ga. 494; *Baker v. Western & A. R. Co.* (1882) 68 Ga. 706.

"The servant is especially entitled to assume that his master had furnished him with suitable and safe materials, machinery, and surroundings, and relieved him of investigation and inquiry in that regard, where the performance of his duties requires constancy of attention to other matters. A man whose attention is constantly directed to moving cars and their coupling cannot possibly give much attention to the tie-switch-bars, etc., over which he may, from time to time, have to pass." *Chicago & E. I. R. Co. v. Hines* (1890) 132 Ill. 109, 23 N. E. 1021.

"Unless the defects are such as to be obvious to anyone giving attention to the duties of the occasion, the employee has a right to assume that the employer has performed his duty in respect to the implements and machinery furnished." *Louisville & N. A. & C. R. Co. v. Buck* (1889) 116 Ind. 566, 2 L. R. A. 520, 19 N. E. 453. See also *Carpenter v. Meriden Nat. R. Co.* (1889) 39 Fed. 315, where similar language is used.

Among the factors rendering the servant's ignorance excusable have been mentioned the "exigencies of the situation" (*Wedarood v. Chicago & N. W. R. Co.* [1878] 44 Wis. 44); and the engrossing nature of his duties (*Cincinnati, L. St. L. & C. R. Co. v. Long* [1887] 112 Ind. 166, 13 N. E. 659; *Mason & O. R. Co. v. Yockey* [1900] 43 C. C. A. 228, 163 Fed. 265).

In *Dorsey v. Phillips & C. Constr. Co.* (1877) 12 Wis. 583, where the plaintiff was struck by a cattle chute near the track, the court argued thus: "The safety of railroad trains depends largely upon the exclusive attention of those operating them, to the track and to the trains themselves. It is not for the interest of railroad companies or of the public—with like, if not equal, concern in the safety of trains—that persons so employed should be charged with any duty or necessity to divert their attention. And it appears to us very doubt-

ful whether persons operating trains, and passing adjacent objects in rapid motion, with their attention upon their duties, ought, without express proof of knowledge, to be charged with notice of the precise relation of such objects to the track. And, with actual notice of the dangerous proximity of adjacent objects, it will be doubted whether it would be reasonable to expect them, while performing their duties, to retain constantly in their minds an accurate profile of the places and things, so always chargeable, as well by the day, with notice of the precise position of the train to adjacent objects, in case of objects so near the track as to be possibly dangerous, such as to divert their attention from their duty on the train, to the safety in performing it. Notwithstanding some things said in some cases for the appellant, we should be inclined to think that, in the absence of express notice of immediate danger, employees operating trains may be held to their duties under an implied assumption that they may do so without exposing themselves to extraordinary danger, that is, danger not necessarily incident to the course of their employment.

Compare also *Valley R. Co. v. ...* (1898) 31 C. C. A. 255, 58 U. S. 377, 87 Fed. 849 (§ 403, note 1 (a)), *infra*; *Bryce v. Chicago & N. W. P. R. Co.* (1897) 103 Iowa, 665, W. 780 (same note, subd. (d)).

In a case where a brakeman was injured by striking against the upper members of a covered bridge, it was proper to instruct the jury that such employee is not required to know absolutely all the defects of construction or all obstructions along the railroad, to neglect his duties to be on a lookout for defects along the road. *Chicago & A. R. Co. v. Johnson* (1888) Ill. 206, 4 N. E. 381.

⁵ See § 403, note 1, subd. (a), *infra*.

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defective.⁶ The cases involving the opposite situation are reviewed in § 405, *infra*.

(f) The physical environment of the servant at the time or times when the chances for observation presented themselves. One important circumstance to be considered under this head is the quality of the light which was available at the times when the servant was in a position where, so far as the conditions of space and distance were concerned, he might have observed the danger.⁷

Another element of a more special character than those so far mentioned is presented by those cases in which recovery has been allowed⁸ or refused⁹ on the ground that certain fellow servants of the injured person, who had had the same opportunities for observation as he had, had failed to notice, or had noticed, the dangerous conditions.

403. Same subject continued. Illustrative decisions.—In the note below are collected a large number of decisions illustrating the evidential significance of the elements which have been discussed under their general aspects in the preceding section. For the purpose of facilitating comparison, they are arranged under subdivisions designated by headings similar to those employed in all the longer notes in the present chapter. Other pertinent cases will be found cited in §§ 405, 406, *infra*.¹

¹ See *McMahon v. McHale* (1899) 174 Mass. 320, 54 N. E. 854 (§ 403, note 1, subd. (a), *infra*).

² In several cases cited in § 403, note 1, *infra*, the courts seem to have proceeded on the theory that a servant could not be charged with knowledge, as a matter of law, when the opportunities for observation occurred in the nighttime. *Colf v. Chicago, St. P. M. & O. R. Co.* (1894) 87 Wis. 273, 58 N. W. 108 (subd. d); *Illinois C. R. Co. v. Welch* (1899) 52 Ill. 183 (subd. d); *Fredenburg v. Northern C. R. Co.* (1889) 114 N. Y. 582, 21 N. E. 1049 (subd. a); *Texas & P. R. Co. v. Crow* (1893) 3 Tex. Civ. App. 260, 22 S. W. 928 (subd. e). Compare also *Hunt v. Kane* (1900) 40 C. C. A. 372, 100 Fed. 256 (subd. a). But a strong decision to the contrary is *Ryan v. New York, N. H. & H. R. Co.* (1897) 169 Mass. 267, 47 N. E. 877 (subd. d). For a case in which the servant was allowed to recover on the ground that the light in a mine was dim, see *Severance v. New England Tale Co.* (1900) 72 Vt. 181, 47 Atl. 843 (subd. ee).

In several of the cases cited in the note referred to, the circumstance that

the opportunities for observation presented themselves in the daytime is mentioned among those which were deemed to be adverse to the servant.

³ *Prake v. South Park Foundry & Mach. Co.* (1897) 68 Minn. 305, 71 N. W. 276 (§ 403, note 1, subd. (r), *infra*).

⁴ *Anderson v. Winston* (1887) 31 Fed. 528 (§ 403, note 1, subd. (d-1), *infra*).

⁵ (a) *Railway tracks and apparatus, generally*.—The risk from the fact that the fastening of the rails on a road under construction was not completely finished was held to have been assumed by a servant who, for some time before the accident, had been traveling over the line daily. *Moss v. Johnson* (1859) 22 Ill. 633. A railroad company is not liable for injuries to a brakeman by being thrown from the top of a car on which he was standing, near his brake, trimming a tump, by the jerking and lurching motion given the car by the unevenness of a new and unfinished side track over which he had passed several times, and the condition of which was open and obvious. *O'Neal v. Chicago & I. Coal R. Co.* (1892) 132 Ind. 110, 31 N. E. 669.

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403a. Sufficiency or insufficiency of the opportunities of knowledge at the time of the accident.—Where the question to be decided

is whether a railway servant, while employed, and during that time passing a certain yard, is chargeable with knowledge of any holes that can be seen by a casual observer. *Recon v. Toledo, A. & N. W. R. Co.* (1893) 97 Mich. 265, 56 N. W. 612.

A railway servant who has worked for two months at a station where there is a side track laid across a large depression, on ties which are blocked up and not ballasted, is chargeable with a knowledge of the patent danger that his foot may be caught between the ties while he is coupling cars. *Bullerson v. Chicago & G. T. R. Co.* (1884) 53 Mich. 125, 18 N. W. 584. A switchman and car coupler who has been employed in a yard for several months, and has passed an open ditch under the track every day, is presumed to appreciate the danger created by it. *DeForest v. Jorrell* (1881) 23 Hun. 490. Affirmed in (1882) 88 N. Y. 264. There can be no recovery for an injury from a passing train, to a switchman whose foot was caught in a hole in the planking between the railroad tracks, which he could have seen every day for six weeks. *Glasgow v. New York & N. E. R. Co.* (1893) 159 Mass. 68, 24 N. E. 79. Notice that the space between the ties of a side track is not filled, and that it is laid with old iron rails, is imputed to a brakeman who has been a baggage-man and brakeman for six years, and a brakeman on a particular road for three months, and has worked recently as brakeman on a gravel train ballasting the track in the vicinity of a place where he is injured, and during such employment has often been on and about the side track. *Atchison, T. & S. F. R. Co. v. Alsdorf* (1892) 47 Ill. App. 200.

Knowledge of the want of fencing on a certain division of a railway is imputed, as matter of law, to an engineer who has been running over it two and a half years before an accident. *Sweeney v. Central P. R. Co.* (1880) 57 Cal. 15.

A watchman at a railroad roundhouse required to assist in moving an engine without steam or power to move itself, into the roundhouse for repairs, assumes the risk of being caught between such engine and another engine standing upon one of the divergent tracks, where the position of each is seen by him, and he takes his position of his

own choice, with full knowledge of the fact that the engine as it moves will come closer to the stand. *Anglin v. Texas & P. R. Co.* (1890) 130, 23 U. S. App. 62, 553.

A section foreman has been entitled to recover for injuries from the derailment of a work train, part of the track which was in his charge. *Taylor, B. & H. Taylor* (1890) 79 Tex. 104, 11 S. W. 2d.

The falling of a mass of rock from a railroad track, is not an ordinary occurrence, of which a brakeman employed on a freight train which passed the dangerous point while he was in position which prevented him from seeing is presumed to take notice. *Bean v. Western North Carolina R. Co.* (1890) 107 N. C. 731, 12 S. E. 2d.

A brakeman upon a freight train, coupling the output of a coal mine, never been upon the track but before, and has no knowledge of its dangerous condition, does not assume the risk of the lack of necessities to prevent the escape of loaded cars from a coal track, steep grade onto the main track, the right to act upon the assumption that the coal track is reasonably safe, and suitable for the use to which it is put, and that the cars stored there are properly secured. *Continental R. Co. v. Toledo, St. L. & K. C. R. Co.* (1892) 32 C. C. A. 44, 59 U. S. App. 133.

A watchman employed by a company to guard its property, when attempting to board a sleeping train, stumbled over a pile of lumber which had been lying beside the track for four or five days, and fell on his head. It cannot be said, as a matter of law, to be chargeable with the negligence of the company in not having the lumber removed, or in not having it properly secured. *R. I. & P. R. Co. v. Kinnare* (1890) 111, 9, 60 N. E. 57. Affirmed in (1891) 111, App. 508. It cannot be said, as matter of law, that a brakeman required to know the condition of the planking at each of the forty cars on his run where he is required to couple cars, and that he assumes the risk of injury from defects in such planking. *Fluhrer v. Lake Shore & M. S. R. Co.* (1899) 121 Mich. 212, 80 N. W. 2d. Ignorance by a yardhand upon

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road, of the dangerous character of the road where it crosses a public highway, will not be held inexcusable as matter of law, where the yard was a mile long, he rode as often as he walked, and when on the ground his duty required active work and great attention. *Valley R. Co. v. Keegan* (1898) 31 C. C. A. 255, 58 U. S. App. 377, 87 Fed. 849. A brakeman is not, as matter of law, chargeable with a knowledge of the existence of a steep grade at a particular point on the track, and of the risk incident to making a coupling upon it. *Leonard v. Hann* (1898) 81 P. & Ste. M. R. Co. (1895) 63 Minn. 489, 65 N. W. 1084.

A yard switchman is not, as matter of law, negligent in failing to notice a small incline a few feet in width, forming the connection between an outside track of the railroad and the sidewalk, although he has been passing and re-passing it for several days. *Rourke v. Ledbetter* (1896) 56 Kan. 348, 43 Pac. 249. The risk incident to walking on an incline on which a car track is laid, at one particular point in which there is no opportunity for stepping off the track, is not an obvious risk to a servant who has often passed along it before, where there was nothing to direct his attention to the risk on any of the previous occasions when he had been on the track. *Bentham v. Taylor* (1896) 66 Mo. App. 308.

A railroad engineer is not conclusively bound to take notice of all omissions of the company by which he is employed, to maintain the statutory fences and cattle guards, so as to constitute his failure to complain of such an omission an assumption of the risk thereby caused. *Torre Hinde & L. R. Co. v. Williams* (1897) 69 Ill. App. 392.

A brakeman who, after three days service, falls into a cattle guard while coupling cars in the nighttime, is not, as matter of law, guilty of negligence in being ignorant of its position. *Fredenburg v. Northern C. R. Co.* (1889) 114 N. Y. 582, 21 N. E. 1049. One who enters the employ of a railroad company as a brakeman does not thereby assume the risk of injury from an uncovered cattle guard within the yard limits, although in passing over the road he was in a position where he might have known of the danger. *Galveston, H. & S. A. R. Co. v. Stinkard* (1897) 17 Tex. Civ. App. 385, 44 S. W. 35.

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A brakeman will not be held, as matter of law, to know that there are unballasted ties and an uncovered cattle guard in one of the yards in which he is required to do switching, because he has acted in such capacity for three weeks, passing through such yard twice a day on a round trip of 100 miles. *Illinois C. R. Co. v. Samuels* (1897) 166 Ill. 270, 46 N. E. 799, *Adams* (1896) 66 Ill. App. 439.

A brakeman is not chargeable, as matter of law, with a knowledge of the dangers created by uncovered signal wires in a yard in which he had done switching work only twice before the day on which he was injured. *Indiana, L. & L. R. Co. v. Bondy* (1899) 152 Ind. 590, 53 N. E. 175.

(b) *Frogs, switches, and guard rails.*—The risk resulting from the want of blocking between switch rails is assumed by a switchman who has worked for two months in a yard where this arrangement is in common use. *Chicago, B. & Q. R. Co. v. Smith* (1885) 18 Ill. App. 119. A servant who has been working for several years as brakeman and as conductor of freight trains, and is frequently brought by his duties into a certain yard to make up his train, is presumed to know the kind of frog which is in use there, and cannot recover if he receives an injury owing to the fact that they are not blocked. *Southern P. Co. v. Seley* (1894) 152 U. S. 145, 38 L. ed. 39, 14 Sup. Ct. Rep. 530. A brakeman who has been engaged for several years in the performance of duties which were of such a nature that he must unquestionably have known that a large portion of the frogs on defendant's road were not blocked, and who had been employed in broad daylight around and near the frog where the accident occurred, for an hour and a half before his injury was received, must be taken to have understood that that frog was unblocked. *Spencer v. New York C. & H. R. Co.* (1893) 67 Hun. 196, 22 N. Y. Supp. 100. A railroad employee cannot recover against the railroad company for an injury caused by catching his foot in a frog of standard make in the yard where he was employed for a considerable time (period not specified) as yard brakeman, and where he could observe the possibility of danger from the frog. *Richmond & D. R. Co. v. Risdon* (1891)

the servant with notice, the element contributed by the number of occasions on which observation was possible is necessarily excluded, since, in the nature of the case, there is only a single occasion

87 Va. 335, 12 S. E. 786. A brakeman is chargeable with notice that frogs and switches at a certain station were unblocked, where they were in the same condition as when he began work eighteen months before he caught his foot in one of them. *Lake Shore & M. S. R. Co. v. McCormick* (1881) 74 Ind. 440. To an employee who had become more or less familiar with a yard while working as a signalman for several months, and who for a month previous to the accident had been engaged in switching, the fact that a plank used for blocking of a frog was not as thick by one inch as that ordinarily used in the yard in question was held to be a palpable defect. *Rajotte v. Canadian P. R. Co.* (1889) 5 Manitoba L. Rep. 365. A switchman who has been employed for seven months in one of the yards of a company which, as a general rule, does not use blocking, assumes the resulting risk. *Narramore v. Cleveland, C. C. & St. L. R. Co.* (1899) 48 L. R. A. 68, 37 C. C. A. 499, 90 Fed. 298. A switchman is chargeable with knowledge of the defects in a switch in not having a proper space between the main rail and the point of the switch rail, and in not having blocking in that space, where he has worked over and about the switch in question for many years, and hundreds of times within the year preceding the accident, and the condition of the switch and its surroundings has been unchanged during that time. *Quinn v. Chicago, R. I. & P. R. Co.* (1898) 107 Iowa, 710, 77 N. W. 464. A skilful railroad brakeman of mature years, who frequently passed an unblocked guard rail, must be presumed to have known of the obvious danger incident thereto. *Wabash R. Co. v. Ray* (1898) 152 Ind. 392, 51 N. E. 920. One who had worked as section man and brakeman for two years on a road where the frogs and guard rails were not filled or blocked was held, as matter of law, to appreciate the danger of getting his foot caught in such frogs and guard rails while stepping about and over them. *Gillin v. Patten & S. R. Co.* (1899) 93 Me. 80, 44 Atl. 361. See also *Appel v. Buffalo, N. Y. & P. R. Co.* (1888) 111 N. Y. 550, 16 N. E. 93 (switchman after working daily for several years in a yard is presumed, as matter of law, to understand the risks created by the want of

blocking); *Rush v. M.* (1887) 36 Kan. 129. A switchman who has been working six months in a yard is presumed to know of the want of blocking of a frog and the main rail at a certain point. *Peoria, D. & E. R. Co. v. Robinson* (1887) 55 Ill. App. 638 (switchman worked for sixteen months in a yard chargeable with knowledge of the want of filling of a frog and guard rail and a main rail); *K. & T. R. Co. v. Thompson* (1897) 33 Tex. Civ. App. 658, 33 S. W. 2d 101, arising from the want of blocking of a guard rail presumed to be known by a switchman who has been in a yard for about seven weeks. The question whether a switchman has noticed that a particular frog was not blocked was held to be a question for the jury in *Curtis v. Chicago & N. W. R. Co.* (1897) 95 Wis. 460, 70 N. W. 100. The ground that the condition of the rails, whether blocked or unblocked, would not be likely to be observed by a brakeman passing on trains, it was held that evidence to the effect that there were numerous other guard rails besides the one which caused the injury in suit was inadmissible in an action by such an employee. *Chicago, R. I. & P. R. Co. v. Quinn* (1898) 107 Iowa, 80, 77 N. W. 33. An employee who worked in different yards where there were many switches, and who was continually employed in making repairs, cannot be charged, as matter of law, with knowledge of the condition of the blocking of a frog in one of those yards, where it was required to use in the night, though the defect had existed for a long time, and was obvious in the day. *Hunt v. Kane* (1900) 40 C. C. A. 100 Fed. 256.

Whether or not a railroad employee was guilty of contributory negligence in pursuing his duties in a switch where a frog projected severely above the track at a point where he frequently to pass, without detecting the condition, and reporting the condition, or taking precautions against danger, is for the jury, after considering the nature of the defect, its location, and the movements with reference to his familiarity with the sur-

taken into account. But with this exception the considerations with reference to which the servant's constructive knowledge is determined

and all the other facts and circumstances. *Walker v. Atlanta & W. P. R. Co.* (1894) 103 Ga. 820, 30 S. E. 503.

(c) *Obstructions above railway tracks.*—A brakeman who is injured by his head coming in contact with a bridge while standing on top of a car cannot recover, where he had on numerous occasions passed under the same bridge. *Williams v. Delaware, L. & W. R. Co.* (1889) 116 N. Y. 628, 22 N. E. 1117; *Queen v. New York C. R. Co.* (1869) 1 Lans. 108 (brakeman had been every day for a year in a position where he might have noticed the relative height of the bridge and the cars on the line); *Wells v. Burlington, C. R. & N. R. Co.* (1881) 56 Iowa, 520, 9 N. W. 364 (servant had been employed as brakeman for four years on a road where he had often passed under bridges of the same height as the one by which he was injured); *Hooper v. Columbia & G. R. Co.* (1884) 21 S. C. 541, 53 Am. Rep. 691 (bridge had been passed daily for three months); *Clark v. Richmond & D. R. Co.* (1884) 78 Va. 709, 49 Am. Rep. 394 (bridge passed several times by daylight).

After two months' service, a freight brakeman on a railroad will be presumed to have become acquainted with the low bridges over the track. *Brossman v. Lehigh Valley R. Co.* (1886) 113 Pa. 491, 57 Am. Rep. 479, 6 Atl. 226 (brakeman was killed at night).

An employee who has passed for three months four low bridges in close proximity, which had a warning signal in front of the east side of the east bridge and also in front of the west side of the west bridge, and understood that these signals were a warning for all the bridges, assumes the risk of an omission of the signals from the intermediate bridges. *Ryan v. Long Island R. Co.* (1889) 51 Hun, 607, 4 N. Y. Supp. 381. A brakeman who on several occasions has been near a bridge is chargeable with notice that it is not protected by warning signals. *Fitzgerald v. New York C. & H. R. Co.* (1891) 36 N. Y. S. R. 755, 12 N. Y. Supp. 932 (accident occurred at night).

If the car on which a brakeman was standing when he came into collision with an overhead bridge was higher than others used by the company, and he was aware of that fact, he cannot recover if he had been on the road a sufficient

length of time to charge him with a knowledge of the height of the bridge. *Lynch v. New York, L. E. & W. R. Co.* (1892) 44 N. Y. S. R. 663, 18 N. Y. Supp. 417; *Baltimore & O. R. Co. v. Stricker* (1878) 51 Md. 47, 34 Am. Rep. 291 (brakeman had passed under the bridge about 1,500 times since cars like that on which he was had been put into use); *Pittsburgh & C. R. Co. v. Sent Meyer* (1879) 92 Pa. 276, 37 Am. Rep. 684 (several months employed).

A brakeman injured by coming into collision with the overhead braces of a covered truss bridge is not, as matter of law, chargeable with a knowledge of the distance between them and the tops of cars, where it is a fair inference from the testimony given by several experienced trainmen that it was an extremely difficult matter to discern by merely looking at such a bridge how far its overhead timbers were above a train, and there is evidence going to show that, although he had crossed the bridge daily for several months before the accident, he had not been on the top of the cars while they were passing over the bridge, more than once before the accident occurred, and that there was no other bridge with braces so low as the one in question. *St. Louis, Ft. S. & W. R. Co. v. Irwin* (1887) 37 Kan. 701, 16 Pac. 146. If it is not shown that the servant's attention had even been called to the additional risk created by the occasional use of cars higher than the average, or that he had ever ridden upon one of them, and the jury would therefore be warranted in finding that he was not familiar with them, the court cannot declare, as matter of law, that he was guilty of negligence in not ascertaining, by measurement or accurate observation, whether he could pass safely under the overhead timbers of a bridge while standing erect. *Atchison, T. & S. F. R. Co. v. Rowan* (1895) 55 Kan. 270, 39 Pac. 1010.

Knowledge of a dangerously low overhead bridge was held not to be, as matter of law, imputable to a brakeman who had passed underneath it eight or nine times during the daytime, and as often at night, but never while he was on the top of the cars. *Louisville, A. & C. R. Co. v. Wright* (1888) 115 Ind. 378, 16 N. E. 115.

A switchman who has been working in

are essentially similar to those which are controlling in the lected in the two preceding sections.

a yard for three years, but always at night, is not necessarily chargeable with notice of the defective condition of a spout several feet above the cars, which has been out of repair three months. *Texas & P. R. Co. v. Crow* (1893) 3 Tex. Civ. App. 260, 22 S. W. 924.

(d) *Obstructions beside railway tracks.*—A yardmaster is chargeable, from the character of his duties, with knowledge of the location of a pole which has been set too near the track, and cannot recover for injuries caused by striking against it while on a moving train. *Blackstone v. Central R. Co.* (1901) 112 Ga. 762, 38 S. E. 79. An engineer who has crossed a trestle bridge 200 times before the accident is chargeable with a knowledge of the distance of the timbers from the cab of the locomotive. *Illick v. Flint & P. M. R. Co.* (1888) 67 Mich. 632, 35 N. W. 708. A finding of a jury that a fireman did not have an opportunity to know that a certain cattle chute was in dangerous proximity to the side of his engine is not warranted where the evidence is that, before the accident, he had been, for more than sixteen months, continually employed upon the same engine upon which he was at work when struck by the chute; that the chute in question was so conspicuous that it, and its location, could be seen for a distance of a half mile and more along the track and each side thereof; that during this period of time the fireman, in the discharge of his duties, passed the station where the chute was located twice each week, and frequently did work and switching at this station; and that a rule of the company required trainmen to take note of dangerous points, and to take time to do their duty. *New York, C. & St. L. R. Co. v. Ostman* (1896) 146 Ind. 452, 45 N. E. 651. Reversing on Rehearing (1895) 41 N. E. 1037. A brakeman is presumed to know of the obvious danger from the location of a cattle chute near a siding, where he has passed the same almost daily for nearly two months, and has on more than one occasion taken cars out on the siding. *Boyd v. Harris* (1896) 176 Pa. 484, 35 Atl. 222. A brakeman who has been over a division of a road about 400 times must be presumed to know the distance, from the rails, of wing fences at cattle guards, so as to charge him with the risk of hanging low on a ladder at the side of

a car in order to look under. *Kee v. Chicago, R. I. & P. R. Co.* (1891) 131 Ill. 411, 13 L. R. A. 817, 209 (dissenting Beck, J.). A section man who had worked for five years on a night train was held to have assumed the risk of being struck descending from a freight car nearly 4 feet from the nearest track. *New York, N. H. & H. R. Co. v. New York, N. H. & H. R. Co.* (1891) 47 N. E. 877.

A section man who has been for two hours on a track close to a pile of lumber is presumed to assume the risk that, in getting away of a train, he may strike. *Benjamin v. Chicago, St. P. & N. W. R. Co.* (1891) 47 Minn. 480, 50 N. W. 408.

A switchman is not, as matter of law, chargeable with notice of the location of a switch stand which he had noticed, where he had always worked at night, and the switch, not being provided with a light, was not provided with a light. *Chicago, St. P. M. & O. R. Co. v. Chicago, St. P. M. & O. R. Co.* (1891) 47 Minn. 480, 50 N. W. 408.

A brakeman is not chargeable, as matter of law, with notice that a switch stand was dangerously close to the track, where the evidence is that the distance between the track and the switch stand was only 7 or 8 feet, and the plaintiff had never, before the accident, passed or attempted to pass the switch stand. *New York, N. H. & H. R. Co. v. New York, N. H. & H. R. Co.* (1891) 47 N. E. 877, 35 Atl. 305. A similar case with regard to facts alleged was reached in *Potter v. H. & M. R. Co.* (1899) 122 Mich. 20, 81 N. W. 80. Judgment Reversed (1900) 122 Mich. 20, 245 (but not on this point).

A railroad switchman who, in a yard but two weeks is not, as matter of law, chargeable with notice that a certain switch pole was within a few inches from the wall of the freight car, and the risk of being struck by the pole was not assumed by the plaintiff. *Johnson v. Short Line & U. N. R. Co.* (1891) 23 Or. 94, 31 Pac. 283.

Whether or not a conductor is chargeable with the risk of being struck by a freight car on a lay road assumed the danger

The servant has been held entitled to go to the jury on the ground that, at the moment when the danger first came within the range of

vision of a trolley pole not more than 4 inches from the outside edge of the platform steps along the side of the car is for the jury upon evidence that the poles were set at irregular distances from the track, and that he had run a car past the poles only on one occasion, where it does not appear on which side of the car he was on that occasion, or whether the car was an open or closed one. *Pierce v. Camden, G. & W. R. Co.* (1896) 58 N. J. L. 400, 35 Atl. 286.

In a recent case it was held that an engineer who was running an engine back to its starting point on a railway which was about to be converted into a trolley line was chargeable with knowledge of the fact that the trolley poles had been erected, and also of their position with relation to the track, although it was the first time he had run over the line since they had been erected, and on the outward trip he had been sitting on the side of the engine opposite to that on which they stood. *North Birmingham Street R. Co. v. Wright* (1901) 130 Ala. 419, 30 So. 40 (no duty to warn). This is certainly a strong decision.

As a fireman's duties have no relation to the roadbed and track, he is not chargeable by law with knowledge of the location of a station limit board so near the track that he is struck by it while leaning out of the gangway to inspect the condition of a hot box, under direction of the engineer. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* (1896) 73 Fed. 661, Distinguishing *East Tennessee, V. & G. R. Co. v. Head* (1893) 92 Ga. 723, 18 S. E. 976, on the ground (1) that the injured employee there was an engineer, whose duty it was to watch the track, and who therefore had greater opportunities of knowledge than a fireman; and (2) that the object which struck the engineer was the post of a "tell-tale," which would be much more likely to attract the attention of employees than a station-limit board.

See also *Dorsey v. Phillips & C. Constr. Co.* (1877) 42 Wis. 583 (§ 192a, note 4, *supra*).

The question as to the assumption by a brakeman of the risk of catching his clothing on a bolt projecting from the top of a truss while standing on the side of a box car is for the jury, not-

withstanding he had frequently passed the point in question, where his attention at such times was directed to releasing the brakes, and, by reason of the curve on either side and his ordinary position on the train, it was difficult to estimate the distance between such cars and the truss. *Bruce v. Chicago, W. & St. P. R. Co.* (1897) 103 Iowa, 665, 72 N. W. 780.

In a case where a brakeman on a freight train had been in the service of the railroad company for twenty-eight days, and had made several trips past a coal shed, a footboard of which was 16½ inches from the ladders on the cars, and his train had stopped there at least twice to receive coal, the court refused to say, as a matter of law, that he knew that the structure was so near the track as to render it unsafe for a brakeman to use the ladder on that side of the cars while passing. *Chicago & A. R. Co. v. Stevens* (1901) 189 Ill. 226, 59 N. E. 577, Affirming (1900) 91 Ill. App. 171.

Whether a brakeman who was injured, while descending a side ladder, by a trestle work near the track, was chargeable with knowledge of the risk created by the structure, after having been four days in the employment and passing it a few times, is a question for the jury. *Rebel v. Chicago, W. & St. P. R. Co.* (1886) 35 Minn. 84, 27 N. W. 305.

In *Illinois C. R. Co. v. Welch* (1869) 52 Ill. 183, 4 Am. Rep. 593, where a brakeman was injured by a structure projecting dangerously far towards the track, defendant's counsel urged that the rule of law governing the case was that a person engaged for a particular service, and knowing, or having full opportunity to know, of the conditions and circumstances of the service, assumes all risk arising therefrom, in the absence of fraud or concealment on the part of the master. But the court considered that this proposition was not applicable to the facts of this case, saying: "It would have been morally impossible for him to have ascertained the existence of all such special perils as this which caused the injury, and there is no reason for supposing that he had acquired such knowledge before the accident, as he had been but two months upon the road, and had always passed the station where he was injured, in the

nial except upon two trips. More is to be remarked that the danger was of such a character that it might well escape the observation of a person who had been even for a long time upon the road."

Contributory negligence or assumption of the risk cannot, as a matter of law, be imputed to a servant who was crushed between a car which he was assisting to move and a platform at the side of a switch track upon which the car had, without his knowledge, been thrown by the direction of the foreman, merely because he had on one previous occasion, and possibly two, assisted in pushing a car on the track furthest from the platform, and was passing along the track past the switch with the other employees about the time it was thrown. *Consolidated Kansas City Smelting & Ref. Co. v. Peterson* (1899) 8 Kan. App. 316, 55 Pac. 673.

A fireman is not chargeable with knowledge that the fastenings of the spout of a water tank, which gave way and allowed the spout to fall on him, were defective. *Missouri, K. & T. R. Co. v. Gordon* (1895) 11 Tex. Civ. App. 672, 33 S. W. 684.

(c) *Railway rolling stock; construction and operation of.*—After a week's work on a road where foreign cars with double deadwoods are being constantly received, even an inexperienced brakeman is presumed to understand the danger incident to coupling such cars. *Hathaway v. Michigan C. R. Co.* (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634. As a servant employed to couple cars is likely to know as much about the peculiar construction of a bump on a foreign car as any other agent of the company, negligence is not predicable of the omission to warn him of the danger created by such bumper. *Simms v. South Carolina R. Co.* (1886) 26 S. C. 490, 2 S. E. 486. The risk of being injured by a defective kind of drawbar is assumed by a brakeman who has been using such drawbars daily for a considerable period. *Record v. Chicago & M. L. S. R. Co.* (1895) 107 Mich. 540, 65 N. W. 550. A freight brakeman who has been in the company's employment eighteen months assumes the risk incident to stock cars having no bumpers. *Houston & T. C. R. Co. v. Barrager* (1890; Tex.) 14 S. W. 242. A switchman who, on several previous occasions, has coupled foreign cars laden with oranges, is presumed, both from the special circumstance of the fragrance

of that fruit issuing from them and from his previous experience, that foreign cars might come into any hour of the day or night, that, when such a car arrived, he be called on to handle couplings of unusual kind ("Miller"), and must, at his peril, use the means for securing his safety. *Missouri P. R. Co.* (1899) 187, 18 S. W. 980. The negligence of a switchman in uniting two couplings of peculiar construction not intended to be put together is for the jury, where the evidence that, although he had been a switchman for two years, he had to unite such couplings three times; that the pin used was a flat pin; that if it had been a pin, fitting the hole in which it was used, he could have drawn it out with his hands; that, as it was found it jammed he was obliged to get a rock and attempt to draw it out, and that, in doing this, he was injured by the backing train. *Mouth v. Burke* (1893) 9 C. C. A. 8, 8 App. 1, 60 Fed. 704 (Partents).

A brakeman after being eight months in the employ of a railway company is chargeable with knowledge of the projecting sills of certain cars in common use on the road, and is dangerously close when two cars are brought together to be coupled. *Brandin v. Central Vermont R. Co.* (1893) 38 N. Y. S. R. 473, 10 Supp. 700.

In a case where a stove in a car was not properly secured, and subsequently fell over on a brakeman, the train was derailed, the brakeman was held entitled to an instruction that if it was the duty of the injured brakeman to light the stove, and its condition was open and patent, and he nevertheless carelessly overlooked it, he could not recover. *C. Air Line R. Co. v. Ray* (Ga.) 674.

A brakeman on a narrow-gauge railway cannot recover for an injury to the manner in which the cars are carried, where he was working on the train for several months and has had his attention called to the alleged source of danger by having worked, before he came a brakeman, on the hoisting of the car bodies were transferred

trucks. *Titus v. Bradford, R. & K. R. Co.* (1890) 136 Pa. 618, 20 Atl. 517.

A fireman who has been at work in that capacity for two years is presumed to be aware of the risk resulting from the want of air brakes on his employer's trains. *France v. Rome, W. & O. R. Co.* (1895) 88 H. n. 318, 34 N. Y. Supp. 408.

A fireman who has been working for a week on an engine between which and the tender there is no apron cannot recover for injury caused by that defect. *Chicago, M. & St. P. R. Co. v. Standart* (1884) 16 Ill. App. 145. A fireman was held not to be, as a matter of law, chargeable with knowledge of the danger caused by the fact that water had leaked from the engine tank, and had frozen on the apron connecting the engine and the tender. *Mason & O. R. Co. v. Luckey* (1900) 43 C. C. A. 224, 103 Fed. 265. The presumption is that a brakeman who has been working six days on a logging train knows that a bumper on an engine tender, which is 26 inches higher than one on the car next to it, will overlap the latter when the engine and car come together. *McLaren v. Williston* (1892) 48 Minn. 299, 51 N. W. 373.

A painter who, while traveling on a steam car, has got on and off at every station, has helped to push it a considerable distance, has, according to his own testimony, examined it, and has several times wiped the wheels, is chargeable with notice that the flanges of the wheels were unusually shallow, and that the wheels were worn flat. *McQueen v. Central Branch Union P. R. Co.* (1883) 30 Kan. 689, 1 Pac. 139.

A section hand, after twenty months' use of an iron rod which communicates motion from a lever to the wheels of a hand car, is presumed to know its condition. *Burlington & C. R. Co. v. Luchs* (1892) 17 Colo. 280, 29 Pac. 175. It is for the jury to say whether a railway servant who, while coupling two engine tenders, was crushed between them was negligent in obeying an order to couple them, where the evidence is that he was employed in the capacity of a hostler helper, assisted in knocking fire-out of engines, in coupling engines and cars, and in moving them, and when injured had been so engaged for about eighteen months. *Thompson v. Chicago & N. W. P. R. Co.* (1900) 86 Mo. App. 141. A switchman new to work, who is injured, after only seven hours' work by a "stuck link," is not necessarily

barred from recovery. *Banner v. Monroe* (1893) 3 Tex. Civ. App. 416, 22 S. W. 272.

The plaintiff's knowledge of a defect in the ratchet of a brake wheel is for the jury, where he has made only one trip on the car, and there is evidence that the wheel was partially concealed, and that its condition might not have been disclosed by frequent use. *Central R. Co. v. Hushett* (1894) 74 Ga. 59.

It is a question of fact for the jury whether, by the exercise of ordinary care and diligence, a locomotive engineer might have discovered a defective condition of the pilot before starting on the trip, where the engine was standing in a depression on the track at the time he took charge of it. *Fordyce v. Edwards* (1898) 65 Ark. 98, 44 S. W. 1034.

Whatever danger there is in the fact that a screw projects beyond the crank of a hand car, and that there is for this reason an increased probability that the clothes of a man turning the crank may be caught, is as well known and as obvious to one who has used the car for several days as it is to his employer. *Carey v. Boston & M. R. Co.* (1893) 159 Mass. 228, 33 N. E. 512.

A jury is justified in finding that a track walker whose connection with a hand car was only incidental and casual was excusably ignorant that rubber on the brake shoe constituted a dangerous defect. *Gibbston, H. & S. A. R. Co. v. Parrish* (1897) Tex. Civ. App. 40 S. W. 191.

Whether a servant in a stone mill who has gone once over a tramway with a car having projections upon it which almost fill the space between it and a certain structure close to the track, has constructive knowledge of this fact, and of the further fact that there are similar projections upon other cars also, is a question for the jury. *Salem Stand & Lumber Co. v. Griffin* (1894) 139 Ind. 141, 38 N. E. 411.

(f) *Bridges and trestles.*—The risk arising from the unsafe condition of a bridge are presumed to have been known, where the servant had passed over it daily for several months, and according to his own testimony, is swayed so much under the passage of a team that the horses could scarcely keep their feet. *Wansfield Coal & Coke Co. v. McFerson* (1879) 91 Pa. 185, 36 Am. Rep. 662.

An employee upon a wrecking car on a railroad cannot recover for injuries

sustained through the toppling over of the car and derrick while standing upon a bridge which was defective and insecure because of injuries at the time of the wreck, and their temporary repairs, and the improper fastening of the ropes used to secure the derrick upon the car, where the defects of the bridge were patent and readily discoverable, and he participated with the wrecking master in handling the ropes. *McGuath v. Texas & P. R. Co.* (1894) 9 C. C. A. 133, 23 U. S. App. 86, 69 Fed. 555.

No action can be maintained for injuries caused by a fall from the track of an elevated railway company, where the evidence is that the plaintiff had been in the defendant's employ for ten years as humpman, brakeman, and conductor; that, according to his own testimony, he had observed narrow, unguarded walks along the sides of the tracks similar to that from which he fell, and had passed along such a walk in switching a train, but at the time of the accident had not observed the width of the walk in question, nor that it was unguarded; and that he had previously traversed similar walks, and also the one from which he fell. *Nugent v. Brooklyn Union Elev. R. Co.* (1901) 64 App. Div. 351, 72 N. Y. Supp. 67.

A servant injured by the giving way of a roughly built bridge over certain piping across which he was wheeling cinders in a barrow is not necessarily chargeable with a knowledge of its unsafe condition, where it had been constructed by his foreman, and he had been working there only a short time. *St. Louis S. W. R. Co. v. Mayfield* (1901; Tex. Civ. App.) 60 S. W. 896.

(g) *Platforms and scaffolds.* — A workman inexperienced as regards scaffolds is not, as matter of law, chargeable with negligence in failing to observe, after a few hours of work, that one of the boards is not secured. *Douglas v. Missouri, K. & T. Trust Co.* (1897) 140 Mo. 1, 41 S. W. 255. There can be no recovery for the death of an experienced engineer who lost his balance and fell off a platform into machinery which he was oiling, where the evidence shows that the accident was due to the dim light, the unevenness of the platform, and the want of a railing, and that these conditions were or ought to have been known to him, as he had already traversed the platform several times. *French v. First Ave. R. Co.* (1901) 24 Wash. 83, 63 Pac. 1108.

It has been held that a workman not

a carpenter, who had been engaged about three hours in carrying along a narrow runway on a scaffold the side of which was placed at a point an additional plank to space for the laborers to pass and was not chargeable, as a matter with knowledge that this plank was nailed to its supports, and that he had known of the defects, had not necessarily have been guilty of negligence in using the scaffold. *Missouri, K. & T. Trust Co.* (1897) 140 Mo. 1, 41 S. W. 255.

(h) *Parts of buildings.* — A hole in the concrete floor of a room, less than a foot in diameter, from 1½ to 3 inches deep, and filled with leather dust of a darker color than the concrete, created a risk which was as great as regarded an employee who had been working about six months in the room, and whose duties for at least six weeks before he was injured by a fall into the depression were such as to make it necessary or convenient to pass over this passageway every day. *Whalen v. Whitcomb* (1901) 173 N. Y. 33, 59 N. E. 666.

The omission of an employer to secure a servant of the removal of a nail supporting the rafters of a building on which he was working, the negligence of the building fell, is not the servant's self negligence, as he must be presumed to have been aware of a circuitous way which he had an ample opportunity of observing, and which was clearly to his sight. The true question is, under such circumstances, whether the employer acted with reasonable prudence in compliance with the rule which requires him to take such precautions for the safety of his servants as to be the result of his judgment. *Sykes v. American Ice Co.* (1882) 99 Pa. 465.

(i) *Slippery surfaces.* — (See next subd.) The owner of a dredge is not liable for injuries to an employee slipping upon an incline upon which he went to oil machinery because of the absence of cleats, which he had frequently been on the task of putting, and which he had also had his attention called to the risk. *American Ice Co. v. Walls* (1898) 28 C. C. 255 U. S. App. 460, 84 Fed. 428.

(j) *Unguarded openings.* — An employee familiar with the condition of the premises assumes the risk of falling through an opening in the floor of the premises assumes the risk of the want of railing to guard a

been engaged in carrying lumber on a scaffold which was placed at the plank to fall, to pass each other, a matter of fact, his plank was not and that, even if defects, he was not guilty of it. *Booth v. Co.* (1897) 11

Wings.—A defective of a passage in diameter and up, and filled with a color than the risk which was of an employee who had six months in the for at least two injured by stepping ere such as to convenient for the gateway every day. (1901) 178 Mass.

employer to notify of some of the ters of a building, the roof fell, is not in it must be held as a circumstance, the opportunity of as clearly visible question for the circumstances, is acted with compliance with him to provide to the best *Mykes v. Parker*

es.—(See also of a structure injuries to an an inclined table oil machinery of cleats, where on the table preceding the and his attention *American Ins. Co.* 8 C. C. A. 44, Fed. 428.

ings.—An employee conditions from ears in that part the risk of guard a vat con-

taining vitriol, in the floor of the factory, and from the obscurity preventing him from seeing it, whether such obscurity arises from a want of light, or from steam, or both; and he cannot recover for injuries sustained by falling into the vat while attempting to pass from one part of the factory to another. *Corrigan v. Washburn & M. Mfg. Co.* (1898) 170 Mass. 79, 48 N. E. 1070.

A servant who had worked several days in a tannery where the planks and along the edge of open vats for the employees to walk upon were occasionally rendered slippery by the vapors which rose from the vats and settled upon them, is presumed to comprehend the danger caused by this slippery condition and by the obscurity created by the vapors thus rising from the vats, and cannot recover for an injury received in attempting to cross the planks before daylight and in vapors so dense that he was compelled to feel his way. *Shipley v. Grand Rapids Leather Co.* (1900) 124 Mich. 533, 83 N. W. 284.

A servant who, when going to clear a from a flume rack, fell into an open space between two platforms, was held unable to recover, where it appeared that the planks by which the space had been covered had been removed a week or ten days before the accident. *Roberts v. Brownville Paper Co.* (1900) 53 App. Div. 641, 65 N. Y. Supp. 955.

Obstructions above roadways.—A person employed to drive a team for hauling materials from a platform, to reach which it is necessary to pass under a beam over a gateway, assumes the risk of the beam being too low so that he is likely to be struck by it in passing back and forth, where the defect is plainly visible, and he has been driving teams under the beam for several years. *Baker v. Barber Asphalt Pav. Co.* (1899) 92 Fed. 117. A man who has driven a coal truck for a year is chargeable with knowledge of the relative height of a beam on the coal bin and the seat on the truck. *Miller v. Grane* (1900) 53 App. Div. 276, 65 N. Y. Supp. 813.

Vehicles.—The absence of large pins about 18 inches long, which it was customary to insert in the top of a buggy to keep the load securely in its place, is such a conspicuous and manifest fact to one who has been engaged for eight days in handling such buggies that his failure to notice the defect is negligence, as a matter of law. *Bräisch*

v. Roberts (1891) 143 Pa. 1, 21 Atl. 398.

One saves.—The danger that a man standing between the rolls which convey all the planks coming from a circular saw is liable to be hit by one of them is deemed to be obvious to an employee who has been working for 2½ months in the room where the saw is, though not in contact with the saw itself until the morning of the accident. *Dimers v. Deering* (1899) 93 Me. 272, 44 Atl. 527.

A servant who has been operating a saw for three days is not necessarily chargeable with knowledge of the danger incident to his place of work, as a result of another unguarded saw close by. *Christianson v. Northwestern Lumber Co.* (1901) 83 Minn. 25, 85 N. W. 826.

Planers.—Where a servant who had been working for the most part in a mill yard was injured while engaged in the work of carrying away the smooth lumber which had passed through the planer, by striking his foot against revolving knives which could not be seen by a person standing in the position occupied by him, and he himself testifies that he knew nothing about these knives, it cannot be declared, as a matter of law, that the opportunities he had previously had of observing them charged him with notice of the danger created by them. *Vegman v. Morse* (1893) 160 Mass. 143, 35 N. E. 451.

Cogwheels, and gearing.—The master's omission to instruct as to the dangers of contact with cogwheels cannot be relied on as a ground of action by a servant who got into the narrow inclosed space where the cogwheels were, after he had been engaged for several weeks upon work which enabled him to see them in operation. *Casen v. Pennsylvania Asphalt Paving Co.* (1901) 198 Pa. 348, 47 Atl. 1128. Contributory negligence is not predicable, as a matter of law, where the evidence is that a mill hand was injured by uncovered cogs three days after returning to his duties, that the cogs had been covered prior to his absence, and that his attention at the time of the accident was distracted by his duties. *Craver v. Christian* (1885) 34 Minn. 397, 26 N. W. 8 (1887) 36 Minn. 413, 31 N. W. 457. A sawmill hand is chargeable with knowledge of the position of an uncovered cogwheel near the place where he has been working for three days, if the only

obstruction to the view is a skid considerably narrower than the cogwheel. *Olson v. McMurray Cedar Lumber Co.* (1894) 9 Wash. 500, 37 Pac. 679.

An employee who has been working only one or two days is not, as matter of law, chargeable with knowledge of the fact that the rods protecting a gearing have become so bent as to produce an opening dangerously large. *Lore v. American Mfg. Co.* (1901) 160 Mo. 608, 61 S. W. 678. It is for the jury to say whether a servant in a sawmill should have known of the danger arising from cogwheels which had been uncovered since his employment began, one week before the accident. *Barbo v. Bassett* (1886) 35 Minn. 485, 29 N. W. 198.

(p) *Revolving cylinders, etc.*—An employee engaged to remove waste from a slowly revolving cylinder, who has been engaged at the work for fifteen months, and has received full instructions as to the manner of performing it, assumes the risk of having his arm caught in the machinery. *Daigle v. Lawrence Mfg. Co.* (1893) 159 Mass. 378, 34 N. E. 458.

An inexperienced servant injured within fifteen minutes after he began work upon a machine with swiftly revolving toothed rollers, between which he was told to push brick bats with a short stick, is not necessarily debarred from recovery. *Chicago Anderson Pressed Brick Co. v. Rombarz* (1893) 51 Ill. App. 545.

(q) *Revolving tumblers.*—No recovery can be had for the death of an employee who stumbled against a revolving tumbler from which flanges and rivet heads projected in such a way as to catch his clothing and throw him between the tumbler and the shafting, where he had worked for many years and was familiar with the machinery. *Carlson v. Monitor Iron Works* (1899) 38 App. Div. 38, 55 N. Y. Supp. 992.

(r) *Set screws.*—A carpenter who is injured by a set screw in a revolving shaft after he has worked on the employer's premises for a considerable time cannot recover on the ground that he ought to have been instructed as to the danger. *Keats v. National Heeling Mach. Co.* (1895) 13 C. C. A. 221, 21 U. S. App. 656, 65 Fed. 940. A servant who had been working about three weeks in a factory cannot recover for injuries caused by his sleeve being caught in a set screw on the shaft while oiling it, where there is uncontradicted evidence that the screw could be seen from the

floor, as the servant must be as having assumed the risk. *Marshall* (1901) 178 Mass. 9, 454.

The question of the contributory negligence of a servant injured by his coat sleeve upon a set screw revolving shaft while he was adjusting a belt upon a pull shaft is for the jury, where it is that he had often adjusted the belt and had never noticed the danger, that other employees who had noticed the belt in the same manner noticed it. *Pruke v. South Portland Dry & Mach. Co.* (1897) 68 Me. 71 N. W. 276.

In a case where the injury was caused by a projecting set screw, the plaintiff's own testimony showed that he had worked inside of a mill, taking care of the big saw, for nearly two years, and had been employed as assistant of the scantling machine—that is, cutting the lumber in place to be cut by the saw—for about nine months, during that time he had, upon several occasions when the foreman was running the machine in all eight directions prior to the accident. The court said: "It does not appear that plaintiff's assistant was such as would naturally give him knowledge of the nature of the machine or of the position of the projecting set screw, which was a concealed danger. It is not shown that he had ever been called upon to adjust it, that it was any part of his duty to come acquainted with this machine, or that it was out of order when out of order. Doubtless true that some men would have had the same opportunity would have been familiar with its mechanism and qualified to take charge of it, but that is a matter of common experience, and men would not. There is a difference in the capacity of men to acquire particular knowledge of machinery, and the arrangement of its parts, or of construction, some having more power of observation, and more power to investigate and understand, than others. The extent of plaintiff's knowledge of this machinery was therefore a matter for the jury to determine from the evidence before them." *Inglis v. Moore* (1891) 90 Cal. 410, 27 P. 100.

(s) *Carding machines.*—In a case where a door in the fence round a carding machine fell out while a servant was wiping the machine, and he was caught against it, it was held that the door could be maintained, the

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the risk. *Dowd v. Bowers*,
3 Mass. 9, 59 N. E.

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South Park Foundry
1897) 68 Minn. 305

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showing that he was experienced in the use of machines, and that he had himself taken off and put on the door several times. *Riverside Cotton Mills v. Green* (1900) 98 Va. 58, 34 S. E. 963.

(t) *Pulleys*.—Knowledge of the danger of the work is not conclusively inferred from evidence that the plaintiff had habitually put belts on the pulley in question during a period of rather over a year before the accident. *McBride v. Washington & G. R. Co.* (1886) 5 Mackey, 144. Affirmed in (1890) 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044.

(u) *Belting*.—A woman of mature age and average intelligence assumed the risk of working in a narrow space in the vicinity of unguarded cross belts and pulleys, where she had worked nearly 10 months in such place before the injury, and four years previously at a machine similar in almost every respect, though the belt was straight instead of a cross belt, where the narrowness of the space was obvious and was observed by her before she commenced the work. *Kenney v. Hingham Cordage Co.* (1897) 168 Mass. 278, 47 N. E. 117. A servant who has been oiling a machine for one year, and is injured owing to the absence of a bolt, which causes a belt to shift from a loose on to a tight pulley while he is working, is chargeable with notice of the defect, where the bolt has been missing for nine months. *Coyle v. Griffing Iron Co.* (1899) 63 N. J. L. 609, 47 L. R. 2 4 Atl. 665. Affirming (1898) 62 540, 41 Atl. 680, where the was put upon the ground that the inspection of the machine had been adequate.

(v) *Steam shovels*.—It is a question for the jury whether a man employed for the first time to operate a steam shovel, who was not instructed by the master as to the risks of the occupation, had time to learn of them before his injury, which occurred within five days after he began work. *Alton Paving, Bldg. & Fire Brick Co. v. Hudson* (1897) 74 Ill. App. 612. Affirmed in (1898) 176 Ill. 270, 52 N. E. 256.

(w) *Machinery for cutting or breaking metal*.—The direction in which the fragments of bolts will fly after they are cut off by nippers operated by a servant is presumed to be known to him. *Chicago & A. R. Co. v. Pettigrew* (1898) 82 Ill. App. 33.

(x) *Steam engines*.—Whether a servant was guilty of contributory negli-

gence in failing to discover that it was impossible to exactly center the valves controlling the operation of a piston rod so as to stop its motion entirely, is for the jury, where the servant had only operated it for about two hours, and the motion was so slight as to be almost imperceptible. *Borgeson v. United States Projectile Co.* (1896) 2 App. Div. 57, 37 N. Y. Supp. 458.

(y) *Machinery for breaking up metal*.—A servant in a foundry, who has for two months seen the effect of the operation of an appliance used for the breaking of castings, and for two weeks has been a daily witness of that process, is presumed to understand the risk that pieces of iron may sometimes fly somewhat farther than usual. *Wood v. Heiges* (1896) 83 Md. 257, 34 Atl. 872.

(z) *Elevators*.—An employee who had run an elevator many times a day for 60 days before the accident, will be held to have appreciated the danger that the jerking and shifting of the elevator, of which he knew, would cause loose boxes placed by him on the elevator floor in piles 6 feet or more high to be so moved and shaken in the ascent of the elevator as to be caught under a projecting beam, the place of which he also knew. *Barny v. New York Biscuit Co.* (1901) 177 Mass. 449, 59 N. E. 75.

An employee injured by an elevator of which he is almost the only user, occasioned by a premature loosening of the elevator from its fastenings at the bottom of the shaft, being occasioned by the weakness of a wooden spring in plain sight of the plaintiff, may not recover from his employer, as it was his duty and he had an opportunity to see the defect before getting upon the elevator. *Juchatz v. Michigan Alkali Co.* (1899) 120 Mich. 654, 79 N. W. 907.

An employee, a part of whose duty for more than two years had been to sweep and clean out the bottom of an elevator shaft several times a week, who was injured, while performing such duty, by the descent of the car upon him, cannot recover, as the risk was an obvious one. *Volk v. B. F. Sturtevant Co.* (1900) 43 C. C. A. 527, 104 Fed. 276. Affirming (1900) 39 C. C. A. 646, 99 Fed. 532.

A servant cannot recover for injuries caused by falling down an elevator shaft, where he had been in the same employment for three months, and had opportunity of knowing where the elevator was, and that it was used by others and liable not to be standing at the door

of the shaft. *Browne v. Siegel, C. & Co.* (1901) 191 Ill. 226, 60 N. E. 815. Affirming (1900) 90 Ill. App. 49.

Whether the dangerous condition should have been observed by a servant is a question for the jury, where injury was caused by his coming into contact with a girder projecting into an elevator shaft so far as to come close to the platform of the elevator, and it appears that he could not see the girder readily on account of the darkness. *Olson v. Hanford Produce Co.* (1900) 111 Iowa, 347, 82 N. W. 903.

(aa) *Other hoisting apparatus.*—A common laborer who has been working round a crane for three weeks, and is injured owing to the fact that the hook attached to the crane, which is used for hoisting pieces of timber, is too dull to hold them properly, cannot recover where the jury has found specially that he could have seen the defect if he had looked. *Rietman v. Stolte* (1889) 120 Ind. 314, 22 N. E. 304. Where a servant engaged in loading bales of cotton on a ship was confined by his duties to the lower hold, where he did not and could not have seen the hooks by which the bales were lowered, he is not chargeable with knowledge of their defective condition. *Ocean S. S. Co. v. Matthews* (1890) 86 Ga. 419, 12 S. E. 632.

Where employees injured by the falling of a derrick had nothing to do with its erection or operation, and were required to work so near it that they might be injured by its fall, it cannot be said, as a matter of law, that they were negligent in working there or that they assumed the risk of such injury. *McMahon v. McHale* (1899) 174 Mass. 320, 54 N. E. 854.

An employee of mature years and ordinary mental capacity, who has been working for two weeks or more about a machine by which round logs 4 feet long, covered with ice, are raised 38 feet upon hooks nearly 4 feet apart, on which they are placed, should be held to have assumed the risk of injury from a log falling from the hook. *Jones v. Manufacturing & Invest. Co.* (1899) 92 Me. 565, 43 Atl. 512.

(bb) *Ladders.*—The risks incident to using a ladder made by nailing horizontal slats to upright posts which extend only 18 inches above the brick work of a boiler is presumed to be appreciated by an employee who has been engaged for a month in stoking the boiler; and he cannot recover for injuries due to his

falling off the ladder while he was working in the dark for the post, and had mounted to the highest slat. *Smith v. Bonce* (1895) 105 Mo. 63 N. W. 517.

(cc) *Trenches and banks of earth.*—Whether a servant injured by the subsidence of a trench, caused by a washout which had occurred not long before the accident, should have known that a washout, is a question for the jury. *Brown v. Field* (1892) 157 Mass. 31 N. E. 1075.

A laborer was not, as a matter of law, guilty of contributory negligence in working, under the direction of a foreman, in that part of a trench which was not sheathed or curbed, so as to prevent recovery for injuries caused by the falling of the trench, where he had worked in the trench for an hour before the accident happened, he was familiar with the character of the work, and the danger was not necessary to a person of his experience. *Laporte v. Cook* (1899) 21 R. I. 101, 4 Atl. 519.

A laborer who reached the place of work only a few minutes before a fall of earth fell upon him while he was working, determining it is not chargeable with knowledge of its specially dangerous condition owing to the fact that the wedges had been driven into the trench the previous day, and that there had been a fall of rain during the night preceding the accident. *Thomas v. (1896) 21 C. C. A. 444, 41 U. S. 574, 75 Fed. 552.*

(dd) *Tunnels.*—A laborer engaged in excavating a tunnel is chargeable with knowledge of a crack in the walls, if all his fellow workmen have observed it. *Anderson v. Winston* (1887) 31 Fed. 7.

(ee) *Mines.*—No action can be maintained for the death of a laborer in a mine who was killed by one of the pillars which it was his business to remove from the bottom of the excavation, where he was working, after they had been thrown down from the sides by the miners. *Lopez v. Central Arizona Co.* (1883) 1 Ariz. 464, 2 Pac. 7.

Whether an employee in a mine is chargeable with knowledge of alleged defects in a tunnel is a question for the jury, where the employee was not part of his duty or business to be on the lookout for such defects, but he had opportunities to observe the course of his employment, the character of the work, and the character of the defects being of such a nature as to afford ground for a

ference that he had observed and did know of them. *Whalley v. Zenida Coal Co.* (1899) 122 Ala. 118, 20 So. 124.

Whether a mere laborer employed to haul ore from the interior of the mine to the ore house by means of a vehicle, and not having anything to do with timbering a tunnel, had knowledge concerning the condition of the roof, is for the jury. *Sampson Min. & Mill. Co. v. Schaad* (1890) 15 Colo. 197, 200, 25 Pac. 89. A miner's knowledge of the dangerous state of the roof of a drift is for the jury, where he had passed under the place several times a day in the course of his work. *Cherokee & P. Coal & Min. Co. v. Britton* (1896) 3 Kan. App. 292, 15 Pac. 100.

A miner injured by the falling of a rock which had negligently been allowed to remain on the side of a shaft when it was excavated cannot be said, as matter of law, to have been chargeable with knowledge of the risk, where it appears that, although he had been employed several months in the mine, he had not helped to excavate the shaft, that the only light in the shaft was by lanterns, and that the place from which the rock fell could scarcely be seen in ascending and descending the shaft. *Soverance v. New England Talc Co.* (1900) 72 Vt. 181, 47 Atl. 833.

A complaint which states that, without any fault or negligence on plaintiff's part, the slate composing the roof in a coal mine fell upon him, and that he had no knowledge of the unsafe or dangerous condition of the roof, inasmuch as he had been in the mine only ten days before the injury occurred, sufficiently alleges that the injury occurred without any fault or negligence on his part. *Hochstetler v. Mosier Coal & Min. Co.* (1893) 8 Ind. App. 442, 35 N. E. 927.

Dangerous chemical properties of various substances.—An employee of a corporation engaged in the business of manufacturing white lead assumes the risk of his health, necessarily incident to such business, of which he has knowledge or means of knowledge afforded by his frequent opportunities to observe the precautions adopted by other employees for their protection. *Berry v. Atlantic White Lead & Linseed Oil Co.* (1898) 30 App. Div. 205, 51 N. Y. Supp. 602.

An employee who has been employed in a guano factory for several years, and has had constant opportunities of ascertaining the dangers caused by the poi-

sonous gases generated in a sulphuric acid tank, assumes the risk of injury from inhaling those gases while engaged in repairing a leak in the tank. *State use of Eckhardt v. Lazaretto Guano Co.* (1899) 90 Md. 177, 44 Atl. 1017.

A servant injured by an explosion caused by throwing water on potassium is not entitled to an instruction which declares him to be free from negligence unless he actually knew of the danger caused by putting potassium into water, where there is evidence that he was warned of his peril by the shouts of bystanders, and that frequent explosions from the same cause had occurred near him. *Hill v. Meyer Bros. Drug Co.* (1897) 140 Mo. 433, 41 S. W. 909.

(2g) *Incompetency of servants.*—Knowledge of a fellow servant's qualities will be conclusively presumed, after working with him in the same railway yard for twenty years. *Latremouille v. Bennington & A. R. Co.* (1891) 63 Vt. 336, 22 Atl. 656.

A complaint alleging that the injured servant was a track repairer and was carried on the construction train for six weeks preceding the injury, and that the engineer in charge of the engine drawing the train "was habitually careless and negligent in the discharge of his duties as such engineer, during all the time, and was not possessed of sufficient skill to run the engine in an ordinarily careful and prudent manner," shows that the injured servant was chargeable with notice of the incompetency of the engineer. *Lake Shore & M. S. R. Co. v. Stupak* (1886) 108 Ind. 1, 8 N. E. 630.

A section hand who has daily opportunity to observe the incompetency of his foreman cannot recover for an injury caused by that incompetency. *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285.

See also § 405, post.

To render a servant chargeable with knowledge of the incompetency of a co-servant, his means of knowledge as to such incompetency must have reference to the circumstances which necessarily attend the performance of his duties as such servant. *Daly v. Sang* (1895) 91 Wis. 336, 64 N. W. 997.

(h) *Number of employees assigned to certain work.*—The danger arising from the fact that there are not a sufficient number of servants to manage the master's machinery properly is presumed to be known to a man who has

possible observation, the weather was dull and stormy;¹ or darkness prevailed;² or temporary conditions prevented him from using eyesight effectively;³ or the work in which he was engaged was grossing as to divert his attention from his surroundings⁴ (see

been in his employ for three years. *Sutton v. Hawksroth* (1872) 26 L. T. N. S. 851.

(ii) *Systems and methods of work.*—A section man who for fifteen months has been repairing tracks in a yard is presumed to have become acquainted with the rate at which trains are usually run there. *Boutson v. Chicago, St. P. M. & O. R. Co.* (1891) 47 Minn. 486, 50 N. W. 531. A section man who has been working for three months on a railway where one third of the trains are irregular or extra is chargeable with notice of the practice of running such trains. *Lawson v. St. Paul, M. & M. R. Co.* (1890) 43 Minn. 423, 45 N. W. 722. After serving on a particular train for several weeks a brakeman is presumed to understand the danger of a collision which is created by the running regulations under which the train has been operated during the whole of that period. *Wright v. New York C. R. Co.* (1862) 25 N. Y. 562.

A civil engineer whose duties are to look after the building and maintenance of railroad bridges and trestles assumes the risk of injury from the failure of the company to provide a watchman at a bridge which gives way under the train upon which he is traveling in discharge of his duties, as he must be presumed to know that no watch is kept upon such bridge. *Texas & P. R. Co. v. Smith* (1895) 31 L. R. A. 321, 14 C. C. A. 509, 30 U. S. App. 176, 67 Fed. 524.

An employee who has worked in a switch yard a short time only, and who has seen men on cars which were being switched, is not, as matter of law, chargeable with knowledge of a custom in the yard not to have men on cars while they are being switched. *Chicago & N. W. R. Co. v. Kean* (1897) 70 Ill. App. 676.

¹ Whether knowledge of the dangerous conditions shall be imputed to the foreman of a switching crew, who, while attempting to couple freight cars on a spur track, stumbled over piles of ashes between the rails, and was caught between the cars, is for the jury where the evidence is that the day was dark, with rain and sleet falling; that the ash piles were from 4 to 8 inches high, and covered with snow and ice; and that the

foreman, whose duties did not require him to observe and make safe the condition of the tracks, had never seen the accident. *Kennedy v. Superior Terminal & Transfer Co.* (1896) 93 Wis. 32, 66 N. W. 111.

² In *Fish v. Illinois C. R. Co.* (1896) 96 Iowa, 702, 65 N. W. 495, it was held that a brakeman who knew of the danger of falling from gravel cars along the track did not assume the risk caused by the presence, where the company was in the habit of cleaning off such stones from time to time, and he began work at night, when he could not see where any stones were on the track.

The fact that a brakeman is upon unexpectedly to make a collision soon after midnight has a material bearing upon the question whether he exercised due care in ascertaining the condition of the coupling appliances. *Illinois C. R. Co. v. Foley* (1893) 220, 21 S. W. 866.

³ A tinner in the employ of a railroad company, who is directed to make repairs on the roof of a passenger car standing on a side track, and is injured that it will remain there several days, is not, as a matter of law, guilty of negligence in remaining on the upper side of the car, and failing to discover that it was stretched across the track, by which he is struck and injured, when the car started soon after he gets on, and smoke and cinders from the engine strike directly in his face. *Stoltenberg v. Pittsburg & L. E. R. Co.* (1895) 3 Pa. 377, 30 Atl. 980. The court marked that the nature of the section man's duties was not such as to bring danger to his notice.

⁴ A "machine runner" operating a machine to undermine coal cannot, as a matter of law, be held to have had attention drawn to the fact that the duty of inspecting the roof of the mine, which the foreman had agreed to assume, was being neglected, because he had been in the room about two hours and there had been no inspection, though frequent inspections were required, where it is a fair inference from the evidence that he was giving the machine his constant attention in an attempt to break the record for work. *Westville Coal Co. v. Schwartz* (1897) 100 N. Y. 481.

350, note 1, *ante*); or was such as to give him no time to make observations.⁵ On the other hand, notice of all obvious dangers is imputed, as a matter of law, to a servant whose opportunities for observation are not restricted or diminished by any specially unfavorable conditions.⁶

As to the effect of the servant's temporary forgetfulness of a previously ascertained danger, see §§ 281, 350, 351, *ante*.

404. Knowledge of particular risks: how far inferable from knowl-

177 Ill. 272, 52 N. E. 276. Affirming (1897) 75 Ill. App. 468.

⁵ Whether a brakeman was negligent in attempting to unite two cars with defective couplings is a question for the jury, where the evidence is that he had at no time been called by his duties to examine or observe the coupler; that, as testified by experienced brakemen, he would not be likely, in the ordinary time of uncoupling a car and keeping his face to the engine, to have seen the defect in the deadwood, and certainly would not have seen or known of any defect in the springs; and that he had not been warned by any servant of the company of any defects therein. *Bender v. St. Louis & S. F. R. Co.* (1897) 137 Mo. 240, 37 S. W. 132. The danger of coupling a foreign car, the drawbar of which differs so much in height from those on the employer's own cars that it will slide past them and permit the cars to come close together, is not a danger of which a servant engaged in coupling cars can be required to take notice. *Ohio & M. R. Co. v. Wangelin* (1892) 43 Ill. App. 324. A brakeman was not guilty of contributory negligence in attempting to couple a car having timbers projecting over the end, where he went toward it rapidly and without good opportunity to see that the projection would prevent his making the coupling safely, and was compelled to act in great haste. *Illinois C. R. Co. v. Reardon* (1894) 56 Ill. App. 542. A court will not declare, as a matter of law, that a brakeman is guilty of negligence in not discovering a defect in a brake and ceasing to use it, when he has only two or three minutes to uncouple the car and regulate its movements so as to bring it to a standstill at a given point. *Philadelphia & R. R. Co. v. Huber* (1889) 128 Pa. 63, 5 L. R. A. 439, 18 Atl. 334. A brakeman who, while hastily attempting to get on a slowly moving car, is injured by the giving way of a stirrup which he had no opportunity to inspect, and which was

not palpably defective, is not necessarily debarr'd from recovery on the ground of contributory negligence. *Leak v. Carolina C. R. Co.* (1899) 124 N. C. 455, 32 S. E. 884. A locomotive engineer does not assume the risk from a defect in an engine, where he does not have time to inspect or examine the engine before using it. *Missouri, K. & T. R. Co. v. Durlin* (1899) Tex. Civ. App. 50 S. W. 1634. That an employee might have seen that the key to a pin holding in place apparatus for hoisting material from a trench was out was not negligence preventing a recovery for an injury caused by the fall of material, where he was hurriedly put to work in the trench without an opportunity to examine the machine. *Higgins v. Williams* (1896) 114 Cal. 176, 45 Pac. 1041.

Whatever may be the obligations of a servant to acquaint himself with the condition of a temporary appliance, such as a scaffold, he is entitled to recover for injuries due to its defects, where it is furnished to him complete and he has no time to inspect it. *Chicago & A. R. Co. v. Scantan* (1897) 170 Ill. 106, 48 N. E. 826.

See also *Mann v. Oriental Print Works* (1875) 11 R. I. 152, where the fact that the servant had been suddenly called upon to undertake new duties, and the want of opportunity to examine and estimate the danger, were adverted to as elements favorable to him.

⁶ In *Hathaway v. Michigan C. R. Co.* (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634, one of the grounds on which the plaintiff was held unable to recover for an injury received in coupling two cars with double deadwoods was that the brief period that elapsed while the moving car was slowly approaching the stationary one afforded an ample opportunity for appreciating the precise nature and extent of the risk.

A brakeman is bound to take notice of the absence of the nut which keeps a brake wheel on the shaft. *Thorn v. Central R. Co.* (1900) N. J. L. 45 Atl.

edge of general conditions.—The range of circumstances under which knowledge may be imputed to a servant who has the means of knowledge has been considerably extended by the application of a principle which may be stated as follows:

A servant who is, or ought to be, aware of the fact that dangerous conditions arising from the construction, arrangement, or operation of the master's instrumentalities are found in certain places or are of such frequent occurrence as to be normal in the employment is deemed to be chargeable, as a matter of law, with knowledge of each single instance of those conditions, although it may be apparent that this would not have been a necessary conclusion if his constructive knowledge had been considered with reference solely to the nature of his opportunities for observing that particular instance, and without respect to the deductions which might be drawn from the wide distribution or frequent occurrence of conditions of similar description.¹

1032 (short *per curiam* opinion, not stating clearly the precise rationale of the decision).

Anyone using a stairway, even for the first time, in broad daylight, is bound to notice such obvious defects as that it is steep, that it has no railing, and that its steps are placed at irregular intervals. *Sweet v. Ohio Coal Co.* (1890) 78 Wis. 127, 9 L. R. A. 861, 47 N. W. 182.

¹ (a) *Railway tracks and appurtenances.*—If low joints in a railway track, causing jolts and jars, are to be expected by a brakeman because of their frequency, he cannot recover for an injury caused by one, unless there is evidence that it was caused by a joint so unusually low as to import negligence of the company. *Texas & N. O. R. Co. v. Dillard* (1888) 70 Tex. 62, 8 S. W. 113. A section hand who knows the general condition of the railroad track to be defective in certain particulars assumes the risk of injury from all defects of that nature, whether particularly known to him or not. *Green v. Cross* (1890) 79 Tex. 130, 15 S. W. 220 (hand car derailed owing to worn condition of rails).

A railroad engineer assumes the risk incident to the opening of a road blocked by snowdrifts, when he sets out upon a train made up for that purpose, with full knowledge of the nature of the work and the dangers incident, although he does not know the exact location and size of every drift which must be re-

moved. *Derr v. Lehigh Valley* (1893) 158 Pa. 365, 27 Atl. 10.

A railroad fireman assumes the risk of using a particular switch without a lamp, where he knows lamps are supplied for switches generally, although he does not know the particular switch has no lamp, if he has had no opportunity of such knowledge. *Illinois C. R. Co. v. Swisher* (1895) 61 Ill. App. 302. The court said: "The distinction between a condition existing in a class of appliances and a condition peculiar to a particular appliance is pointed out in *Indianapolis, B. & W. R. Co. v. Smith* (1875) 77 Ill. 365. In this condition was common to switches on that part of defendant's road long distance. Plaintiff had no opportunity to know, and it was known, that there were no switches on that part of the road. He did not deny that he knew the general condition of the switches in respect, but confined his denial to one that was left open, which was different from the others. If it was increased hazard in his employment to account for the use of switches without lamps, he knew that he was exposed to that hazard every time he went upon the road after dark."

An employee familiar with the work who undertakes to block the driving wheel of a locomotive on a down grade, assumes the risk

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blocking does not hold, of having his hand caught on a spike in one of the sleepers, where he knows that the sleepers are secondhand, and that spikes are in some of them, although he does not know of the particular spike which causes the injury. *O'Neil v. Keyes* (1897) 168 Mass. 517, 47 N. E. 416.

Where all the frogs and guard rails in the yard where a servant is working are, so far as he has observed, unblocked, he cannot, in the exercise of ordinary care, assume that the particular one which causes his injury is blocked, even if he has not had an opportunity to inform himself as to its condition. *Burnham v. Concord & M. I. Co.* (1896) 68 N. H. 567, 44 Atl. 750. Similarly, it has been held that an experienced switchman who had been working nearly two months in a certain yard where all the guard rails were unblocked assumed the resulting risk. *Missouri, K. & T. R. Co. v. Thompson* (1895) 11 Tex. Civ. App. S. W. 718.

A brakeman cannot recover for an injury caused by an unblocked guard rail, where he was familiar with the yard in which the accident occurred, and knew that the guard rails in that and other yards on the line were not blocked. *Rice v. New York C. & H. R. R. Co.* (1900) 35 App. Div. 339, 67 N. Y. Supp. 133. To same effect see *Haas v. Buffalo, N. Y. & P. R. Co.* (1886) 40 Hun, 145, where it was held that no action could be maintained by a workman who knew that there were no blocks in similar places on the road, although he did not have actual knowledge of the precise location of this particular guard rail. Recovery was also denied in *Banks v. Georgia R. & Bkg. Co.* (1901) 112 Ga. 655, 37 S. E. 992, on the ground that all the frogs on the line were unblocked.

A verdict is rightly directed for the defendant, where a brakeman is suing for injuries caused by a cattle guard while he was coupling a car, and it is shown that such guards existed at intervals over the whole road. *Fuller v. Lake Shore & M. S. R. Co.* (1896) 103 Mich. 690, 66 N. W. 593.

(b) *Obstructions near railway tracks.*—An engineer who was struck by a signal post while leaning out of his locomotive cannot recover where he knew that there were other structures on the road at the same distance from the track (3 ft. 8 in.), although he knew nothing about this particular post. *Lorejoy v. Boston & L. R. Corp.* (1878) 125 Mass. 79, 28 Am. Rep. 206. The Vol. I. M. & S.—71.

court said: "If there was any danger to the plaintiff while in the performance of his duty, from the structures thus placed, it was a risk he had assumed. He knew the manner in which the road was constructed, the proximity to the track of these structures, and the methods employed in the management of the trains."

The fact that an engineer knew nothing about the position of a temporary post will not enable him to recover for injuries caused by striking against it, when he is familiar with the road, and there are many other structures closer to the track than the post. *Thain v. Old Colony R. Co.* (1894) 161 Mass. 353, 37 N. E. 309. The court said: "It is necessary for railroad companies to put up structures near enough to their tracks for it to be possible for persons on the trains to come in contact with them. Parallel tracks usually must be laid near enough to each other to create a similar danger between trains moving in opposite directions. A company is not bound to give warning of every such structure to every person employed upon its trains. There must be some point within the limit which it is possible for a man on a train to reach at which the railroad company has a right to build without notice, and to assume that those on the trains will keep out of the way. Everyone knows that there is danger as soon as he gets outside of the line of the train when it is in motion."

A railroad employee knowing of the existence of "clearing posts" between the switch and main tracks along the line of the road assumes the risk incident to the existence of such a post at a particular switch, although he had no actual knowledge of its existence. *Sedmore v. Milwaukee, L. S. & W. R. Co.* (1895) 89 Wis. 188, 61 N. W. 765.

A brakeman aware that a large number of cattle guards are dangerous because of their proximity to the track, and that in this regard they are all substantially alike, must be held to take the risks incident to their general condition, and cannot recover for an injury received by being struck by one of them while stooping, on the lower step of a car, to throw off a defective brake, although he did not know that the particular cattle guard in question was so near the track. *Missouri P. R. Co. v. Somers* (1888) 71 Tex. 700, 9 S. W. 741; (1890) 78 Tex. 439, 14 S. W. 779.

Notice that a coal bin close to a siding may be encountered at any point is

Such a principle obviously has no application to cases in which it is shown that conditions like those which caused the injury were a matter of fact, exceptional rather than normal.²

imputed to a servant who admits that he knew of the company's practice to locate this class of structures in such a position; and he cannot recover if, owing to his failure to keep a lookout, he comes into collision with one of them while pushing a car along a siding in the dark. *Pohlan v. Detroit, G. H. & M. R. Co.* (1899) 122 Mich. 232, 81 N. W. 103.

The fact that a brakeman was unacquainted with a yard where he was struck by a flash chute will not enable him to recover, where he knows that there are many similar structures at various points on the road. *Phelps v. Chicago & W. M. R. Co.* (1899) 122 Mich. 171, 81 N. W. 101, 84 N. W. 66.

A brakeman on a short section of railroad, who is notified that stones have been piled so near the road that a person on the side of a car passing them is liable to be struck, assumes the risk from that cause, although the precise location of the danger is not stated to him. *Smith v. Winona & St. P. R. Co.* (1899) 42 Minn. 87, 43 N. W. 908.

See also *Fisk v. Fitchburg R. Co.* (1893) 158 Mass. 238, 33 N. E. 510 (subd. (c) *infra*).

(c) *Railway cars; construction and operation of.*—A servant assumes the risk incident to the handling of broken and disabled cars placed upon the repair track, where he knows the location of the repair tracks and the purpose for which cars are placed thereon. His finding a car on a repair track is in effect a warning as to their condition. *Broken v. Chicago, R. I. & P. R. Co.* (1898) 59 Kan. 70, 52 Pac. 65.

An instruction that, if cars constructed in the manner of the car occasioning the injury were in common use by well-managed roads, and were received in exchange by the defendant company, to the knowledge of the plaintiff, the plaintiff assumed the risk of finding one in the train on which he was brakeman, is erroneous in limiting the use to the plaintiff's knowledge, which was unimportant where he had had ten years' experience. *Benson v. New York, N. H. & H. R. Co.* (1901; R. I.) 49 Atl. 689. A brakeman who has been working on a certain division of a railway for two years, and is injured by a projecting awning upon a permanent

structure, while he is climbing a ladder on a foreign car which is of unusual height, but similar to that of a like construction, which he occasionally received on the same road, is deemed to have assumed the risk, which he was exposed by the use of the cars and the existence of such structures. *Fisk v. Fitchburg R. Co.* (1893) 158 Mass. 238, 33 N. E. 510.

(d) *Unguarded openings.*—A servant who knows that a vat may be uncovered at any time for the purpose of his employer's business is deemed to accept the risk of such a temporary condition whenever it may supervene. *Wright v. Washburn & M. Co.* (1898) 170 Mass. 79, 48 N. E. 510.

A longshoreman who from previous experience is familiar with the usual conditions prevailing in a cargo hold is being stowed on ships to the same owners as the one on which he is injured cannot recover damages while obeying an order of the captain to go forward between decks, to get some dunnage, he falls through a hatchway. *The Padje* (1881) 15 Fed. 354. An experienced stevedore is to take notice of the effect of the operation of discharging cargo from the opening of the scuttles. *Krafft v. Milwaukee & W. R. Co.* (1896) 92 Wis. 252, 65 N. W. 510.

(e) *Management of teams.*—A servant knowing that steam engines, boilers from time to time, are loaded to a place near boilers, and cover for an injury caused by a horse from the horse he was driving was frightened by steam escaping from such a boiler. *Tramway Co. v. O'Brien* (1899) App. 74, 44 Pac. 766.

² In *Scanton v. Boston & M. R. Co.* (1888) 147 Mass. 484, 18 N. E. 510, where a brakeman was injured by a structure close to the track, the court refused to apply the doctrine of cases cited in note 1, *supra*. "He did not know that there were structures so near the track as to be dangerous to him. Such erections were, in fact, unusual and exceptional. Within 15 miles of Boston there were but seven, and only one telegraph pole, and a few bridges and abutments. It does not appear whether there were any other structures upon the road. It was the

Other qualifications of the principle are these: That the servant's knowledge of the existence of a condition which may and usually does produce certain defects in a large number of cases does not charge him with an acceptance of the risk created by any particular one of that class of defects as soon as it actually supervenes;³ that his knowledge of the fact that the general condition of that portion of the master's plant which caused the injury is unsatisfactory will not charge him with knowledge of a particular defect;⁴ and that he is not

first trip as brakeman; he was unfamiliar with the road and with the running of trains, and was not informed that there was any such danger, or in any way cautioned in regard to it; and he had no reason to know that there were permanent erections so near the tracks as to make it dangerous for him to be upon the place on the car which was provided by the defendant."

Where the master has adopted certain structural safeguards, and, to the servant's knowledge, has failed to replace them in a large number of instances after they have been worn out, this does not amount to the establishment of a dangerous system, the risk of which the servant assumes by reason of his knowledge. To defeat his recovery it must be shown that he knew of the want of the safeguard at the particular place where he was injured. *Sherman v. Chicago, M. & St. P. R. Co.* (1885) 34 Minn. 259, 25 N. W. 593 (said of a case where the blocking of frogs had been worn out).

The fact that a brakeman injured by having his foot caught between ties in a railway switchyard knew of the generally dangerous condition of the tracks in the yard in not having spaces between ties filled in will not warrant a court in declaring that, as matter of law, he knew of the extra hazard to which he was exposed, where his injury occurred where the exposure of the ties was greater than in other places. *St. Louis, I. M. & S. R. Co. v. Robbins* (1893) 57 Ark. 377, 21 S. W. 886.

The fact that ballast of the same general character was used at points other than that at which the accident occurred will not serve as a notification to the servant of the fact that at the point where he was injured there were used stones so large that it was culpable to have put them there. *Galveston, H. & S. A. R. Co. v. Pitts* (1897; Tex. Civ. App.) 42 S. W. 255.

A railroad employee did not, as matter of law, assume the risk of falling

into a ditch 8 inches deep between the ties at a switch in one of three railroad yards in which he worked, where all the other ditches in the same yard were much shallower and less dangerous, and there were no ditches in the other two yards. *Hennessey v. Chicago & N. W. R. Co.* (1898) 99 Wis. 100, 74 N. W. 554.

An employee of a railroad company will not be presumed to know that a particular coal car is furnished with a hand hold and stirrup, where most of the company's coal cars are not so equipped, so as to charge him with contributory negligence in not using them. *Light v. Chicago, M. & St. P. R. Co.* (1894) 93 Iowa, 83, 61 N. W. 380.

Actual knowledge of the particular defect alone will bar the action of a brakeman injured by the pulling out of a hand hold from the rotten top of a car, where, though he knew that there were a number of cars on the road with rotten tops, the cars were not so uniformly rotten as to establish a condition of which he was bound to take notice. *Fordyce v. Culver* (1893) 2 Tex. Civ. App. 569, 22 S. W. 237. Distinguishing *Missouri P. R. Co. v. Somers* (1888) 71 Tex. 700, 9 S. W. 741, note 1, *supra*.

³ Thus, the fact that the ground on which a side track was laid was known by the brakeman to be wet and soft, and that low joints were liable to be caused thereby, will not charge him with actual knowledge of the existence of such a defect whereby he was injured while making a coupling. *Texas & P. R. Co. v. McCoy* (1897) 17 Tex. Civ. App. 494, 44 S. W. 25.

⁴ *Graham v. Chapman* (1890) 33 N. Y. S. R. 349, 11 N. Y. Supp. 318 (notice that the ties were rotten at a certain point not necessarily imputed to an employee because he knows the track to be in a generally rough condition).

The fact that a brakeman has been in the defendant's employ for two weeks,

deemed to be affected with notice that a certain instrument was dangerously placed merely because he had had, in the course of his employment, sufficient opportunity to ascertain its general location.

Even as thus restricted in its operation, the conception that the knowledge of the particular may be deduced, as a matter of law, from the knowledge of the general, would seem, in many instances, to lead to extremely harsh consequences. The present writer ventures to express the opinion that in most, if not all, of the cases in which this doctrine has been furnished the foundation for a conclusion adverse to the servant, the doctrine of imputed notice has been beyond the justifiable limits.

404a. Knowledge of coservant not imputed to injured servant.

One servant is not the agent of another in such a sense that the knowledge of a defect which is possessed by the former can be imputed to the latter. This principle enures to the benefit of an injured servant whether he was or was not under the control of the employer at the time he knew of the defect.¹

D. COMPARISON BETWEEN THE POSITION OF MASTER AND SERVANT IN REGARD TO IMPUTED KNOWLEDGE.

405. Servant's means or opportunities of knowledge equal to those of the master.—Constructive knowledge of a danger is frequently imputed to a servant on the ground that his means or opportunities

of knowledge are equal to those of the master, and has thus acquired a general knowledge of the neglect of the company to keep the tracks near the wood yards free from pieces of wood, will not preclude him from recovering for injuries caused by tripping over such a piece while coupling a car, where there is no specific evidence showing his knowledge of the condition of the track at the place where he was injured. *Hidman v. Green Bay, W. & St. P. R. Co.* (1887) 68 Wis. 520, 32 N. W. 529.

¹In a case where a brakeman was struck by a cattle chute, it was held proper to refuse an instruction to the effect that, if the jury found that the plaintiff had been employed as brakeman or conductor on trains passing the chute several times a week, during some months before he was hurt, and had also assisted several times in running cars into and out of the siding to which the chute was adjacent, they must find that he had means of knowledge as to its situation. The court considered it to be "contrary to the experience of human life that one knowing generally of a

thing, without opportunity of knowing its precise relations and conditions, is to be charged with notice." *Dowsey v. Phillips & C. C.* (1877) 42 Wis. 583. Contradiction by the same court, cited 1, *subd. (b), supra*.

The fact that a brakeman has general knowledge that there was a stand at a certain point does not impute to him, as a matter of law, with notice that it was dangerously close to the track, where the evidence shows that the rule of the company forbade the use of any obstruction so close to the track as this was, and he had, therefore, no reason for expecting to find it clear. *Palmer v. Union P. R. Co.* (1888) 5 Utah, 612, 1 L. R. 191.

²The knowledge possessed by a man in charge of a piece of work is imputed to his subordinates, if he has no agency in such a case. *Hooper* (1890) 52 N. J. L. 215 (storeman). Compare *Hannibal & St. J. R. Co.* (1888)

possessed by a few
species of water
invertebrates, there
is a case. *ibid.*
N. J. L. 25
Company
Co. (1987) 27

den v. Smithville Mfg. Co. (1861) 29 Conn. 518; *Fairbank v. Huntzicker* (1874) 73 Ill. 230; *O'Keefe v. National Felling Box & Paper Co.* (1895) 66 Conn. 38, 33 Atl. 587; *Cochill v. Roberts* (1893) 71 Hun. 127, 24 N. Y. Supp. 533; *Griffin v. Ohio & M. R. Co.* (1890) 124 Ind. 326, 24 N. E. 888; *Carlson v. Sioux Falls Water Co.* (1894) 15 Minn. 111.

Similar forms of expression are found in cases where the risk is said to be as "obvious" to the servant as to the master.

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346, 9 S. E. 670
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21 S. W. 563 (fire-
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13 Ont. Rep. 47
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Plant Co. (1896)
E. 205 (risk arising
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three years); *Hart*
123 N. Y. 641, 23
g (1889) 50 Hun-
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95) 143 Ind. 381.
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Bedford Stone Co.
Ind. App. 27, 38
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over); *Steffen v.*
420, 9 S. W. 630
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in question.³ In another class the action has been held not main-
tainable because the servant had himself produced, or assisted in pro-

frightened by a train); *Larich v. Moies* (1894) 18 R. I. 513, 28 Atl. 661 (over-
hanging bank of sand fell); *Swanson v.*
Lafayette (1893) 134 Ind. 625, 33 N. E.
1033 (bank of gravel fell on shoveller);
Texas & P. R. Co. v. French (1893) 86
Tex. 98, 23 S. W. 642 (error in use
of this type, to refuse a charge th- if
the danger to be expected from the lay-
ing of a bank was as open to the ob-
servation of the servant as it was to the
foreman, the servant could not recover).

The danger involved in using a simple
appliance like a 12-foot ladder with a
defect so obvious as the absence of about
20 inches at the top of one of the side
rails is presumed to be known to a
servant of mature years and average
mental capacity. *Jenney Electric Light*
& P. Co. v. Murphy (1888) 115 Ind.
566, 18 N. E. 30. A hand car being a
simple appliance, it will be assumed
that a section hand who has used it for
about twenty months is as familiar with
its condition as his foreman. *Burling-*
ton & C. R. Co. v. Lieke (1892) 17
Colo. 280, 29 Pac. 175.

The danger of losing his balance and
having his hand caught in unguarded
cogs near a ladder which a servant who
has been at work in a brick factory
for three months is using is as obvious
to him as to his master. *Buhle v. Har-*
land (1890) 37 Ill. App. 350.

The danger that the clothes of a man
on a hand car may be caught in a
screw projecting from the crank is as
obvious to him, after helping for sev-
eral days to run the hand car, as it is
to his employer. *Carey v. Boston & M.*
R. Co. (1893) 158 Mass. 228, 33 N. E.
512.

A superintendent of bridges and as-
sistant superintendent of the construc-
tion of a railway, who has made a per-
sonal inspection of the condition of the
track, and is aware that the cross-ties
are not sufficiently secure, being only
half tied, and that the road, which has
not been opened for passenger traffic, is
not safe for a rapidly moving train, as-
sumes the risk of the derailment of a
train upon which he is riding. *Evans-*
ville & R. R. Co. v. Barnes (1894) 137
Ind. 306, 36 N. E. 1092.

Knowledge of the risk of injury from
the narrowness of a platform is imputed
to a servant, where he has wheeled his
barrow many times, both night and day,
during the three weeks he has been at

work, over the same platform, in the
same condition, and under similar cir-
cumstances. *Kaare v. Troy Steel & I.*
Co. (1893) 139 N. Y. 369, 34 N. E. 901.
The fact that stronger couplings are re-
quired for the special work of running
cars down an incline to a transfer boat
is a fact presumably as well known to
an experienced brakeman engaged in the
work for a considerable time as it is
to his employers. *Illinois C. R. Co. v.*
Jones (1882) 11 Ill. App. 324.

The danger caused by the sudden drop-
ping of an elevator while a servant is
engaged in placing heavy granite sills
therein is as obvious to him as to the
master. *Connors v. Morton* (1894) 160
Mass. 333, 35 N. E. 860.

The fact that the poles of a derrick
which is being unloaded from a wagon
are wet, and therefore liable to slip dur-
ing the operation, is as obvious to a
workman as to his foreman. *Pintorelli*
v. Horton (1900) 22 R. I. 375, 48 Atl.
142.

The servant's allegation of ignorance
is overcome by another allegation show-
ing that he was injured by slipping on
loose ashes while pushing a heavy car.
Louisville & N. R. R. Co. v. Kemper
(1896) 147 Ind. 561, 47 N. E. 214.

A servant who was thrown against
gearing by the shutting to of an auto-
matically closing gate which he touched
while rising from a floor which it was
his duty to keep clean cannot recover.
Brady v. Ludlow Mfg. Co. (1891) 154
Mass. 468, 28 N. E. 901.

Where the evidence shows that the
danger of collapse of an arch became
known only when it actually began to
subside, such danger is regarded as one
which can be observed as well by the
men who undertake the work of shor-
ing it up, as by their employer. *Ogden*
v. Rummens (1863) 3 Fost. & F. 751
(verdict for defendant was not disturb-
ed).

A conductor under whom an incom-
petent engineer has been serving for six
weeks is presumed to have had as good
an opportunity as the company of as-
certaining that incompetency. *St. Louis,*
I. M. & S. R. Co. v. Morgart (1885) 45
Ark. 518.

In *French v. Aulls* (1893) 72 Hun,
442, 25 N. Y. Supp. 188, a servant was
denied recovery for injuries caused by
the breaking of a rope on the ground
that, having often seen and constantly

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190, 44 Atl. 619
has been held that
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36 N. E. 547.
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Co. (1895) 129

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406. Servant's means or opportunities of knowledge superior to those of the master.— Another way of applying the test of a comparison between the relative positions of masters and servants is exemplified in those cases in which servants have been held chargeable with knowledge for the reason that their means or opportunities of knowledge were superior to or better than those of the masters.¹ A controlling effect has been ascribed to this conception in cases where the fact emphasized is that the servant had been habitually handling the defective instrumentality, or had been constantly brought into close local relations thereto.² Other classes of cases in which the more favor-

structive knowledge of its condition. *Wolf v. Big Creek Stone Co.* (1897) 148 Ind. 317, 47 N. E. 664. Affirming (1894) 138 Ind. 496, 38 N. E. 52.

An employee in a shipyard, at work in a dark place between the decks on a ship in the course of construction, who, stepping off a platform, fell into a hole and was injured, cannot recover therefor if, a few days before, under the master's orders, he had assisted in boarding up the hole, which had thereafter been reopened without the master's knowledge. *Rick v. Cramp* (1888; Pa.) 11 Cent. Rep. 400, 12 Atl. 495.

A railway servant who helps to place a car on a certain track is chargeable with knowledge of its position, and cannot recover for an injury caused by projecting his person so far beyond the car on which he is riding, on an adjoining track, that he is struck by the standing car. *Kansas City, M. & B. R. Co. v. Burton* (1892) 97 Ala. 240, 12 So. 88.

Recovery has been denied to a charwoman who cut her hand on a piece of glass in a washtub, she herself having poured in the water which covered it. *Flynn v. Beebe* (1868) 98 Mass. 575. The danger that certain iron plates which had been insecurely placed by the servant himself might fall is presumed to be better understood by him than by his employer. *Reese v. Clark* (1892) 146 Pa. 465, 23 Atl. 246. The risk resulting from a floor being slushy is presumed to be obvious to a servant, if it is caused by oil from machinery, of the oiling of which he himself has charge. *Murphy v. American Rubber Co.* (1893) 159 Mass. 266, 34 N. E. 268.

¹ The use of this form of the test also is traceable to the leading case of *Priestley v. Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, 7 L. J. Exch. N. S. 42, where Lord Abinger observed that, under the circumstances, the

servant "must have known as well as the master, or probably better," the danger to be apprehended.

² "The duty which the master owes to his servants is to provide them with safe tools and machinery where that is necessary. When he does this, he does not, however, engage that they will always continue in the same condition. Any defect which may become apparent in their use it is the duty of the servant to observe and report to his employer. The servant has the means of discovering any such defect, which the master does not possess." *Baker v. Allegheny Valley R. Co.* (1880) 95 Pa. 211, 40 Am. Rep. 634 (rope on derrick became defective from wear). Compare *Philadelphia & R. R. Co. v. Hughes* (1888) 119 Pa. 301, 13 Atl. 286, where the same phrase is repeated.

When the master has provided his servant with safe tools it is "the duty of the latter who has them in use to observe their condition, and, if defective, to report the fact to his superior. Having them under his control, he is better able to observe their condition than is the master. If defects exist, and are not observed by those who have them in daily use, how can the master be better able to know of any defects existing? and if the servant uses them without objection the master has a right to assume that no cause of complaint exists. We are now speaking of those articles with which the employee is brought in actual contact when in use, and where by handling them he must necessarily see and know of their condition. When a master provides his servant with an axe or a pick to be used in the latter's ordinary business or employment, there would arise no duty on the part of the employer to inspect them, unless after complaint made. To allow a servant to handle and use a chain for days, weeks,

able position of the servant has been asserted are those in whom the master had acquired, by experience or technical training, special skill in the work and a capacity for appreciating the dangers which it involved.

or months, and then hold a master responsible for accidents resulting from wear and tear or breaking would be harsh law. That such articles will in time wear out or break is evident, but who is better able to judge of their condition than those who have them in daily use? To hold otherwise would be to offer a premium for carelessness; for the servant, by mere inattention to his duty, might allow his tools to become unfit for use, and then visit the consequences upon his employers. A different rule would prevail with reference to machinery or perishable articles which experience teaches us require regular inspection, and which are ordinarily presumed to demand repairs or attention." *Kinney v. Corbin* (1890) 132 Pa. 343, 19 Atl. 141.

In a Wisconsin case the court, in laying down the doctrine that the duty of a railway company to know of the difference between the heights of the couplings on its own cars and those of another company was not absolute, and that it was not presumed, as a matter of law, to know of this difference, said: "The difference in the elevation of the coupling irons of this foreign car and the caboose or other cars of the defendant's road would not have been very easily or readily observed when they were distant from each other; and yet the company is sought to be held liable for its want of ordinary care in not knowing this difference when consenting to take this foreign car into its train. When the car and caboose were brought nearly together, this difference could have been at least much more readily seen and observed by comparison. The company is charged with negligently endangering the lives of its brakemen by not knowing of this difference, and, if presumed to know of it, in allowing this car to be attached to its train; and the intestate is alleged to have been in the use of proper care when he endangered his own life by not seeing, observing, or knowing of such difference in the elevation of the coupling irons. Did not the intestate have the same, if not superior, means of knowing of this difference, as or to that of the company? If the negligence of the intestate and that of the company in this respect are equally balanced, ought the plaintiff to recover?

The duty of the company to know of this difference is not absolute, not presumed to know of it as a matter of law." *Kelly v. Abbot* (1885) 307, 53 Am. Rep. 292, 23 N. W. 307.

An employee in a sawmill continues to operate a saw held by a wire rope, knowing it to be worn and to sustain a weight of several hundred pounds, and knowing that if it should break the saw will fall upon and strike him, assumes the risk." *Week v. Fremont Mill Co.* (1890) 629, 29 Pac. 215.

An employer is not liable for the death of an employee killed at work by the fall of a projecting rock, by blasting in an adjoining street, where he had no reason to expect that the blasting would weaken the rock. *Dolan v. McLaughlin* (1898) 132, 628, 53 N. Y. Supp. 273.

Negligence cannot be imputed to an employer for failure to shore up a building in which an employee injured by falling in of the sides thereof was working, where the latter and those at work with him were better informed than the employer as to the danger to be apprehended from the liability of the building to cave, and the shallowness and other peculiar characteristics of the dirt. *Mount Cemetery Assn. v. Davis* (1890) 4 Colo. App. 570, 36 Pac. 911.

In an early New York case it was considered that an engineer was not liable to know of occasional defects in cattle guards or bridges than the company or its officers elsewhere. *McMillan v. Saratoga & W. Ry.* (1855) 20 Barb. 449. But it is held that no court at the present time would lay down the rule so against the servant. See § 40.

Where the evidence is conflicting as to whether carpenters who were using a ladder had a better opportunity to detect a knot in the side piece of the ladder, into which a nail holding the piece was driven, than a servant who afterwards used the ladder, is for the jury. *Flanigan v. Guggenheim & Son* (1899) 63 N. J. L. 647, 44 Atl. 717, generally, § 390, *supra*.

407. Servant's means or opportunities of knowledge usually inferior to those of the master.—Although, as has been shown in the two preceding sections, it is a well-settled doctrine that knowledge is imputable to a servant in all cases where his opportunities or means of knowledge are equal or superior to those of the master, it is also clear, both upon principle and authority, that, if such equality or superiority is relied upon by the master in a case where the injury was due to a defect in some part of the plant, he has the burden of establishing their existence by specific testimony, and that, in the absence of such testimony, the obligatory knowledge of the servant is determinable with reference to the hypothesis that both his means and opportunities of knowledge are normally inferior to those of the master.¹

a servant by reason of defects in machinery is for the court, and not for the jury, where the defects were obvious and known to the servant when he entered the service, and were constantly brought under his notice in the discharge of his regular duties, while he was skilled, and had opportunities to observe and understand the danger, superior to those of the master. *Detroit Crude-Oil Co. v. Grable* (1899) 36 C. C. A. 94, 94 Fed. 73.

An experienced well digger who examines carefully a rope furnished him by his employer, and who testifies that he had a better opportunity to know how good the rope was than anyone else, can not recover for injuries due to the breaking of the rope. *Reid v. Central R. & Bldg. Co.* (1888) 81 Ga. 694, 8 S. E. 629.

74. *An employee of a steam sawmill whose duty is to take charge of hands and keep in proper repair a tram road on which engines and truck cars are run to haul logs, cannot recover, if, owing to the bad condition of the road, he is injured while riding on the top of a load of cross-ties. *White v. Kennon* (1889) 83 Ga. 343, 9 S. E. 1082.

¹ See, generally, the cases cited in the following notes and under the next subtitle.

Where the master has created the danger, he is bound to guard against it; and if he admits that he did not know or believe that the danger existed, he cannot

The decisions also show that the courts do not consider it able to impute knowledge to a servant, as a matter of law, ground that his means or opportunities of knowledge were superior to those of the master, unless the risk to which the was traceable belonged to the class to which the description "ob-
"visible," "manifest," etc., is applicable.² Since it is to this

require superior knowledge and judgment from the servant. *Faren v. Sellers* (1887) 39 La. Ann. 1011, 3 So. 363 (injury received through stepping on a loose puline while a building was in course of demolition, the method adopted being unscientific and dangerous).

In *Whipple v. New York, N. H. & H. R. Co.* (1896) 19 R. I. 587, 35 Atl. 305, it was urged that, if the proximity of a pole to the track was not sufficiently obvious to the plaintiff to put him on his guard against injury from the pole, it was not sufficiently obvious to the officers of the defendant for them to observe it in the exercise of reasonable care, and that the defendant could not be deemed negligent in maintaining the pole in its position. The answer of the court was that the officers of the defendant located the pole; and that it was their duty to have so located it as to make it safe.

In an action for injuries sustained by the fall of a defective scaffold, the employee need not prove affirmatively that he did not know, or had not equal opportunity with the employer of knowing, that the scaffold was unsafe. *Chicago & A. R. Co. v. Maroney* (1897) 170 Ill. 520, 48 N. E. 953, Affirming (1896) 67 Ill. App. 618.

² It is the duty of the servant to use reasonable care to inform himself in respect to the hazards to which he is exposed, but he is not under the same obligation as a master to know the nature and extent of the risks, unless they are patent. *McDonald v. Chicago, St. P. M. & O. R. Co.* (1889) 41 Minn. 439, 43 N. W. 380.

"The doctrine that the servant cannot recover if he had equal means with the master of ascertaining the defect is not applicable to a case of latent defects in machinery, but only to cases where the defect is obvious to the senses, or would have been disclosed to an ordinarily observant man in the ordinary use of the machinery in the business the servant was engaged in, within the time the injured servant operated such machinery before the accident, or in the case of the

negligence of a fellow servant, probably others; but certainly not one now under consideration, if here to the doctrine announced case when here on a former case. If the servant, as was then held, and the master is, required to diligence to discover defects in ery with which the servant is to work, the latter may rec though he may have had equal of ascertaining its defects, if in was ignorant of their existence were not patent or such as would been disclosed by operating it stated. If the master did not the defect, and reasonable care part would not have disclosed would not be liable. If, how the exercise of reasonable care, employer could have discovered, a like exercise of care on the part servant would also have disc him, a latent defect, yet, if in did not know it, the master would be liable, although the servant's nities to ascertain it were equal of the master. The servant has to assume that the machinery oments furnished him by the e are safe and suitable for the l and he is not, while the master required to examine them for the pose. The master is charged knowledge which he might have by the exercise of due care, tho if he actually possessed it, whe servant has the right to assume necessary examinations have bee by the master, and is not r either in person, or by another e by him for the purpose, to exam machinery as to its fitness an ciency." *Porter v. Hannibal d. R. Co.* (1879) 71 Mo. 66, 36 A 454.

"Where the danger is open aous to either master or servant, doubtless be properly said that and servant stand upon an e *Brazil Block Coal Co. v. Hoodlet* 129 Ind. 327, 27 N. E. 741. B then the servant's assumption

consider it justified of law, on the ground that the means were equal or unequal, which the injury was not "obvious," and to this class of

low servant; and certainly not to the master, if we are to hold that the former's obligation is not to be held, is not required to equalize defects in the servant's means of knowledge. It may be said that the servant had equal opportunities to observe the defect, if in fact the defect existed, and that such as would have been imputed to him, did not know of the defect, and that the master had no duty to disclose it.

If, however, the master had equal opportunities to observe the defect, although on the part of the servant it was not disclosed, yet, if in fact the master would have discovered the defect, the servant's opportunities were equal to those of the master. The servant has a right to rely on the machinery or equipment provided by the employer for the business, and the master is responsible for that part of the equipment which is chargeable with the duty of providing care, the same as the master is responsible for the machinery or equipment. It is not required of the master to examine the fitness and sufficiency of the equipment, and the servant is not required to examine the fitness and sufficiency of the equipment. *Annals & St. J.* 66, 36 Am. Rep.

is open and obvious to the servant, it might be said that the master is not responsible upon an equality of means. *Woodlet* (1891) 27 Ind. App. 511, 59 N. E. 741. But even if the servant's means of knowledge are equal to those of the master, the master is not responsible for the defect, if the defect was not discovered by the servant.

risks alone that the doctrine as to equal means of knowledge is applicable, it is error to give an unqualified instruction which may lead

to the conclusion that the servant's means of knowledge are equal to those of the master. The risk depends, not upon the equality of the servant's means of knowledge, but upon the fact that by the exercise of reasonable care he ought to have known of the danger, and is therefore held to have known it. It is conceded by counsel for both parties that the defect in this case was a latent one. We think it clear that as to such a defect the master and servant are not upon an equality. The duty resting upon them is different, and the acts required of them to constitute care with reference to the discovery of the defect are different. It could not, therefore, have been correctly said that the servant assumed the risk because his opportunities to observe the defect were equal to those of his master." *Pittsburgh, C. C. & St. L. R. Co. v. Woodward* (1894) 9 Ind. App. 169, 36 N. E. 442.

Where a brakeman was injured while running alongside a moving engine in the nighttime, by tripping over wires stretched across the path, the conclusion that the danger was equally open to the observation of the servant and the master is not necessarily deducible from special findings that the wires from a semaphore ran across the track on which the engine was, to a pulley box about 4 feet south of it, being strung about 7 inches from the ground between the track and the box, and from the box to the tower station the wires were strung higher than the box, and the wires running each way from it were in full view; that the brakeman was in full view of his sight, and had worked as a brakeman for many years, and in that capacity for the defendant for several months, but did not know that the wires he tripped over were not boxed. Considering the difference between the duty of the master to provide a safe place to work in, and that of the servant to use his opportunities to discover the dangers of his position, there is nothing in such findings to forbid a conclusion that the servant had a right to assume that his path was not rendered dangerous by means of wires stretched across it at such a distance from the ground that a person properly intent upon his duty was liable at night to be tripped up. *Flutter v. New York, C. & St. L. R. Co.* (1901) 27 Ind. App. 511, 59 N. E. 337.

On the ground that the members of a train crew have not the same oppor-

tunity as the company to know of defects in the track, it has been held unwarrantable to declare, as matter of law, that an engineer who suffered injury by reason of such defects was guilty of contributory negligence simply because he knew the track was somewhat out of repair. *Mehan v. Syracuse, B. & N. Y. R. Co.* (1878) 73 N. Y. 585. That the servant had not equal opportunities with the master to discover the dangerous condition was also the basis of the decision allowing recovery in a somewhat similar case where the injured servant was a fireman, and in passing over the section of road on which the accident ultimately occurred, had observed that it was a rough part of the track, that the rails were short, and inferred that it was a bad track from the bumping of the cars in passing over it. *Dale v. St. Louis, K. C. & N. R. Co.* (1876) 63 Mo. 455.

That the rule as to equal means of knowledge does not apply where the defect could not be discovered by the use of ordinary care was laid down in *East Chicago Iron & Steel Co. v. Williams* (1896) 17 Ind. App. 573, 47 N. E. 26.

In a case where a brakeman was injured by striking against a car left by the conductor of another train in an improper position on the adjoining track, it cannot be said that his opportunity to know the dangerous position of the car was as good as that of the conductor, since it was the latter's duty to see that the car was properly placed. *Chicago & E. I. R. Co. v. Richards* (1901) 28 Ind. App. 46, 61 N. E. 13.

In *Magee v. North Pacific Coast R. Co.* (1889) 78 Cal. 430, 21 Pac. 114, the following statement of principles from *Shearn & Redf. Neg.* 4th ed. § 27, was expressly approved: "It has been often said that the master is not liable for defects in such things to a servant whose means of knowledge thereof were equal to those of the master. But this is an erroneous statement. The master has no right to assume that the servant will use such means of knowledge because it is not part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's inquiry, because it is the master's duty so to inquire; and the servant may justly assume that all these things are fit and suitable for the use which he is

the jury to suppose that the law infers constructive notice in all where his means of knowledge were equal to those of the master

directed to make of them. The true definition is that, when circumstances make it the duty of the servant to inquire, it is contributory negligence on his part not to inquire." This passage, however, has been considerably modified by the learned authors in the last edition of their treatise. Their present view is thus summarized: "The true rule as to equal knowledge is that, when the means of knowledge and the duty to use those means are equal, between master and servant, and neither uses those means, both are equally at fault." They also cite some recent cases which, in their opinion, show that the doctrine formerly enunciated in other cases to the effect that no action can be maintained where the servant's means of knowledge were equal to those of the master has now been repudiated. The present writer is unable to concur in the theory that this doctrine is no longer accepted by some courts. It never was applied to any risks except those of certain classes, (see note 2 to this section, and §§ 405, 406, *supra*), and it is quite clear from the later volumes of the reports that judges have evinced no disposition to treat it as an inappropriate criterion of the servant's constructive knowledge of such risks.

In *Austin v. Appling* (1891) 88 Ga. 54, 13 S. E. 955, it was remarked that the rule to the result of an equality of the means of knowledge must always be considered with reference both to the duties of the servant and to the question whether the defect was or was not an obvious one.

*An instruction that, if servant had the same means of knowledge as the master, he could not recover, was held to have been rightly refused for the reason that it did not appear from the evidence that it was a part of his duty to inspect the defective appliance. *Austin v. Appling* (1891) 88 Ga. 54, 13 S. E. 955. An unqualified instruction to the effect that knowledge is imputable to the servant if the dangerous conditions were equally open to his inspection and that of the master is erroneous. *Texas, S. V. & N. W. R. Co. v. Guy* (1893; Tex. Civ. App.) 23 S. W. 633. So is an instruction that the servant could not recover if he could have discovered the alleged defect as well as

the master, and did not do so (*E. Chamberlain* [1893] 40 S. C. 104, E. 213); or if he had the "same" of knowledge as the master (*Lo & N. R. Co. v. Kelly* [1894] 11 C. 260, 24 U. S. App. 103, 63 Fed. *International & G. N. R. Co. v.* [1897] 16 Tex. Civ. App. 380, 41 605; *Muldowney v. Illinois C.* [1873] 36 Iowa, 470; but see *Ogden v. Rummena* [1863] 3 F. 751, § 405, note 1, *supra*); or "opportunities" of knowledge (*Pitt C. C. & St. L. R. Co. v. Wood* [1894] 9 Ind. App. 160, 36 N. E. 1; *Champion Ice Mfg. & Cold Storage v. Carter* [1899] 21 Ky. L. Rep. S. W. 16); or "as good means or tunity" of knowledge (*Wedgwood & N. W. R. Co.* [1878] 44 V. [court declined to say that the i tion should have been given beca defect was one of long standing "equal means" of knowledge (*T. P. R. Co. v. Kenna* [1899; Tex. App.] 52 S. W. 555 [building ne way track]; *Williams v. Missouri Co.* [1891] 109 Mo. 475, 18 S. W. [incompetent co-servant]); or facilities" for ascertaining the (*Laurence v. Texas C. R. Co.* [Tex. Civ. App.] 61 S. W. 342 [petency of servant]; *Internatio G. N. R. Co. v. Elkins* [1899; Tex. App.] 54 S. W. 931 [defective rop

It has also been held proper to an instruction that the servant co recover unless he had not equal of knowledge, as compared with t ter. (*Silveira v. Iversen* [1900 Cal. 187, 60 Pac. 687 [defective pennant]); or unless he showed t did not have opportunities equal of his master for discovering the (*Pittsburgh, C. C. & St. L. R. Woodward* [1893] 9 Ind. App. N. E. 442. [drawbar]).

An instruction (words not giv which the necessity for the exer reasonable care and diligence a part of the plaintiff is ignored, which the jury are required to b the opportunities as between the tiff and defendant merely, witho guide as to when either party sh chargeable with knowledge of th is properly refused. *Western St v. Whalen* (1894) 151 Ill. 472, E. 241.

But it is clear that there are numerous cases in which none of these considerations is pertinent. The technical knowledge of the servant in regard to such conditions as those which caused the injury is not necessarily as great as that of the master. See § 406, *supra*. It cannot be denied that, in many instances, time and place and the nature of the work are perfectly favorable for a searching and exhaustive examination of the environment by the servant. As a matter of ultimate fact, it will be found that the logical basis of the doctrine which places the master and the servant upon different footings in regard to imputed knowledge of risks is to be found in the fact that the master has a special and appropriate function of the former to furnish and supervise the instrumentalities of his business, and the special and appropriate function of the servant to use those instrumentalities. The duty of making a reasonably careful examination of the instrumentalities is a natural and necessary incident of the former function but not of the latter.⁶ See the following subtitle.

In the opinion of the present writer, the practice of comparing the master's and the servant's means of knowledge has been the source of much confusion of thought, which is apt to operate to the disadvantage by imposing upon him too high a standard of knowledge. It would have been far preferable to refrain from importing into these discussions in this class of cases an element which is wholly unnecessary, inasmuch as the ultimate question in every instance is simply whether a person who had the same natural and acquired capacities for observation, and had been placed in the same position as the servant, would have discovered the danger by the exercise of ordinary care. The extent of the obligatory knowledge of the facts under the given circumstances seems to be wholly irrelevant for consideration.

The danger was not obvious from the place where the plaintiff started his team, in any such sense that it was not a reasonable opinion from observation at this place that he could drive through the gateway in safety; that the plaintiff's attention was necessarily chiefly devoted to the management of the horses, and that he did not discover the danger until it was too late to save himself; and that the defendant had better means of observation and of seasonably appreciating the danger, and either did not warn the plaintiff at all, or warned him when it was too late. On such findings, we cannot say that the plaintiff was not in exercise of due care, or that the defendant was.

The test is not only what each knew, but what each reasonably should have known, concerning the condition. We cannot say that identical duty rested on the servant and the master seasonably to ascertain the extent of the danger involved in doing the work in the manner directed by the master.

⁶ In *Louisville & N. R. Co. v. McGee*, (1894) 11 C. C. A. 260, 24 103, 63 Fed. 407, the court said: "The railroad company owed the plaintiff a duty of care in selecting firemen, engineers, and others with whom he was to work, and to that end was negligent in its use of its means of knowledge, but the defendant in error

E. SERVANT'S DUTY AS REGARDS INSPECTION AND INQUIRY.

408. Servant not ordinarily charged with the duty of inspection or inquiry.—From the remarks at the end of the preceding section it is apparent that an investigation into the meaning and effect of the doctrine there discussed conducts us directly to another doctrine which has been enunciated and applied with great frequency; viz., that, as a general rule, the servant is under no obligation either to inspect that part of the plant by which his safety may be affected, or to inquire into the details of the system adopted for the conduct of the master's business, for the purpose of discovering concealed dangers which would not be disclosed by superficial observation.¹

The duty of inspection does not rest upon a superior servant, any more than upon mere subordinates, except in so far as it may be properly incident to the functions assigned to him.²

In some cases language is used which seems to imply that there is an essential distinction between the extent of a servant's obligations, according as the instrumentality in question was or was not one which he was required to use in the course of his employment. Thus, it has been said that he is entitled to assume that an instrumentality is safe, where the defect existed in a department of the work with which he had nothing to do by way of inspection or re-

no duty in that respect, and therefore could be affected only by the knowledge which he had, including what was within his observation at the time of the injury."

"A servant is not under the duty of inspecting the appliances about which he works, in search of hidden or unapprehended sources of danger. *Atchison, T. & S. F. R. Co. v. Mulligan* (1895) 14 C. C. A. 547, 34 U. S. App. 1, 67 Fed. 569. A servant is not bound "to make close scrutiny into all the details of the instrumentalities with which he deals." *Johnston v. Oregon Short Line R. Co.* (1892) 23 Or. 94, 31 Pac. 283. A servant is under no primary obligation to investigate the fitness and safety of the instrumentalities. *Chicago & E. I. R. Co. v. Hines* (1890) 132 Ill. 169, 23 N. E. 1021, Affirmed (1889) 33 Ill. App. 271; *Pioneer Cooperage Co. v. Romaniuk* (1899) 85 Ill. App. 407, Affirmed in (1900) 186 Ill. 1, 57 N. E. 864. See also cases cited in the ensuing notes.

¹One employed to take entire charge of the business in his employer's store until the latter is able to be out has a right to rely upon the employer's having

put a proper elevator in the store, without inspecting it. *Eastman v. Curtis* (1895) 67 Vt. 432, 32 Atl. 232. The contention of the master was that the duty of inspection devolved on the servant under the circumstances, but there was no evidence that the injury was due to an omission to inspect during the time the servant was in charge, but, so far as appeared, it was caused by a defective construction.

That an employee is foreman of the shop in which he works will not prevent his recovery for damages caused by defective appliances, unless it is his duty to see that they are kept in order. *Nichols v. Crystal Plate Glass Co.* (1894) 126 Mo. 55, 27 S. W. 518, 28 S. W. 991.

A yardmaster is not bound to inspect the ties in the yard where he is employed. *Pennsylvania Co. v. Brush* (1891) 130 Ind. 347, 28 N. E. 615.

The foreman in charge of a derrick car, its crew, and the work performed by them, who has no knowledge or opportunity to acquire knowledge of latent defects in the car, has the right to repose confidence in the prudence and caution

pair;⁵ that the law requires the servant to know such defects which he might see by the exercise of diligence in his employment; that he is not obliged to know defects in connection with which he is not obliged to know that it is incumbent on an employee to know whatever is connected with his special line of employment, but that he is not required to know those things which belong to a different branch of service; that he is not bound to look out for sources of danger entirely disconnected from his work;⁶ that the law does not under any circumstances exact of an employee the use of diligence in ascertaining defects in regard to such appliances or instruments as he is not habitually engaged in using, but charges him with knowledge of such defects only as may come to his observation.⁷ It is obvious, however, from a perusal of many of the decisions cited in § 100, that these statements are not to be understood as embodying the doctrine that the only conditions in respect to which a servant is exempt from the duty of inspection are those parts of the work which are thus designated. Such forms of expression were evidently suggested by the particular circumstances which happened to be under review.

In other cases a distinction has been taken between simple and complex instrumentalities, the theory being that a servant is required to see that one of the former description is safe when it is in his hands, but that no such obligation is predicable with respect to the latter.⁸ If this distinction is intended to lead up to the conclusion that the responsibility for injuries caused by defects in simple appliances always rests upon the servant, it seems impossible to concede its validity. In such appliances, not less than in those of a more elaborate description, there may be latent defects which are quite impossible for the servant to discover by means of the inspection which he has the means of making. No logical reason can be suggested why the general principle that a servant cannot assume any abnormal risks of which he has neither actual nor constructive knowledge should in this instance be broken into.

of the railroad company in furnishing him a car in a reasonably safe condition. *Chicago & E. R. Co. v. Brannan* (1894) 10 Ind. App. 570, 37 N. E. 190.

⁵ *Waltcher v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 37.

⁶ *Pennsylvania Co. v. Burgett* (1893) 7 Ind. App. 352, 33 N. E. 914, 34 N. E. 650.

⁷ *Boyers v. Union P. R. Co.* (1885) 4 Utah, 215, 7 Pac. 251.

⁸ *Johnson v. Tacoma Mill Co.* (1900) 22 Wash. 88, 60 Pac. 53.

¹ *Missouri P. R. Co. v. ...* (1889) 75 Tex. 61, 12 S. W. 8.

² *Nicholds v. Crystal Plate ...* (1894) 126 Mo. 55, 27 S. W. 2 W. 991, distinguished between appliances as a spade, hoe, hand sledge, and a crane. It has been held that a company does not owe a servant the duty of inspecting a pole 8 feet long and 4 inches in diameter, but may rely on the presumption that the one using it will detect any defect. *Mittler v. ...*

400. Rationale of this doctrine.—The doctrine which exempts servants from the duty of inspection may be referred to as one of three conceptions. Which of these conceptions is to be regarded as the primary one it is impossible to say. Nor is it a matter of any great practical importance. It will be sufficient to observe that they are interdependent in such a sense that any one of them may be deduced from either of the other two.

a. Servant not bound to take notice of concealed defects.

In the first place it is possible to view the doctrine as being simply a mode of expressing the idea that a servant is not chargeable with knowledge of conditions which may be described by the terms "concealed," "hidden," "latent," etc. As using this to be a fundamental principle, it is clear that the servant is not bound to make any attempt to discover such condition.¹

1807) 21 App. Div. 45, 47 N. Y. Supp. 285.

"The servant is not bound to inspect the appliances to see whether or not there are latent defects that render their use more than ordinarily dangerous, but is only required to ascertain such defects or hazards as are obvious to the senses." *Yates v. McCullough Iron Co.* (1888) 69 Md. 370, 16 Atl. 280.

"A servant is expected to observe such objects only, in the absence of notice, as would in an instant convince him of their danger." *Johnston v. Oregon Short Line R. Co.* (1892) 23 Or. 94, 31 Pac. 283.

The case is for the jury where the risk was one which was "not open and patent or ordinarily discernible by the use of one's senses." *Land v. E. S. Woodworth & Co.* (1899) 75 Minn. 501, 78 N. W. 81. The servant's duty to use "reasonable care" does not cast upon him the duty to discover latent defects. *Wabash & W. R. Co. v. Morgan* (1892) 132 Ind. 430, 31 N. E. 661. A servant is not bound to observe "latent" defects. *Faren v. Sellers* (1887) 39 La. Ann. 1011, 8 So. 363. A servant is not chargeable with knowledge of dangerous conditions which can only be discovered by a careful inspection. *Rice & B. Malting Co. v. Paulsen* (1893) 51 Ill. App. 123.

In *Oregon Short Line & U. N. R. Co. v. Tracy* (1895) 14 C. C. A. 199, 29 U. S. App. 529, 66 Fed. 931, the court, in declining to hold a trainman chargeable, as matter of law, with notice of an obstruction on a side-track, created by a growth of brush, thus differentiated be-

tween the position of such a servant in the cases where the dangers arose from fixed conditions and in cases where the dangers were the result of changes in those conditions: "The distinguishing principle between these two classes of cases is that in the one the defects are visible and apparent, and the dangers therefrom are presumed to be known and assumed, while in the other the danger is not seen, and no such presumption arises. The condition of the switches and frogs, the degree of the curvature of the track, are all fixed conditions which are visible to the eye. The experienced employee knows that he is to serve the railroad company with its road and cars in the condition in which he sees them, and he knows the danger that may attend such service. But he does not necessarily know, and he cannot be expected to meet, dangers which arise from changes in these conditions. However apparent may be the cause which produce them. He is not presumed to know that the rains and floods will have covered the track with earth and sand at a place where common prudence would require that provision be made against the occurrence of such an obstruction. He is not required to assume that ice and snow will be allowed negligently to accumulate upon the track and switches, or that other obstructions will be placed on or about the same, so as to render the track unsafe, or his work more dangerous than if otherwise would be."

See also s. 413, notes 4 to 9, *infra*.

b. Different standards of care in the case of master and servant.—In another type of statements in which the servant is declared not to be under any obligation to inspect the plant, the logical standpoint seems to be that the absence of that obligation is properly deducible from a principle, the correctness of which in this connection taken to be axiomatic, *viz.*, that, in view of the relative positions occupied by the parties to the contract of employment, the standard of duty implied by the phrase "ordinary care" or "reasonable care" bears a different meaning according as the servant's constructive knowledge of the master or of the servant may be in question. But it will be observed that, in some of these statements the conception discussed in the next subdivision of this section is quite prominent.²

"Both master and servant must use reasonable care to ascertain defects and dangers; but reasonable care upon the part of the master demands inspection and search for latent and hidden defects and causes of danger, while reasonable care upon the part of the servant requires attention and observation of known or obvious defects and perils." *Louisville, N. A. & C. R. Co. v. Quinn* (1896) 14 Ind. App. 554, 43 N. E. 240. "An employee is required to observe and avoid all known or obvious perils, even though they may arise from defective machinery and appliances; but he is not bound to search for defects, or make a critical inspection of the appliances which are provided for his use. These are duties of the employer." *Ohio & M. R. Co. v. Pearcy* (1891) 128 Ind. 197, 27 N. E. 479. "Both master and servant must exercise reasonable care, but reasonable care upon the part of the servant does not require of him an inspection to discover latent defects, while reasonable care upon the part of the master does require such inspection for him." *Salem Stone & Lime Co. v. Topps* (1894) 10 Ind. App. 516, 38 N. E. 229.

"While it is true that both master and servant will be held to know that which by the exercise of reasonable diligence they might have learned, still, this rule does not by any means place the master and servant upon equality as to the acts necessary to constitute diligence. He is not bound to search for defects, or make a critical inspection of the appliances which are provided for his use. These are duties of the employer." *Pittsburgh, C. C. & St. L. R. Co. v. Woodward* (1894) 9 Ind. App. 169, 36 N. E. 442.

"The duty of inspection is by law imposed upon the master. He is under obligation to search for and discover defects discoverable by proper examination of those things which are hidden from the careful observation of the servant. The discharge of his ordinary duty is not to those hidden or concealed defects. The master and servant are not upon equality of obligation. The master must search diligently; the servant must observe carefully." *Pennsylvania R. Co. v. Witte* (1896) 15 Ind. App. 583, 44 N. E. 319, 44 N. E. 377.

In *Guthrie v. Louisville & N. R. Co.* (1883) 11 Lea, 373, 47 Am. Rep. 107, where the plaintiff was injured by defective mail, the court remarked with reference to a case like this, that the rule is that the duty of the master is absolute to use active diligence to prevent improper or unsafe tools or instruments being furnished an employee which he may be injured. [*Nash v. C. R. Co. v. Elliott* (1860) 11 Ind. 613, 78 Am. Dec. 506. In reference to this matter the employee may be held to some extent, at least, on the performance of duty on the part of the employer, and therefore what may be ordinary care in avoiding an imminent danger might well not be required to the same extent to guard against breach of duty on the part of the servant which the party could have no reason to anticipate. The employee had no right to perform, under the facts in this case, as to the repair of the tools; nor was he called on to inspect them, nor whether the master might not have neglected his duties in this reference being no special care imposed

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c. Servant entitled to assume that the master has performed his duties properly.—The most common conception of the doctrine is that which treats it as a deduction from the principle already developed under another aspect in a previous chapter (see §§ 354, 355, *ante*), that, in the absence of circumstances suggestive of the imprudence of such a course, a servant is warranted in acting upon the assumption that his master has fulfilled, and will continue to fulfil, either personally or by means of some employee who represents him *ad hanc vicem*, his duty to see that due precautions are taken to protect his servants against avoidable and unnecessary dangers.■

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nature of his position, nor obligation to inspect the tools, there could be no want of it, or negligence, or carelessness, in not doing what he was not bound to do by the nature of his employment and the legal obligations arising out of the relations existing between the parties."

"The servant is bound to take notice of those dangerous defects of which he has knowledge and which are obvious to his senses, but he is not bound to investigate for himself a department of work with which he has nothing to do, and set up his judgment against that of his master." *Dorlin v. Wabash, St. L. & P. Co.* (1885) 87 Mo. 549.

"It is the duty of the employer to exercise reasonable care to furnish safe machinery, and to discover defects therein. But the employee is not under like obligation to resort to means for the discovery of defects. He has a right to presume that his employer has done his duty, and complied with the requirements of the law. And it is only when he has knowledge of defects in the machinery which he is required to use, and continues to use them without objection, that he is presumed to waive the defect." *Kroy v. Chicago, R. I. & P. R. Co.* (1871) 32 Iowa, 357. . . . Of course, the situation of the plaintiff and his means of knowledge may be proved in order to enable the jury to determine the fact of his knowledge of the condition of the machinery with which he works. But it is his knowledge, and not his means of knowledge, which affects his right to recover." *Muldoney v. Ill. Coal & R. Co.* (1873) 36 Iowa, 470.

"The difference in the duty of the master and servant is, the master is bound to look for defects, while the servant is bound only to discover what the ordinary use of the appliance would make known to a man of ordinary prudence

The master is held to know the defect, if by the exercise of ordinary care he might know it. The servant has a right to assume that the master has furnished him safe machinery, unless its condition is such that by the exercise of ordinary care he would have discovered its defects." *Gutridge v. Missouri P. R. Co.* (1891) 165 Mo. 523, 16 S. W. 913.

That a servant is not required to exercise the same degree of care and diligence as the master in inspecting and investigating risks was also recognized in *Dault v. Missouri, K. & T. Trust Co.* (1897) 140 Mo. 1, 41 S. W. 255.

In *Houston & T. C. R. Co. v. McNamara* (1883) 59 Tex. 258, the court, after speaking of the duty of the master to keep the track in good order, and the diligence required of the employer, said: "The law requires no such extraordinary vigilance and care of servants, nor charges them with knowledge of facts which they could have known only by their exercise." Quoted with approval in *Trans & P. R. Co. v. Johnson* (1896) 89 Tex. 519, 35 S. W. 1042.

It is error to sustain a demurrer to the evidence, based on the theory that a servant is bound to exercise every precaution for his safety. *Bender v. St. Louis & S. F. R. Co.* (1896) 137 Mo. 240, 37 S. W. 132.

"It being the duty of the master to provide suitable and proper appliances, the employee had the right to rely on the master having discharged his duty in this respect, and he is not bound to search for defects." *Ohio & M. R. Co. v. Peary* (1890) 128 Ind. 204, 27 N. E. 479.

"A person when employed and instructed to commence work at a particular place . . . is under no obligation, in order to protect himself from the charge of contributory negligence,

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This confidence on the part of the servant is more especially justifiable where a promise to remove certain dangerous conditions has been given (see chapter XXII., *post*), or where the servant is complying with a direct order (see chapter XXIII., *post*), or where he has been assured that there is no danger (see chapter XXIV., *post*).

Where the employer's rules charge two servants with the co-

first to go all through the building, and make himself familiar with each piece of machinery, and the danger he may incur in case he comes in contact with it in its then condition. It is sufficient for him that in entering upon the active discharge of the duties assigned him he ascertains what he is expected to do, and the dangers directly connected therewith, and he has a right to assume that, in the performance of that particular duty, reasonable facilities therefor will be afforded him, without coming in contact with other unforeseen or unsuspected dangers." *Suoboda v. Ward* (1879) 40 Mich. 423.

"The duty of the company to this class of its employees is to provide a roadway in all respects reasonably safe for the running of its trains and the performance of the functions imposed upon them by the exigencies of the service, and they have the right to assume without inquiry or investigation, that this duty has been discharged. The *onus* of inquiry or investigation is not upon them." *Georgia P. R. Co. v. Davis* (1890) 92 Ala. 300, 9 So. 252, quoted with approval in *Birmingham R. & Electric Co. v. Allen* (1892) 99 Ala. 359, 20 L. R. A. 457, 13 So. 8.

"It is the duty of the master, and not of the servant, to exercise due care and diligence to ascertain whether the appliances furnished are safe and suitable, and a servant has a right to assume, without inquiry or examination, that the appliances furnished him are safe and suitable." *Carter v. Oliver Oil Co.* (1890) 34 S. C. 211, 13 S. E. 419, citing *Lasure v. Graniteville Mfg. Co.* (1882) 18 S. C. 281.

The servant "is not bound to make an examination to find defects. There is no such legal obligation imposed upon him. That is the duty of the master. The servant is not bound to search for dangers, except those risks which are patent to ordinary observation; he has a right to rely upon the judgment and discretion of his master, and that he will fully perform his duty toward

him." *Little Rock, M. R. & T. L. Co. v. Lorcett* (1886) 49 Ark. 333, 3 S. W. 50.

"The duty of the employee to exercise ordinary care as to any risk or danger does not serve to relieve the company of its duty of careful and vigilant inspection, or devolve it on the employee; for the latter, while in the exercise of ordinary care, and unmonished in some manner to the contrary, has a right to assume that the company has properly discharged the duties it owes to him to secure his safety." *Curtis v. Chicago & N. W. Ry.* (1897) 95 Wis. 460, 70 N. W. 665.

"The burden of furnishing safe machinery, appliances, surroundings, is upon the master, and while the master is not to be held liable for dangers and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate or test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect." *Chicago I. R. Co. v. Hines* (1890) 132 Ill. 23 N. E. 1021, Affirming (1889) App. 271.

"We think it equally well settled that it is not incumbent upon the employee to search for latent defects in machinery or implements furnished him by the employer, but that without such investigation he has the right to assume they are safe and sufficient for the purpose." *Porter v. Hannibal & St. L. Co.* (1879) 71 Mo. 66, 36 Am. Rep. 549. *Dale v. St. Louis, K. C. & N. W. Ry.* (1876) 63 Mo. 459.

"There are cases where, in the use of machinery, or in the prosecution of work involving some degree of technical knowledge, the servant cannot be presumed to know the risks and dangers well as the master, and in such cases the servant can rely on the master's superior knowledge and his assurance of the absence of danger. This is also true where the danger proceeds from a part

and management of a certain piece of machinery, and one of them assumes to attend to a duty incident to the functions thus imposed

work or the character of appliances which the servant's labor does not call him in contact with, or make him conversant with their condition." *O'Connell v. Clark* (1897) 22 App. Div. 466, 48 N. Y. Supp. 74.

"The master is chargeable with knowledge which he might have acquired by the exercise of due care, the same as if he actually possessed it; whereas the servant has the right to assume that all necessary examinations have been made by the master, and is not required, either in person or by another employed by him for the purpose, to examine the machinery as to fitness and sufficiency." *Houston & T. C. R. Co. v. McNamara* (1883) 59 Tex. 258, quoted with approval in *Texas & P. R. Co. v. Johnson* (1896) 89 Tex. 519, 35 S. W. 1042.

A servant has a right "to rely somewhat on the expectation" that the master will provide safe machinery, and is "not called upon to be over-strict in an examination into its safety." *Myers v. Hudson Iron Co.* (1889) 150 Mass. 125, 22 N. E. 631. "A servant has a right to assume that his employer will not, by any act over which the servant has no control, render his position extra-hazardous." *Wills v. Cape Girardeau & S. W. R. Co.* (1890) 44 Mo. App. 51.

It is the master's duty to see that the place of work is safe, and the servant has the right to rely upon the belief that the master has made it safe. Hence, the obligation of the servant to be acquainted with the danger is not the same as that of the master. The master is liable if it might have known of the danger by the exercise of due care. *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 461, 44 N. E. 876, Affirming (1895) 59 Ill. App. 32.

A servant is not under any duty to make an examination where he has a right to expect safety and there is nothing to put him on inquiry as to the existence of danger. *Southern P. R. Co. v. Markey* (1892; Tex.) 19 S. W. 392.

The primary responsibility, it has been said, rests on the employer or his representative, and the servant may well trust something to them in determining whether he can work in safety. *Hennessy v. Boston* (1894) 161 Mass. 502, 37 N. E. 668.

The servant's right to rely upon the

master's proper performance of his duty is also adverted to as the rationale of the servant's exemption from the duty of inspection in the following, among many other, cases: *Cumben v. Belleville Stone Co.* (1896) 59 N. J. L. 226, 36 Atl. 473; *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 554, 8 So. 369; *Kansas City, M. & B. R. Co. v. Burton* (1892) 97 Ala. 240, 12 So. 88; *Paunee Coal Co. v. Roper* (1900) 184 Ill. 402, *Reversing* (1898) 79 Ill. App. 469; *Goodrich v. New York C. & H. R. R. Co.* (1889) 116 N. Y. 398, 5 L. R. A. 750, 22 N. E. 397; *Bud v. Long Island R. Co.* (1896) 11 App. Div. 134, 42 N. Y. Supp. 888; *Chicago & E. R. Co. v. Brannan* (1894) 16 Ind. App. 570, 37 N. E. 190; *Jones v. Shaw* (1897) 16 Tex. Civ. App. 290, 41 S. W. 690; *Boyle v. Dequann-McLean Const. Co.* (1900) 47 App. Div. 311, 61 N. Y. Supp. 1043. Leave to Appeal Denied (1900) 49 App. Div. 636, 63 N. Y. Supp. 1105; *Louisville, Y. A. & O. R. Co. v. Wright* (1888) 115 Ind. 378, 16 N. E. 145; *Boyce v. Fitzpatrick* (1881) 80 Ind. 526, 529; *Vord Deutscher Lloyd S. S. Co. v. Imbrogsten* (1894) 57 N. J. L. 401, 31 Atl. 619.

Variants upon this form of expression are exemplified in the statements that the servant "has a right to assume, in the absence of notice to the contrary, or of something to put him on inquiry, that the master has performed his duty, and hence, to a certain extent, to rely on the superior judgment of his master" (*Russell v. Minneapolis & St. L. R. Co.* [1884] 32 Minn. 230, 20 N. W. 147; *Austin v. Appling* [1891] 88 Ga. 54, 13 S. E. 955); that a servant has the right to rely on the superior knowledge and judgment of his master, and to assume that the latter will not expose him to evitable risk, and that he has taken proper precautions to guard him from danger (*Faren v. Sellers* [1887] 39 La. Ann. 1011, 3 So. 363); that a servant is not bound to inform himself as to the safety of the premises or material to be used, "where the master has superior means of knowledge, and the circumstances authorize the servant to rely upon him because of want of equal opportunity." (*Bogenschutz v. Smith* [1886] 84 Ky. 330, 1 S. W. 578).

The servant's reliance upon the knowledge or judgment of the employee in charge of the given instrumentality has

upon both of them, the other may rely upon the presumption that duty has been properly performed.⁴

If an appliance has just been inspected by the proper employee, the obligation of the servant to examine it may be said to reach its vanishing point.⁵

410. Doctrine considered with reference to the sufficiency of the complaint.—The servant is not required to aver facts showing affirmatively that he had no means of knowledge; it is sufficient to aver that he had no knowledge.¹ Nor is it necessary for him to aver that he carefully examined the dangerous instrumentality before using it.²

A complaint is not demurrable where the defects alleged are of such a nature that the injured servant was not bound to look for them.³

410a. Doctrine considered with reference to the propriety of the instructions.—*a. Correct.*—In any case where no evidence has been introduced which would warrant the inference that the function of the injured servant were of such a nature as to cast the duty of inspection upon him (see §§ 413 *et seq.*, *infra*), an instruction which directly enunciates the doctrine that he is not subject to the

been treated as an element which renders it impossible to say, as matter of law, that the servant ought to have known of the risk. *Helfenstein v. Medart* (1896) 136 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294; *McDonald v. Chicago, St. P. M. & O. R. Co.* (1889) 41 Minn. 439, 43 N. W. 380.

In one case it was said that a station agent required to set the brakes of cars left at his station has the right to presume that they are in proper condition for use, since it is not his duty to inspect such appliances or to repair them. *Chicago, B. & Q. R. Co. v. Kellogg* (1898) 54 Neb. 127, 74 N. W. 454. The writer has found no other example of the logical sequence of ideas indicated in this statement.

¹On this ground it has been held that an engineer had a right to assume that the conductor and trainmen had repaired a leaky air pipe without cutting off the air brake from part of the train. *Merritt v. Great Northern R. Co.* (1900) 81 Minn. 496, 84 N. W. 321.

See also *Peoria, D. & E. R. Co. v. Johns* (1891) 43 Ill. App. 83 (§ 411, note 1, subd. (dd), *infra*).

²This was the situation in *Chicago & E. I. R. Co. v. Kucirim* (1894) 152 Ill. 458, 39 N. E. 324, affirming (1892) 48

Ill. App. 243; *New Orleans & M. Co. v. Clements* (1900) 40 C. C. 106, Fed. 415.

³*Ohio & M. R. Co. v. Pearcey* 128 Ind. 197, 27 N. E. 479.

⁴*Bowce v. Schroeder* (1898) App. 28, 51 N. E. 376.

⁵*Carley v. Coleman* (1901) 1994, 39 S. E. 558 (complaint alleging negligence of the master in allowing a rotten tree to fall across the track, held not to be demurrable). A complaint alleging that a servant was injured by reason of negligence of the master in allowing track and rails along which loads were pushed to become worn, rusted, rotten is not demurrable as showing its face that the defects to which injury was due were obvious. *Sabford Stone Co. v. Hilt* (1901) App. 543, 59 N. E. 97.

An averment that four cross-bents had been torn down, leaving support for the roof of a tunnel, is not demurrable on the ground that it admits constructive knowledge of the plaintiff's part. *Louisville, C. R. Co. v. Cornelius* (1895) App. 399, 43 N. E. 31.

A complaint cannot be excepted to on the ground that it does not show the servant's opportunities for

is, of course, correct.¹ So, also, is an instruction which explicitly affirms the right of the servant to act upon the assumption that the master has properly performed his obligations in the premises.²

b. Incorrect.—On the other hand it is error to give, and proper to refuse, instructions by which the jury is given to understand that it was the servant's duty to know whether the dangerous conditions existed,³ or that he cannot recover if the dangerous conditions which

edge were not equal to those of the defendant, where the danger arose, not from the bad repair or decayed condition of the structure, but from its negligent construction,—a fact the knowledge of which is necessarily imputed to the master. *Salem Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141, 38 N. E. 411.

¹*Carpenter v. Mexican Nat. R. Co.* (1889) 39 Fed. 315 (defective bracket). The following clause in a charge has been held correct: Nor is there imposed on the servant any duty of watchfulness and care to discover defects, when he has no notice of danger, and the defects are not so glaring and apparent as to be open to the observation of ordinarily prudent men. *Pennsylvania Co. v. McCormack* (1891) 131 Ind. 250, 30 N. E. 27. A jury is properly instructed that an engineer was not bound to examine the roadbed of a railway to see if there were any latent defects. *Little Rock & Ft. S. R. Co. v. Voss* (1892 — Ark. —) 18 S. W. 172. A jury is properly instructed to the effect that a brakeman is not required to stop and examine the draw-heads to see whether they are safe, before he makes the coupling, although he is bound to use such care and caution as a reasonably prudent man would use under like circumstances. *Galveston, H. & S. A. R. Co. v. Briggs* (1895, Tex. Civ. App.) 30 S. W. 933. A jury is properly charged that it is not the duty of a railroad brakeman to inspect the track to discover defects therein which may result in injury to him. *Texas & P. R. Co. v. Magrill* (1897) 15 Tex. Civ. App. 353, 40 S. W. 188.

²In instructing the jury it is proper to tell them that, in determining whether the servant was negligent, they should consider him as a person entitled to assume that the master had performed his duty. *Vord Deutsche Lloyd S. S. Co. v. Ingham* (1894) 57 N. J. L. 401, 31 Atl. 619. A jury is properly instructed that, in the absence of knowledge to the contrary, a train hand has a right to presume that the employer's

duty to furnish a safe track has been performed. *Chicago & E. R. Co. v. Binkowski* (1897) 72 Ill. App. 22. A jury is properly instructed that a servant has a right to assume, without looking for latent defects, that the master has done his duty in providing safe premises or working places for his servants, unless he has or can obtain knowledge to the contrary by reasonable observation. *Summit Coal Co. v. Shaw* (1896) 16 Ind. App. 9, 44 N. E. 676. A railroad employee has the right to assume that the company has established proper rules for his protection in the performance of his duties. *Texas & P. R. Co. v. Eberhart* (1897) 91 Tex. 321, 43 S. W. 510. Affirming (1897; Tex. Civ. App.) 40 S. W. 1060. In a case where the evidence tends to show that the derailment of a car was caused by a defect in one of its trucks, it is proper to charge the jury that a servant "has a right to rely on the company's implied promise to furnish safe machinery, and it is not his duty to inspect the appliances furnished him, but he takes the risk of such secret defects as cannot be discovered by ordinary diligence, and no more." *Jones v. Shaw* (1897) 16 Tex. Civ. App. 290, 41 S. W. 690.

In a case where insufficient ballasting caused a switchman to fall in front of a train, it is proper to instruct a jury that he is not precluded from recovery by the fact that he might, by the exercise of ordinary care, have ascertained the condition of the track, and that the action may be maintained unless he had "equal opportunity" with defendant's servants having charge of the track to know of its condition. *Louisville & N. R. Co. v. Ross* (1900) 21 Ky. L. Rep. 1730, 56 S. W. 14. See also § 414, *infra*.

³*Ohio & M. R. Co. v. Percy* (1890) 128 Ind. 208, 27 N. E. 479 (brakeman injured by defect in brake staff). It is proper to refuse an instruction that the servant's knowledge of the danger of coupling cars with mismatched couplings is a necessary inference from the

caused the injury were known to him, or could have been discovered by ordinary care,⁴ or by proper care,⁵ or by reasonable care,⁶ or by the use of diligence,⁷ or by "care and diligence."⁸

See also § 407, note 3, *supra*, and § 412, note 1, *ad finem*, in

fact that they were of different heights. *Muldorff v. Illinois C. R. Co.* (1873) 36 Iowa, 470. A charge (words not stated) which would give the jury to understand that a brakeman is required to inspect the drawheads of cars handled by him is properly refused. *Missouri, K. & T. R. Co. v. Cox* (1900; Tex. Civ. App.) 55 S. W. 354, Rehearing Denied (1900; Tex. Civ. App.) 56 S. W. 97. An instruction (words not stated) requiring the servant to acquaint himself with the condition of a railway track was held to have been properly refused in *Atchison, T. & S. F. R. Co. v. Swarts* (1897) 58 Kan. 235, 48 Pac. 953.

The following instruction was held erroneous in a case where cattle strayed through a defective fence on to a track: The jury are instructed that, if the defect in the fence was known to the plaintiff he cannot recover unless the evidence also shows that he notified the company of such defect, and was induced to remain in the employment by a promise that the defect would be repaired. *Dickson v. Omaha & St. L. R. Co.* (1894) 124 Mo. 140, 25 L. R. A. 320, 27 S. W. 476.

It is a misdirection to charge the jury that the risk of the dangerous conditions was assumed by the servant if they were known or ought to have been known to him. *Houston & T. C. R. Co. v. Kelly* (1896; Tex. Civ. App.) 35 S. W. 878 (brakeman injured by defective car wheel).

Where a railway fireman was injured, while standing on the side of the engine tender, by being crushed against a coal bin standing near the track, an instruction denying recovery because of the assumption of the risk of an obvious defect was held to have been properly omitted, for the reason that no presumption arises as to the dangers created by objects extraneous to that with which a trainman is working. *Gulf, C. & S. F. Co. v. Gray* (1901; Tex. Civ. App.) 63 S. W. 927.

It is error to instruct a jury that, if an engineer is required in the performance of his duties to go upon a platform, it is his duty to keep it in safe condition, and that if he failed to know of any rottenness or defect therein, ow-

ing to his failure to examine it, the dict should be for the defendant. *Tower* (1881) 11 Mo. App. 199.

⁴ *Mexican C. R. Co. v. Murrain* (1892) 42 C. C. A. 334, 102 Fed. 264; *J. v. Missouri, K. & T. R. Co.* (1892) Tex. Civ. App. 319, 55 S. W. 376 (man injured by results of negligent act); *San Antonio & A. P. R. Co. v. Brooking* (1899; Tex. Civ. App.) 50 S. W. 537. A master is not entitled to an instruction that a servant is bound to use ordinary care to see whether the master has adopted a reasonably prudent plan for the conduct of the work. *Missouri, K. & T. R. Co. v. Hannig* (1891) 91 Tex. 347, 43 S. W. 508, *Revised* (1897; Tex. Civ. App.) 41 S. W. 111. It is not error to refuse to charge the plaintiff assumed all the risks from defects in appliances used by him, which he might have known by the exercise of ordinary care. *Missouri, K. & T. R. Co. v. Baker* (1900; Tex. Civ. App.) 58 S. W. 964.

In a case where the following charge was requested, it was held that, in giving it, the words in brackets were properly omitted: "Now, if you believe that it was a custom of defendant company to inspect or repair cars when brought over to be loaded and returned, and the plaintiff knew this custom, he could have known it by the exercise of ordinary care, then he assumed the risk of being injured by any defect in said car." *Texas & P. R. Co. v. Bald* (1896) 21 C. C. A. 520, 41 Fed. App. 567, 75 Fed. 802, *Affirmed* (1898) 170 U. S. 665, 42 L. ed. 118, 10 Sup. Ct. Rep. 777.

In a case where plaintiff, while cleaning an engine to clean its headlight, slipped and was injured, due to an accumulation of grease on the engine, the reason assigned for holding it to be error to instruct the jury that the plaintiff, by the exercise of ordinary care, "could" have known of the condition of the step, he was debilitated from a recovery, was that the word "could" tended to cast on plaintiff the duty of inspection or inquiry, while the question of negligence depended on what he "could" have seen, but what he "would" have seen if he had

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App. 191.
Murray v. B. & O.
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W. 376; 60 N. W.
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411. Decisions illustrative of the doctrine.— In the subjoined note are collected a large number of cases in which the refusal of the court to impute knowledge, as a matter of law, is based upon one or other of the various phases of the doctrine developed in the last four sections.¹ For other cases illustrative of situations in which servants

ordinary care. *Bookrum v. Galveston, H. & S. A. R. Co.* (1900; Tex. Civ. App.) 57 S. W. 919. But the distinction thus taken seems to be of more than dubious propriety. It is submitted that an instruction in which the word "would" is used is not less likely to be misleading than one in which the word employed is "could."

In a case where a sliver flew from a maul and struck a laborer, it was held that the defendant could not complain of an instruction that the plaintiff could not recover if the defect was known or might have been known by the use of ordinary care." *Guthrie v. Louisville & N. R. Co.* (1883) 11 Lea, 372, 47 Am. Rep. 296.

Gulf, C. & S. F. R. Co. v. Kelly 1896; Tex. Civ. App.) 34 S. W. 140.

Gulf, C. & S. F. R. Co. v. Warner 1899; 22 Tex. Civ. App. 167, 54 S. W. 1064 (switchman injured by defective track).

Porter v. Hannibal & St. J. R. Co. (1875) 60 Mo. 160; *Terrell Compress Co. v. Arrington* (1898; Tex. Civ. App.) 48 S. W. 59; *Gulf, C. & S. F. R. Co. v. Hohl* (1895; Tex. Civ. App.) 29 S. W. 1131.

Louisville & N. R. Co. v. Foley (1893) 94 Ky. 220, 21 S. W. 866.

¹(a) *Railway tracks and appurtenances.*—It has frequently been recognized that trainmen, having no duties to perform in respect to construction and maintenance of the roadway, are not chargeable with notice of defects therein (*Georgia P. R. Co. v. Davis* [1890] 92 Ala. 300, 9 So. 252); and that diligence in inspecting a roadbed is not required of any servants of a railway company except those whose duty it is to inspect it (*Southern P. R. Co. v. Aylward* [1891] 79 Tex. 675, 15 S. W. 697).

In the following cases trainmen were injured either by an accident to the train on which they were working, or by the dangerous condition of the roadbed considered as a footway: *Pennsylvania R. Co. v. Zink* (1889) 126 Pa. 288, 17 Atl. 614 (brakeman in yard injured by derailment resulting from rotten ties); *Mehan v. Syracuse, B. & N. Y. R. Co.* (1878) 73 N. Y. 585 (rails not properly

secured); *Lake Shore & M. S. R. Co. v. Conkey* (1897) 169 Ill. 505, 48 N. E. 483, Affirming (1896) 67 Ill. App. 155 (train derailed by defective track ran against tower in which a gateman was at work); *Corley v. Coleman* (1901) 113 Ga. 994, 39 S. E. 558 (rotten tree fell across track); *Chicago & N. W. R. Co. v. Sirett* (1867) 45 Ill. 197, 92 Am. Dec. 206 (train fell through a culvert in bad repair); *Southern P. R. Co. v. Aylward* (1891) 79 Tex. 675, 15 S. W. 697 (bolt in guard rail had become loosened, and, as it projected, caught the plaintiff's foot while he was sitting on the edge of a hand car); *Texas, S. V. & N. W. R. Co. v. Guy* (1893; Tex. Civ. App.) 23 S. W. 633 (rotten tie caused a subsidence of the track, the result being that a car which was about to be coupled was thrown over to one side, and its drawhead slipped past that of the car to which it was about to be united); *Houston & T. C. R. Co. v. McNamara* (1883) 59 Tex. 258 (rotten ties); *Northern P. R. Co. v. Teeter* (1894) 11 C. C. A. 332, 27 U. S. App. 316, 63 Fed. 527 (hole under ties concealed by slush); *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 36 Am. Rep. 454 (hole under tie); *Little Rock, M. R. & T. R. Co. v. Levere* (1886) 48 Ark. 333, 3 S. W. 50 (no ballast); *Cleveland, C. C. & St. L. R. Co. v. Sloan* (1894) 11 Ind. App. 404, 39 N. E. 174 (no ballast; ties irregularly spaced); *Illinois C. R. Co. v. Sanders* (1897) 168 Ill. 270, 46 N. E. 799, Affirming (1896) 66 Ill. App. 439 (unfilled space between ties); *Little Rock & M. R. Co. v. Moseley* (1893) 6 C. C. A. 225, 56 Fed. 1009 (want of filling between the ends of the ties); *Cregg v. Chicago & W. M. R. Co.* (1892) 91 Mich. 624, 52 N. W. 62 (piles of snow shoveled from between the rails of a side track and left lying beside it); *Little Rock & Ft. S. R. Co. v. Voss* (1892; Ark.) 18 S. W. 172 (landslide obstructed track); *Pennsylvania Co. v. Brush* (1891) 130 Ind. 347, 28 N. E. 615 (split ties); *Devlin v. Wabash, St. L. & P. R. Co.* (1885) 87 Mo. 545 (engineer, though knowing that rails are old, light, and well-worn, is not bound to pursue the inquiry and determine whether the road is fit for

have been held excusably ignorant of the risks, see §§ 1453a, 457, notes 1, 2, *post*.

use); *Dale v. St. Louis, K. C. & N. R. Co.* (1876) 63 Mo. 459 (defective rail joint); *Chicago & E. R. Co. v. Binkowski* (1897) 72 Ill. App. 22 (hole 6 inches deep close to track); *Bird v. Long Island R. Co.* (1896) 11 App. Div. 134, 42 N. Y. Supp. 888; *Louisville, N. A. & C. R. Co. v. Wright* (1888) 115 Ind. 378, 16 N. E. 145; *Atchison, T. & S. F. R. Co. v. Scurts* (1897) 58 Kan. 235, 48 Pac. 953; *Jones v. Shaw* (1897) 16 Tex. Civ. App. 290, 41 S. W. 690; *Houston & T. C. R. Co. v. McNamara* (1883) 59 Tex. 255; *Southern P. R. Co. v. Mackey* (1892; Tex.) 19 S. W. 392; *International & G. N. R. Co. v. Bonatz* (1898; Tex. Civ. App.) 48 S. W. 767.

That a switchman engaged in coupling cars is not bound to observe whether guard rails are blocked was laid down in *Curtis v. Chicago & N. W. R. Co.* (1897) 95 Wis. 460, 70 N. W. 665. A similar doctrine seems to be adopted in *Trott v. Chicago, R. I. & P. R. Co.* (1901) 115 Iowa, 80, 86 N. W. 33. But the precise rationale of the decision is not quite clear. The obligation to notice such conditions is, however, asserted in several other cases. See § 403, note 1 (b), *ante*.

In *Waldhier v. Hannibal & St. J. R. Co.* (1895) 87 Mo. 37, where a brakeman's foot caught under the loose plate of a frog, he knowing that the point of the frog was broken, but not that the plate was loose, it was held that he was entitled to recover, unless a prudent person would not have worked about a broken frog, since he was not bound to inquire into the condition of the whole frog. *Gulf, C. & S. F. R. Co. v. Hohl* (1895; Tex. Civ. App.) 29 S. W. 1131 (track was not properly surfaced; guard rail was not at proper distance from main rail, and its ends were not on the ties).

A brakeman is not bound to examine into the location of sidings with respect to adjoining tracks. *Pennsylvania Co. v. McCormack* (1891) 131 Ind. 250, 30 N. E. 27 (space between main and side tracks being insufficient, a brakeman was struck by a car standing on the side track).

Tie-in hands are not bound to examine into the condition of the fences along the track. *Dickson v. Omaha & St. L. R. Co.* (1894) 124 Mo. 140, 25 L. R. A. 320, 27 S. W. 476.

(b) *Obstructions beside tracks.*—*Johnston v. Oregon S. R. Co.* (1892) 23 Or. 94, 31 (switchman not expected to carefully the distance between target and the rail); *Georgia v. Davis* (1890) 92 Ala. 300, (brakeman not bound to know there is a projecting rock so close to track as to be dangerous); *C. I. & P. R. Co. v. Cleveland* (Ill. App. 308 (for jury to say trainman should have known building erected for the purpose of building trains was dangerously track)).

A brakeman is not required to direct his attention to the discovery of obstructions caused by impediments and in no way required in the open road, such as a post erected to the track by a station agent for the purpose of supporting a clothes line by his family. *Kearns v. Chicago & N. W. R. Co.* (1885) 66 Iowa, N. W. 231.

A switchman whose duties are to perform manual labor in replacing cars on yard tracks, is not to determine their location or see that tracks are clear of obstructions. He is not guilty of contributory negligence because he did not ascertain that there had been left standing in such close proximity to an adjacent track to render it unsafe for him to perform his duties. *Kansas City, M. & St. P. R. Co. v. Burton* (1893) 97 Ala. 24, 88.

A railroad switchman has the right to presume that a car which he is to assist in moving is on the track, and that he will not be caught between cars and cars standing on an adjoining track, because it has been started with a pair of wheels is off of the track. *Chicago & E. I. R. Co. v. Driscoll* (Ill. App. 91. Reversed in 111 Ill. 330, 52 N. E. 921; but the court was on the ground that negligence of the defendant's partner was not shown. The question of contributory negligence was not discussed).

(c) *Obstruction above tracks.*—A trainman has a right to assume that overhead bridges are constructed sufficiently high to be clear of the tracks. *Louis, Ft. S. & W. R. Co. v. ...* (1887) 37 Kan. 701, 16 Pac.

412. Doctrine considered in relation to the servant's opportunities of knowledge.—A doctrine resting on such foundations as those explained

brakeman is not required to go over the road on a tour of inspection looking for dangerous bridges, before he enters the service. *Louisville, N. A. & C. R. Co. v. Wright* (1888) 115 Ind. 378, 16 N. E. 145.

(d) *Railway cars.*—It is not part of the ordinary duty of a brakeman to inspect the various parts of the brakes which he handles; nor does he hold himself out as having sufficient skill to determine by an inspection their fitness for use. *Central R. Co. v. Haslett* (1884) 74 Ga. 59.

Knowledge was held not to be imputable to trainmen, as a matter of law, in the following cases: *Goodrich v. New York C. & H. R. R. Co.* (1889) 116 N. Y. 398, 5 L. R. A. 750, 22 N. E. 307 (bumpers of unequal height); *Rauzier v. Minneapolis & St. L. R. Co.* (1884) 32 Minn. 332, 20 N. W. 332 (ratchet was so much worn that it would not hold the ratchet wheel when it was shaken by the movement of the cars); *Ohio & M. R. Co. v. Percy* (1890) 128 Ind. 208, 27 N. E. 479 (threads of screw on top of brake staff were so worn that they did not hold the nut which secured the wheel); *International & G. N. R. Co. v. Emery* (1896) 14 Tex. Civ. App. 551, 40 S. W. 149 ("dog" intended to catch in the ratchet of brake was too loose to hold it); *Van Tassel v. New York, L. E. & W. R. Co.* (1892) 1 Misc. 299, 20 N. Y. Supp. 708. Affirmed in (1894) 142 N. Y. 634, 37 N. E. 566 (board forming brake step was sprung in such a way that the defect was only visible from below); *Galveston, H. & S. A. R. Co. v. Templeton* (1894; Tex. Civ. App.) 25 S. W. 135. Affirmed in (1894) 87 Tex. 42, 26 S. W. 1066 (defect in brake which a switchman could have ascertained only by mounting the car); *Louisville, N. A. & C. R. Co. v. Buck* (1888) 116 Ind. 566, 2 L. R. A. 520, 19 N. E. 453 (brakeman injured owing to absence of reach rod on brake beam, a defect only discoverable by looking under the car); *Chicago & E. I. R. Co. v. Kneirim* (1894) 152 Ill. 458, 39 N. E. 324. Affirming (1892) 48 Ill. App. 243 (helper in yard, engaged in switching, not bound to examine brakes); *Bradshaw v. Chicago, R. I. & P. R. Co.* (1897) 58 Kan. 618, 50 Pac. 876 (janney coupler slipped too far into the casting which received it, owing to the fact that the middle projection of

that casting was defective, and a brakeman's hand was caught); *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 898 (no bumpers to prevent cars from coming together); *Denver, T. & Ft. W. R. Co. v. Smock* (1897) 23 Colo. 456, 44 Pac. 681 (drawheads in such a condition that they slipped past each other); *Taylor v. Missouri P. R. Co.* (1891; Mo.) 16 S. W. 206 (switchman not, as matter of law, chargeable with knowledge of the danger of using a coupling consisting of a piece of brake beam rod, partly bent, but not sufficiently to stay in place when the cars came together); *Louisville, N. A. & C. R. Co. v. Howell* (1897) 147 Ind. 266, 45 N. E. 584 (broken link); *Bowers v. Union P. R. Co.* (1885) 4 Utah, 215, 7 Pac. 251 (workman employed as "track fixer," and to assist in replacing upon the track the cars which should get off a certain curve, not chargeable with knowledge that the couplings were made of iron of a bad quality); *Texas Mexican R. Co. v. King* (1896) 14 Tex. Civ. App. 290, 37 S. W. 24 (partition between upper and lower part of drawhead was broken); *Missouri, K. & T. R. Co. v. Chambers* (1897) 17 Tex. Civ. App. 487, 43 S. W. 1090 (wood in which the screw holding a round of a ladder was inserted was so rotten that the screw became loose); *Illinois C. R. Co. v. Hiliard* (1896) 99 Ky. 684, 37 S. W. 75 (top of bolt was so worn that the round of the ladder which it held came off when grasped); *Fordyce v. Culver* (1893) 2 Tex. Civ. App. 569, 22 S. W. 237 (top of car to which handhold was screwed had become rotten); *Jones v. Shaw* (1897) 16 Tex. Civ. App. 290, 41 S. W. 690 (defective truck).

A trainman is entitled to assume that a side ladder is safe, where its appearance is not such as to awaken his doubts, and make him hesitate in the discharge of his duty, or refuse to venture on it. *Goodman v. Richmond & D. R. Co.* (1886) 81 Va. 576.

In a case where a brakeman was injured owing to the fact that the ratchet of a brake would not hold, the court declined to set aside a verdict for the plaintiff, where answers to interrogatories were conflicting, the purport of one being that the defect could have been readily discovered by the plaintiff, and of another that it could not have been

in § 409, *supra*, manifestly enures to the benefit of the servant though he may have had an opportunity to examine the ins-

discovered if an examination had been made. *Matchett v. Cincinnati, W. & M. R. Co.* (1892) 132 Ind. 334, 31 N. E. 792.

In a case where a car which the servant was ordered to mount careened, owing to the fact that the side bearings were missing and it was not properly blocked, it was held that he was not negligent in failing to examine into its condition before he obeyed the order. *Southern R. Co. v. Hart* (1901; Ky.) 64 S. W. 650.

The rule that trainmen are not bound to inspect cars is applicable to foreign cars, as well as to those belonging to their employer. *New Orleans & N. E. R. Co. v. Clements* (1900) 40 C. C. A. 465, 100 Fed. 415 (nut which held wheel of brake on the rod was missing); *Southern R. Co. v. Dugall* (1900) 22 Ky. L. Rep. 56, 56 S. W. 988 (car dangerously high compared with the elevation of overhead bridges).

A brakeman in a repair yard is not required to inspect a car returned to the ordinary tracks for use after being repaired, before attempting to couple another car thereto. *Jennings v. New York, N. H. & H. R. Co.* (1895) 12 Misc. 408, 33 N. Y. Supp. 585.

The risk occasioned by the want of stakes or cleats on a car loaded with stone and to be coupled to another is not so obvious that a brakeman is chargeable, as matter of law, with knowledge of it, where it is shown that the company's rules required the stones to be thus secured. Under such circumstances it is at least a question for the jury whether a brakeman is justified in assuming that the load is properly secured. *Austin v. Fitchburg R. Co.* (1899) 172 Mass. 484, 52 N. E. 527 (concussion of coupling threw a stone off the car).

A car repairer going under a car which is raised up for the purpose of repairs does not assume the risk of latent defects in the car, which he has not been ordered to repair, but on account of which it falls and crushes him. *G. H. Hammond Co. v. Mason* (1895) 12 Ind. App. 469, 40 N. E. 642.

(c) *Locomotives*.—The servants who use, or have occasion to be on, locomotives are not bound to inspect them. *Galveston, H. & S. A. R. Co. v. Smith* (1900) 24 Tex. Civ. App. 127, 57 S. W.

909 (engineer injured by top of locomotive); *St. Louis & S. F. R. Co. v. McClain* (1891) 80 Tex. 85, 1789 (fireman injured); *Tyler Co. v. Raspberry* (1896) 13 Tex. App. 185, 34 S. W. 794 (fireman necessarily negligent in continuing work on locomotive with defective boiler); *Sabine & E. T. R. Co. v. Ewing* (1892) 1 Tex. Civ. App. 8, 57 S. W. 700 (fireman injured by coupling between engine and car); *Atchison, T. & S. F. R. Co. v. [?]* (1895) 14 C. C. A. 547, 34 U. S. 1, 67 Fed. 569 (helper of engine injured by a cracked footboard); *C. & S. F. R. Co. v. Kelly* (1898) 18 Civ. App. 34 S. W. 140 (coalman injured, while cleaning out the fire, by a defective damper).

(f) *Hand cars*.—Section hand is not chargeable with a knowledge of latent defects in hand cars. *St. Louis & St. J. R. Co.* (1884) 82 Mo. 641, 8 S. C. (1887) 27 Mo. 170 (handle was made of brittle wood); *Gulf, C. & S. F. R. Co. v. [?]* (1888) 70 Tex. 623, 8 S. W. 67 (in lever covered by iron socket); *Tennessee, V. & G. R. Co. v. [?]* (1882) 9 Lea. 685 (latent unsafe in lever); *Burton v. Missouri I. & N. R. Co.* (1888) 32 Mo. App. 455 (particle of iron not stated).

(g) *Scaffolds, platforms, etc.*—A servant working on a scaffold has a duty to assume that it is safe, and is not bound to examine it. *Benzing v. St. Louis & S. F. R. Co.* (1886) 101 N. Y. 547, 5 N. E. 101 (defect on lower side of plank); *v. Tower* (1881) 11 Mo. App. 185 (engineer allowed to recover where decayed timbers of a platform collapsed); *Edward Hines Lumber Co. v. [?]* (1896) 68 Ill. App. 523 (1898) 315, 50 N. E. 225 (knot in plank not visible); *Rice & B. M. Co. v. Paulsen* (1893) 51 Ill. App. 185 (plank of scaffold was left unsecured and tipped up when the servant was on it); *Chicago & A. R. Co. v. [?]* (1896) 67 Ill. App. 618 (ins-

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& S. F. R. Co. v.
Tex. 85, 15 S. W.
; Tyler N. E. R.
1906) 13 Tex. Civ.
794 (fireman not
continuing to
with defects inside
& E. T. R. Co. v.
Civ. App. 531, 21
injured by defective
engine and tender
R. Co. v. Mulligan
547, 34 U. S. App.
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footboard); *Gulf
Kelly* (1896; Tex.
140 (coal heaver
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(1884) 82 Mo. 430
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Co. v. Silliphant
S. W. 673 (break
iron socket); *East
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547, 5 N. E. 449
of plank); *Reber
Mo. App. 199 (con
over where the de
platform broke
ber Co. v. Louis
23 (1898) 172 E.
not in plank; *Le
& B. Matting Co.
51 Ill. App. 123
is left unfastened
he servant stepped
R. Co. v. Marlow
618 (insufficient**

spacing and other defects not specified);
McLean v. Standard Oil Co. (1893) 50
N. Y. S. R. 626, 21 N. Y. Supp. 874
cross-joined plank gave way under an
iron worker); *Cunningham v. Seaboard
Lophall Paving Co.* (1900) 49 App. Div.
50, 63 N. Y. Supp. 357 (rotten and
worm-eaten plank broke under servant);
Tele v. Warren Mfg. Co. (1899) 63 N.
J. L. 626, 44 Atl. 647 (plaintiff held not
to be negligent in standing on the end
planks of a scaffold which supported a
line of overhead shafting).

A common laborer employed in bring
ing timbers and in carrying a heavy
grider, although a carpenter by trade,
is not bound to inspect the materials in
a scaffold which he helps to build for
the purpose of carrying such timber over
it. *Guldie v. Werner* (1893) 50 Ill.
App. 297. Affirmed in (1894) 151 Ill.
551, 38 N. E. 95 (knot in a joist).

A servant working on or near a pile
of lumber is not bound to examine it for
the purpose of ascertaining whether it
has been safely constructed. *Zintek v.
Stinson Mill Co.* (1894) 9 Wash. 305,
37 Pac. 340; *Rigdon v. Allegany Lum
ber Co.* (1891) 37 N. Y. S. R. 514, 13
N. Y. Supp. 871.

A servant set to work beside a pile of
ore from which material is to be loose
ned by the use of explosives is not
bound to study the conditions affecting
the stability of the ore at the sides of
the pile. *Illinois Steel Co. v. Schyman
owski* (1896) 162 Ill. 447, 44 N. E. 876.

(h) *Gangways*.—A servant is not
bound to examine a gangway before go
ing on it. *Alabaster Co. v. Lonergan*
(1900) 90 Ill. App. 353 (defect not
specified).

Whether a break in a plank guarding
a tank was obvious to the servant was
held to be a question for jury, as it was
only 3 inches high, and liable to be con
cealed by accumulations of dirt. *Moore
v. St. Louis Wire Mill Co.* (1893) 55
Mo. App. 491. A servant has been al
lowed to recover where a bracket sup
porting the plank footpath on which he
was working was knocked away by a
passing wagon, the result being that the
footpath fell. The grounds assigned
for the decision were that the liability
of the structure to be injured in this
way was not a risk "open to observa
tion," and that the servant was not re
quired to notice the manner in which the
planks were sustained underneath. *Sel
lick v. J. Langdon & Co.* (1891) 37 N.
Y. S. R. 511, 13 N. Y. Supp. 853.

(i) *Railways*.—An employee in a
brewery has the right to rely on the
safety of a run down wheel. If keys
are permitted to slide into the collar,
where it is not part of his duty to re
pair defects. *Mayer v. Lehmann*
(1897) 16 App. Div. 54, 11 N. Y. Supp.
1067.

(j) *Buildings*.—A factory hand hired
to do knitting not required to examine
into the safe construction of a privy
provided for his use, or chargeable with
knowledge whether it was or was not
safely constructed. *Roun v. Fowler*
(1862) 24 N. Y. 110, 82 Am. Dec. 315.

A carpenter hired to work on a roof
not bound to examine into the condition
of the building. *Giles v. Diamond State
Iron Co.* (1887) 7 Houst. (Del.) 453, 8
Atl. 368 (charge to jury).

A servant not a carpenter entitled to
assume that roof of building in which
he works is strong enough to protect
him from ice which may fall from an
adjacent building. *Gaul v. Rochester
Paper Co.* (1893) 72 Hun. 485, 25 N. Y.
Supp. 443.

The mere fact that a servant knows
that the floor of his master's shop is de
cayed will not, as a matter of law, pre
vent him from recovering for injuries
received by its giving way under him,
since the accident would have happened
without his fault, if the existence of ac
tual danger could not have been ascer
tained without an examination of the
under side of the floor or of the parts
of the building under it. *Huddleston v.
Lowell Machine Shop* (1871) 106 Mass.
282.

In a case where the moving of a load
ed truck over the ends of the loose
boards of a defective floor caused them
to tip up, and thus throw a bale of cot
ton on the plaintiff, it was held that he
was not, as a matter of law, guilty of
negligence in having knelt down under
neath the bale just before the accident.
Norman v. Wabash R. Co. (1894) 10 C.
C. A. 617, 22 U. S. App. 505, 62 Fed.
727.

(k) *Seats*.—A servant is not charge
able with knowledge that a seat is lia
ble to tip up, where the amount of lev
erage can only be ascertained by look
ing underneath it. *Spaulding v. Forbes
Lithograph Mfg. Co.* (1898) 171 Mass.
271, 50 N. E. 513.

(l) *Unguarded openings*.—A servant
who, while employed at a part of the
premises where he had never worked be
fore, stepped back into an uncovered bar

rel of hot water close by, the top of which was level with the surface of the ground, cannot be debarred from recovery on the ground that he should have looked out for such a pitfall. *Johnson v. Tahoma Mill Co.* (1900) 22 Wash. 88, 60 Pac. 53.

A servant who has been working for one day on a trestle within a few feet of an uncovered hole leading down into a coal bunker is not, as matter of law, negligent in assuming, when his duties require him on a subsequent occasion to work near it during the night and with insufficient light, that it will be kept covered when not in use. *Boyle v. Degeon-McLean Constr. Co.* (1900) 47 App. Div. 311, 61 N. Y. Supp. 1013, leave to appeal denied in (1900) 49 App. Div. 630, 63 N. Y. Supp. 1105. Where a hole had been dug in the floor of a boiler room in preparing a foundation for a piece of machinery, and left partly covered, but in an insecure and dangerous condition, a fireman had a right to rely on the general appearance of safety, and the presumption that his employer had provided him a safe place in which to work, and was not bound to examine the hole critically before stepping on the covering. *Frye v. Bath Gas & Electric Co.* (1900) 94 Me. 17, 46 Atl. 804.

A stevedore injured by falling into an unguarded trimming hole in a dark place between decks was justified in assuming that the place was as safe as on the last preceding workday. *The Proton* (1891) 48 Fed. 919.

A member of an ice gang employed to put ice on board a ship is not necessarily negligent in assuming that a hatchway covered by a tarpaulin for the purpose of receiving the ice is in proper condition, notwithstanding one of the hatch covers has been removed, where there is nothing from its appearance to indicate such removal, and that is the customary way of preparing a ship for taking on ice. *Perkins v. Furness, W. & Co.* (1897) 167 Mass. 403, 45 N. E. 759.

(m) *Telegraph poles.*—A lineman who is ordered to climb a trolley pole and cut a guy wire is not imprudent in taking it for granted that the pole is planted sufficiently deep to stand without the support of the wire, where nothing indicates that the planting is too shallow to be secure without the wire. *Bland v. Shreveport Belt R. Co.* (1896) 48 La. Ann. 1057, 36 L. R. A. 114, 20 So. 284. The contributory negligence of the servant was held to be for the jury,

where the arm of a telegraph pole, owing to a defect which was not ascertainable without inspection, but which was partially concealed by an insulator and to some extent by paint. *McLain v. Postal Tel. Co.* (1900) 22 Ill. 46, 48 Atl. 407.

(n) *Ladders.*—As such a defect is ascertainable without inspection, the question whether the breaking of a ladder, caused by a cross piece breaking because a nail that fastened the left end to the side piece was near a knot in the side piece, was a serious risk, is for the jury. *Flanagan v. Guggenheim Smelting Co.* (1899) 100 Cal. 417, 44 Atl. 762.

(o) *Machinery.*—An inexperienced employee who injures his hand while engaged in rubbing off a piece of wood known as a "beater" is not negligent in failing to examine it with a view to discovering dangers of which there was no outward indication. *Howard v. Farmer* (1882) 56 Tex. 301. A servant is not bound to inspect the mechanism of a pressing machine while he is operating it. *Pioneer Co. v. Manoir* (1899) 85 Ill. App. 180, 186 Ill. 9, 864 (spring so loose that it disengaged the press when the operator's foot was taken off the treadle).

An oiler on a steamship is not negligent with knowledge of the condition of the cushion valves of the cylinder, where, although it was to examine the pump to see that it was all right, it was not his duty to examine the cushion valves, which were set up when the pipe was set up, and after touched. *Hoot v. Ocean* (1900) 56 App. Div. 259, 67 N. Y. 782. A servant is not charged with knowledge of a fracture in the stem drill at a place where it was sealed by the socket. *Salem Lime Co. v. Topps* (1894) 101 Me. 516, 38 N. E. 229. Knowledge of the defective condition of a "jack" is imputed, as a matter of law, to the employer, where it is only by taking the jack apart that the defect can be discovered. *Missouri, K. & T. R. Co. v. Young* (1900) 4 Kan. App. 219, 45 Pac. 963.

(p) *Elevators.*—A workman merely employed to load, ride up and unload an elevator is not negligent in assuming that the chain is sound. *Mulvey v. Portland Locomotive Works* (1885) 20 Vt. 20 (worm link).

(q) *Derricks.*—A quarryman

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A workman who sees an apparently safe gangway with new timbers just put

in place, and knows that under the eye of his employer experienced miners have just finished the work of making the gangway safe, and is commanded by his employer to work in a particular place, is not required to enter upon an inspection of the place between the timbers to determine whether such workmen have performed their duty with care, or have left loose material liable to fall upon him. *Vanessa v. Catsburg Coal Co.* (1893) 159 Pa. 403, 28 Atl. 200.

Where an examination of defendant's mine was made, but the record did not show that all the conditions were safe, and plaintiff was permitted to enter the mine to work, and was injured, the fact that he did not examine the record did not prevent him from charging defendant with a wilful violation of the mining act, § 4, providing that all mines shall be examined every morning, and that no one shall be permitted to enter until all the conditions are reported to be safe. *Pairnee Coal Co. v. Royce* (1900) 184 Ill. 402, 56 N. E. 621, Reversing (1898) 79 Ill. App. 469.

In *Eddy v. Aurora Iron Min. Co.* (1890) 81 Mich. 555, 46 N. W. 17, it was recognized that a servant might be guilty of contributory negligence in "failing to find out" a defect in the timbering of a mine: but it was held that, under the circumstances, such negligence could not be attributed to him as a matter of law.

For other mining cases, see subd. (r), *supra*; and § 413, notes 1, 4, *infra*; and § 410, note 1, *supra*.

(w) *Trenches*.—It is no part of a servant's duties to study the conditions affecting the stability of the earth at the sides of a trench in which he is set to work. *Hennessey v. Boston* (1894) 161 Mass. 502, 37 N. E. 668; *Bartolomeo v. McKnight* (1901) 178 Mass. 242, 59 N. E. 804.

(x) *Banks of earth, etc.*—An employee engaged in shoveling dirt into a car from a bank of hardpan so hard that it has to be blasted is not, as matter of law, chargeable with knowledge of the risk of injury from an unexpected fall of earth, where the evidence is that the bank looked solid, but was really seamed with cracks, the result of previous blasts. *Hill v. Winston* (1898) 73 Minn. 80, 75 N. W. 1030. An employee in a quarry is not, as matter of law, chargeable with knowledge of the risk from the fall of an overhanging mud bank, the character of which, as distinguished from stone, was not open to visual inspection because of the ad-

mixture of sand and minerals though its true character could have been determined by the use of tools. Evidence being that both stone and mud banks were to be met with in the quarry. *Pearless Stone Co. v. Wray* (1899) 100 Ind. 27, 51 N. E. 326.

(y) *Quarries*.—In view of the principle that the servant has a right to assume that his employer has fulfilled his duty, it is for the jury to say whether a quarryman should have appreciated the danger created by the sagging of a rope. *Comben v. Belleville Stone Co.* (1897) 59 N. J. L. 226, 36 Atl. 404.

(z) *Electric appliances*.—In a case where a servant while lubricating a dynamo box came in contact with a charged wire, it was held that, though proof was made that he appreciated the danger, the presumption was that he did not appreciate it, for in that case he would have avoided the risk of contact. *Myhan v. Louisiana Electric & P. Co.* (1889) 41 La. Ann. 983, 17 R. A. 172, 6 So. 799.

(aa) *Risks from the fall of heavy objects*.—(See also subd. (r), (w), *supra*). Recovery has been allowed where a door fell on a servant, owing to the fact that the rope which supported it was not properly fastened. *Ames v. Appling* [1891] 88 Ga. 54, 13 S. E. 248, and where a tank fell on a servant, owing to the fact that a nut slipped from a bolt. *Champion Ice Mfg. & Cold Storage Co. v. Carter* [1899] 21 Ky. L. 210, 51 S. W. 16).

A machinist of several years' experience who is hurt while working on a lathe, by the fall of an unfastened nut reaching from a runway to the countershaft timbers, and used to obtain access to a pulley for the purpose of adjusting a belt, will not be declared a matter of law, to have been injured by the result of an obvious danger or assumed as an incident to his employment. *Quimby v. Boston & M. R. Co.* (1898) 69 N. H. 334, 41 Atl. 266.

A servant employed to dress stone is not required to examine the stone for proximity to that upon which he is working, to ascertain if they are safely placed and free from danger of falling over upon him. *Blondin v. Quincy Quarry Co.* (1894) 11 Ind. App. 301, 1 N. E. 812.

(bb) *Inadequate provision against fire*.—An employee in a factory is not, as matter of law, chargeable with knowledge that there is no fire escape outside of a building, where his business is on the inside, and his attention

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never been called to the absence of the escape. *Gorman v. McArdle* (1893) 67 Hun. 484, 22 N. Y. Supp. 479.

(cc) *Incompetency of fellow servants.*—In the absence of specific knowledge or information putting him on inquiry, a servant is not required to examine into the competency of the servants employed to work with him. He is warranted in acting upon the assumption that the master has performed his duty in selecting and retaining those servants. *Texas & P. R. Co. v. Johnson* (1896) 89 Tex. 519, 35 S. W. 1042; *St. Louis, A. & T. H. R. Co. v. Corgan* (1891) 49 Ill. App. 220; *Charles Pope Glucose Co. v. Byrne* (1895) 60 Ill. App. 20; *Pennsylvania Co. v. Roney* (1883) 89 Ind. 453, 48 Am. Rep. 173; *Chicago & E. I. R. Co. v. Beatty* (1895) 13 Ind. App. 604, 40 N. E. 753.

In *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92, the law was thus laid down: "The contention of appellant, as we understand it, is that where one is employed as an operative in a particular branch of service he is bound to investigate and find out, at his peril, whether the common master has used reasonable care and prudence in the selection of those already employed in the same branch of service. The law imposes no such duty. One thus employed is warranted in assuming that the master has discharged his duty in this respect, and until notice to the contrary is brought home to the employee he may safely act upon that hypothesis. All that the law demands of one thus employed is that he keep his eyes open to what is passing before him, and avail himself of such information as he may receive with respect to the habits and characteristics of his fellow servants."

A switchman who has complained of the incompetency of a fireman, and received a promise that he shall be removed, is not necessarily negligent because, on a subsequent occasion, when he has to signal to the same engine, he does not look closely at the fireman for the purpose of ascertaining whether the promised change of employees has been made. *Galbreath, H. & S. A. R. Co. v. Eckles* (1900; Tex. Civ. App.) 60 S. W. 830.

(dd) *Nonperformance of a specific duty by a fellow servant.*—A servant is not bound to ascertain whether a co-employee who is not consociated with him has discharged his duty to report the existence of a defect. *Peoria, D. & E.*

R. Co. v. Johns (1891) 43 Ill. App. 83.

As a servant may, in the absence of actual knowledge of the incapacity of a collaborer, assume that he is competent, it is improper, in an action for injuries caused by his negligence, to instruct the jury that plaintiff would be put on inquiry to ascertain, before engaging in work with such laborer, whether he was a man of ordinary intellect and understood the English language. *B. Lantry Sons v. Lourie* (1900; Tex. Civ. App.) 58 S. W. 837. So, it was error to instruct the jury that, if the plaintiff had the same means of knowing the incompetency as defendant had, he could not recover. *International & G. N. R. Co. v. Cook* (1897) 16 Tex. Civ. App. 386, 41 S. W. 665.

As a servant is not charged with the same obligation of inquiry as the master, the general reputation of the delinquent servant for carelessness, recklessness, or other bad qualities is not in itself evidence from which the injured servant's knowledge of his incompetency can be inferred. *Olsen v. North Pacific Lumber Co.* (1900) 40 C. C. A. 427, 100 Fed. 384, holding it to be error to give an instruction from which the jury might be led to suppose that such a reputation charged the injured servant, not less than the master, with notice of the incompetency.

To escape liability on this ground, the defendant must go further and show that the injured servant knew of the general reputation, or had at some time been placed in such a position that a jury might reasonably infer that he did actually know of it. *Texas & P. R. Co. v. Johnson* (1896) 89 Tex. 519, 35 S. W. 1042, contrasting the different principle which prevails when the master's constructive knowledge is in question. (See § 202, ante.) Same case on second appeal, *Texas & P. R. Co. v. Johnson* (1897) 90 Tex. 304, 38 S. W. 520, Denying Writ of Error in (1896) 14 Tex. Civ. App. 566, 37 S. W. 973.

(ee) *Vicious animals.*—An employee who is not notified that a horse furnished for his use is vicious, has a prima facie right to recover damages for injuries caused by the animal. *Helmke v. Stetler* (1893) 69 Hun. 107, 23 N. Y. Supp. 392; *Lane v. Minnesota State Agri. Soc.* (1895) 62 Minn. 175, 29 L. R. A. 708, 64 N. W. 382; *Leigh v. Omaha Street R. Co.* (1893) 36 Neb. 131, 54 N. W. 134; *George H. Hammond Co. v. Johnson* (1893) 38 Neb. 244, 56 N. W. 967. (In the last two cases the

tality which caused his injury.¹ There are, of course, still strong grounds for holding him to be relieved from any obligation to inspect the plant, where he had no time for such inspection before his attention was absorbed in engrossing duties which demand rapid action, or because, for some other reason, an examination

special point made by defendant's counsel and negatived by the court was that the rule where animals were concerned was different from that which prevailed in regard to inanimate appliances.)

(ff) *System*.—An employee is not deemed to accept the danger of using defective appliances because of his knowledge of the general methods adopted by the employer in carrying on his business, or because, by ordinary care, he might have known of the methods, and inferred therefrom that danger from insufficient appliances might arise. *Texas & P. R. Co. v. Archibald* (1898) 170 U. S. 665, 42 L. ed. 1188, 13 Sup. Ct. Rep. 777, Affirming (1896) 21 C. C. A. 520, 41 U. S. App. 567, 75 Fed. 802. A servant is not bound to inquire what regulations have been made to secure his safety. *Missouri, K. & T. R. Co. v. Hannig* (1897) 91 Tex. 347, 43 S. W. 508, Reversing (1897; Tex. Civ. App.) 41 S. W. 196; *International & G. N. R. Co. v. Hall* (1892) 1 Tex. Civ. App. 221, 21 S. W. 1024. A baggage master is not presumed to know whether or not the rules and schedule provided for the running of his employer's trains were defective and ambiguous. *Georgia R. & Bkg. Co. v. Rhodes* (1876) 56 Ga. 645.

A servant is not bound to examine into the safety of the method adopted for taking down a building. *Faren v. Sellers* (1887) 39 La. Ann. 1011, 3 So. 363.

(gg) *Contagious diseases*.—Negligence is inferable where an employer allows an employee to work in a room where one of the household is sick with typhoid fever, and neglects to inform her what the malady is. *Kliegel v. Aitken* (1896) 94 Wis. 432, 35 L. R. A. 249, 69 N. W. 67.

(hh) *Illegality of act which servant is required to do*.—The danger of being arrested for obeying orders which put the servant in the position of violating an injunction not actually known to him is one with regard to which he has a right to expect to be warned. *Guirney v. St. Paul, M. & M. R. Co.* (1890) 43 Minn. 496, 46 N. W. 78. The court remarked that the liability of the principal does not, in such a case, depend

upon the ultimate determination of the question whether an alleged trespasser or upon the servant is or is not liable, justifiable, or whether the issuing of the injunction is legal and proper.

(ii) *Danger from acts of violence by strangers*.—A master is negligent who fails to warn a workman employed to erect a fence, as to the risk of being shot by a person who is in adverse session. *Baxter v. Roberts* (1872) Cal. 188, 13 Am. Rep. 160.

¹ Masters and servants are not equally chargeable with knowledge merely because the reason that both have equal opportunities for acquiring knowledge. *Idem Stone & Lime Co. v. Tepps* (1890) 10 Ind. App. 516, 38 N. E. 229.

A fireman is not chargeable with knowledge of a defective rail joint merely because he had ample opportunity to examine it. *Dale v. St. Louis, K. & N. R. Co.* (1876) 63 Mo. 455. The brakeman had opportunities to learn the condition of a track cannot be inferred from the fact that he had been working upon it for a year or more. *Texas & P. R. Co. v. Magrill* (1897) 15 Tex. App. 353, 40 S. W. 188 (rotten ties and loose spikes).

A brakeman is not charged with the duty of examining cars to discover latent defects, merely because his opportunities for discovering such defects are equal to those of the company and its superiors. *Pittsburgh, C. C. & St. L. Co. v. Woodward* (1894) 9 Ind. 169, 30 N. E. 442 (drawbar). An employee has the right to assume, in the absence of knowledge to the contrary, that the handle for working a hand car is reasonably safe, and he does not assume the risk arising from unknown latent defects, or defects not obvious to him while using ordinary care and observation. *Banks v. Wabash W. R. Co.* (1890) 40 Mo. App. 258. Defendant's contention was that plaintiff had opportunities of knowing the inefficiency of the handle, and was, in the evidence, guilty of contributory negligence in failing to observe its condition. The fact that a servant had an opportunity to inspect the inside of a bucket for some time before

impossible under the circumstances.² Excusable ignorance may, of course, be inferred on this ground, although the defect is one of which

caused an accident does not show that he is chargeable with notice of the condition of the latch. The court said: "It was the unquestioned duty of the defendant to furnish plaintiff a safe bucket, and he had a right to assume that it had performed that duty, and was not bound to make a personal inspection of the same before using it."

If the servant must, at his peril, examine for himself, what becomes of the primary duty of the master to see that safe and suitable machinery and implements are furnished his employee? *Pennsylvania Coal Co. v. Kelly* (1895) 156 Ill. 16, 40 N. E. 938.

The fact that a seaman injured while operating a defective steam winch used in shifting the cargo had an opportunity for seeing the winch before the ship sailed does not create a conclusive presumption that he sailed with knowledge of its condition. *Eldridge v. Atlas S. S. Co.* (1890) 58 Hun. 96, 11 N. Y. Supp. 168. An employee who has no knowledge which would suggest his looking for dangerous projections from a car over in otherwise safe walk on the employer's premises is not negligent in going thereon without looking. *Salem Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141, 38 N. E. 411 (servant had previously worked below the walk, in a position from which the projections were not visible).

Evidence that a stevedore injured by falling down an open hatchway had previously worked upon the vessel, and had had an opportunity to learn the position of the hatchway and that it was open on such occasions as that on which he was injured, is not conclusive of knowledge on his part that the hatchway was open, but is to be considered by the jury in connection with the other evidence. *Smith v. Occidental & O. S. S. Co.* (1893) 99 Cal. 462, 34 Pac. 84.

The servant is not, as matter of law, chargeable with knowledge of a defect, where the evidence tends to show that it was one which would not be discovered simply by using it, but that it was discoverable only by an examination made by a competent person. *Nichols v. Crystal Plate Glass Co.* (1894) 126 Mo. 35, 27 S. W. 516, 28 S. W. 991.

An employee in a mine is not chargeable, after only twenty days' work, with knowledge of a defect in a hoisting rope,

which could not have been discovered by ordinary observation. *Perry v. Ricketts* (1870) 55 Ill. 234.

In *Louisville, N. A. & C. R. Co. v. Howell* (1896) 147 Ind. 266, 45 N. E. 584, it was contended on demurrer that, because it was alleged that the defect in a coupling was "patent and open to the inspection of the defendant if an examination of the same had been made," it therefore followed that the defect was one which was obvious "to ordinary careful observation," and consequently one which the servant should have seen and avoided; but the court said: "The words used, and their context, plainly indicate that the defect was one which could have been easily discovered on a careful examination by appellant's inspectors. There is nothing in the complaint to show that appellee had anything to do with the coupling link. Had he coupled the cars between which the link was used, and thus handled the defective appliance, and so had opportunity to observe it, there might be some propriety in holding him accountable for a knowledge of its condition. . . . The defect was one that might readily have been discovered by proper inspection, but this the employer, and not the employee, was bound to make."

An instruction announcing the naked proposition that mere means of knowledge are equivalent to actual knowledge is erroneous. *Norfolk & W. R. Co. v. Vannally* (1892) 88 Va. 546, 14 S. E. 367.

It is error to charge that, if the servant had the opportunity to observe the degree of danger, he cannot recover. *Ft. Worth & D. C. R. Co. v. Wilson* (1893) 3 Tex. Civ. App. 587, 24 S. W. 686 (This decision was reversed in 85 Tex. 516, but merely on a point of practice.)

It is error to instruct a jury that if they find from the evidence that plaintiff, at the time of and before his injury, knew that the roof of an entry was unsafe, or had the means and opportunity to ascertain its defective condition, and did not avail himself of such opportunity, or use the means at hand, he was guilty of negligence. *Wellston Coal Co. v. Smith* (1901) 65 Ohio St. 70, 55 L. R. A. 99, 61 N. E. 143.

It is not expected that the servant will make close scrutiny into all the details of the instrumentalities with which

the servant would otherwise have been bound to make an examination.³

he deals. His employment forbids that he should thus spend his time. If the rule were otherwise, the management of a great railway system would be needlessly slow." *Johnston v. Oregon Short Line R. Co.* (1892) 23 Or. 94, 31 Pac. 283.

A brakeman is not chargeable with contributory negligence in coupling defective cars, where the defects are of such a character as to appear only on inspection, and where, in the hurry incident to his work, he cannot discover such defects, and he is not warned thereof. *Chenapeake & O. R. Co. v. Lash* (1896; Va.) 24 S. E. 385; *S. P. Louisville & N. R. Co. v. Foley* (1893) 94 Ky. 220, 21 S. W. 866 (brakeman unexpectedly called upon at midnight to make a coupling of cars in a train recently made up.)

A brakeman, being obliged to act with promptitude in coupling cars, has a right to assume without inspection that the couplings are in a proper state of repair. *King v. Ohio & M. R. Co.* (1882) 11 Bism. 362, 14 Fed. 277, per Gresham, J. A servant who has to select a block for checking the speed of cars, from among a number which are so soiled that it is practically impossible to distinguish the sound from the unsound, without a more careful examination than his work permits him to make, does not assume the risk of selecting a wornout block. *Lehigh Valley Coal Co. v. Warck* (1898) 28 C. C. A. 540, 55 U. S. App. 437, 84 Fed. 866.

A servant is not chargeable with knowledge of a knot in a plank forming part of a platform on which he was about to work, when he had no opportunity of inspecting it, and it is quite doubtful whether he could have discovered it even if he had made such an examination, since there was a covering of paint on the upper surface, and it was difficult, as the plank was placed, to inspect its under side. *Benning v. Steinway & Sons* (1886) 101 N. Y. 547, 5 N. E. 449.

An operator of a "former" machine in an oil mill, who is compelled to work with such great rapidity that he cannot carefully examine all bags furnished him and placed by other employees on top of the machine, and which for his safety should be free from holes, has the right to assume without examination that the bags furnished him are free from holes.

Carter v. Oliver Oil Co. (1892) 3604, 15 S. E. 928.

A workman in a dangerous position upon a railroad bridge, and hurrying his work, is not guilty of negligence in failing to inspect a mail handled by a foreman under whom he is employed. *Chicago, K. & W. R. v. Blevins* (1891) 46 Kan. 370, 2087.

Compare also the following: *Great Northern R. Co. v. McLaughlin* (1895) 17 C. C. A. 330, 44 U. S. App. 189, 70 Fed. 669 (no opportunity to examine skids used for loading railroad flat cars); *Louisville, N. A. & C. v. Howell* (1896) 147 Ind. 266, 41 S. E. 584 (defective coupling link caused injury to brakeman); *Stewart v. Guson* (1898) 34 App. Div. 515, 51 Supp. 615 (servant had no reasonable opportunity to observe that the use of a scaffold were not properly broken); *Chicago & A. R. Co. v. Scannlan* (1896) 170 Ill. 106, 48 N. E. 826, 46 App. 189 (1896) 67 Ill. App. 621 (bricklayer not chargeable with knowledge of defective construction of a scaffold prepared for his use, where he came from another portion of the building directly to the scaffolding without opportunity to inspect it); *Baldwin v. St. Louis, K. & N. W. R. Co.* (1896) 104 Mo. 33, 33 N. W. 356 (failure to examine pile of lumber which fell on plaintiff, not negligence, as matter of where his view of it was obstructed by another pile); *Chicago K. & W. R. v. Blevins* (1891) 46 Kan. 370, 2087 (servant received from his foreman a defective tool when he was hurrying his work and in a specially dangerous position which limited the opportunity for making an examination); *Atwood v. Williams* (1896) 114 Cal. 101, 10 Pac. 1041 (servant had no opportunity to examine hoisting machinery going to work in a trench).

In one case the doctrine that a servant may assume that adequate precautions have been made for his safety has been declared to apply with especial force where the performance of his duties requires constancy of attention to such matters. *Chicago & E. I. R. v. Hines* (1890) 132 Ill. 161, 23 N. E. 101.

Obviously, a similar reason may be given if it is not, assigned in many of the railway cases cited in § 411.

³In an Illinois case (see § 414,

413. Limits of the servant's exemption from the duty of inspection; generally.—The scope and effect of the doctrine discussed in the preceding sections must be considered with due reference to the existence of the servant's general obligation to exercise ordinary care. He is manifestly not warranted in assuming that he is not exposed to any abnormal dangers, where he has actual knowledge that one of the master's duties has not been performed;¹ nor where he has been expressly warned to examine the appliance in question.² He will not be heard to say that his ignorance of a danger was excusable if it could have been discovered by a reasonable use of his faculties of observation.³

infra), the fact that his duties require prompt action is mentioned as one of the reasons why a yard hand is not bound to examine brakes before using them. *Chicago & E. I. R. Co. v. Kneir* (1894) 152 Ill. 458, 39 N. E. 324.

¹ In cases where the doctrine is enunciated, this necessary qualification is frequently recognized by the introduction of clauses of a restrictive tenor. See, for example, *Illinois C. R. Co. v. Sanders* (1897) 166 Ill. 270, 46 N. E. 799; *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 548, 8 So. 360; *Fordyce v. Yarrowborough* (1892) 1 Tex. Civ. App. 260, 21 S. W. 421; *Chicago & E. I. R. Co. v. Hines* (1890) 132 Ill. 161, 23 N. E. 1021.

In *East St. Louis Connecting R. Co. v. Shannon* (1893) 52 Ill. App. 420, an instruction was condemned by which the jury was told that the servant was not required in the first instance to know that tracks were properly constructed, but had a right to rely on the implied undertaking of the company to make and keep them safe. "Given actual knowledge," said the court, "there remains no room for presumptions."

² *Senior v. Ward* (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261 (hoisting tackle of mine). See §§ 363, 364, *ante*.

³ "A man cannot decline to see, and then hold the master liable, excusing his own negligence by saying that he was under no primary obligation to investigate." *Illinois C. R. Co. v. Sanders* (1894) 58 Ill. App. 117. "It is his [i. e., the servant's] duty to use ordinary care in informing himself of the dangers and responsibilities attending his employment, and to take the same degree of care in avoiding accident and injury.

He may not close his eyes to serious defects or weaknesses in ma-

chinery or appliances, occasioned by use, of which, considering his employment, he might reasonably take notice; and he may not forget or omit precautions which, under the circumstances, as a reasonable and prudent man, he ought continually to exercise." *Wills v. Coe* (1886) 9 Colo. 159, 163, 11 Pac. 50. "While the employee may repose confidence in the prudent and cautious adherence to duty by the employer, yet he may not repose that blind confidence in the performance of the employer's duty which fails to observe the patent defects which an ordinary observation of the employee's duty would readily disclose." *Evansville & T. H. R. Co. v. Ducl* (1893) 134 Ind. 156, 33 N. E. 355.

"The servant is culpable if he fail to discover such a defect as would have been apparent, without a thorough examination, if he had used ordinary diligence to discover it." *Cherron v. John L. Roper Lumber Co.* (1896) 118 N. C. 59, 23 S. W. 925.

A servant cannot be "permitted to rely blindly on the presumption" that the master has provided a safe working place, "to the utter disregard of the plain and palpable evidence of his own senses." *Muncie Pulp Co. v. Jones* (1894) 11 Ind. App. 110, 38 N. E. 547.

In one case it was remarked, *arguendo*, that the servant is not bound "to exercise care" to know defects, unless it is in the line of his duty. *Taylor, B. & H. R. Co. v. Taylor* (1890) 79 Tex. 104, 14 S. W. 918. This statement is plainly erroneous, if taken literally. But the context shows that nothing more is meant than that no duty of active inspection lies on the servant.

An experienced laborer when going to work in a trench is bound to exercise a reasonable degree of vigilance in regard to the safety of the place of work

ognized by the application of a elements in which et the plant is is not required ole with notice cross negligence han "ordinary e plant;"⁵ that h as he has an ing more than efore him, and with respect to e is not bound sources of dan- cealed defects her cases it is safe condition st be presumed s to be open t eect cannot be not obvious;¹⁴

v. *Tector* (1894) S. App. 316, 63 *Annihil & St. J.* 635; *Porter v. Co.* (1879) 71 Mo. *Flood v. Western* 9 N. Y. S. R. 674 *Conard v. Kinnear* 61 N. E. 688; *At App.* 145; *Park* (1892) 5 Ind. . See also *Union* (1896) 161 U. S. Sup. Ct. Rep. 618 n that the servant e that the master h respect to mak r latent defects *New York Mar* p. Div. 272, 67 N

Don & Co. (1891) N. Y. Supp. 858 *Win* (1886) 108

(1891) 88 Ga. 54.

umber Co. v. Ligon 50 N. E. 225; *At*

or where there is no such obvious and palpable defect as to attract his attention.¹⁵

In several cases the character of the inspection which the servant is not bound to make is particularized by the addition of the epithet "critical."¹⁶ Such an epithet obviously implies a standpoint similar to that which is indicated by the various forms of expression collected above.

The correctness or incorrectness of an instruction will frequently depend upon whether the jury were or were not informed in appropriate terms that the servant's right to rely upon the safe condition of the plant is not an absolute one.¹⁷

Such examination of an appliance as is necessary to enable a serv-

ant to examine it (1896) 68 Ill. App. 523; *McDonald v. Chicago, St. P. M. & O. R. Co.* (1889) 41 Minn. 439, 43 N. W. 380. "The employee is not required to look for defects, but such as are patent, or known to him." *Norton v. Louisville & N. R. Co.* (1895) 16 Ky. L. Rep. 846, 30 S. W. 599.

"*Devlin v. Wabash, St. L. & P. R. Co.* (1885) 87 Mo. 549.

"*McLean v. Standard Oil Co.* (1893) 50 N. Y. S. R. 626, 21 N. Y. Supp. 874; *Baltimore & O. S. W. R. Co. v. Amos* (1898) 20 Ind. App. 378, 49 N. E. 854.

"*Cincinnati, H. & D. R. Co. v. McMullen* (1889) 117 Ind. 439, 20 N. E. 287; *Consolidated Coal Co. v. Bruce* (1893) 47 Ill. App. 444; *Ross v. Shanley* (1900) 185 Ill. 390, 56 N. E. 1105; *Chicago, R. I. & P. R. Co. v. Cleveland* (1900) 92 Ill. App. 308; *Alabaster Co. v. Lonergan* (1900) 90 Ill. App. 353; *Frye v. Bath Gas & Electric Co.* (1900) 94 Me. 17, 46 Atl. 804.

"There is no error or unfairness in an instruction in which the court tells the jury that a yard switchman who is about to couple two cars has a right to assume that they are properly loaded and to act on that assumption, where it is added that if, by the exercise of proper diligence, he might have discovered the dangerous manner in which they were loaded, in time to avoid injury, he cannot recover. *Northern P. R. Co. v. Everett* (1894) 152 U. S. 107, 38 L. ed. 373, 14 Sup. Ct. Rep. 474.

An instruction that one employed in a mine was not required or expected in going up and down the ladder, with a candle, to his work, to investigate and discover its condition as to safety or otherwise, is not ground for reversal, where qualified by a statement that the

employee was bound to use his eyes, and to take reasonable care to avoid known dangers and those which could be seen by the use of ordinary care. *Reese v. Morgan Silver Min. Co.* (1898) 17 Utah, 489, 54 Pac. 759. A jury is properly charged that a servant has a right to presume that an appliance is safe for use, where the defect is not patent, and he has used due diligence to discover defects (*Missouri, K. & T. R. Co. v. Crowder* [1899; Tex. Civ. App.] 55 S. W. 380); and that a servant has a right to assume, without looking for latent defects, that the master has done his duty in providing safe instrumentalities, unless he has or can obtain knowledge to the contrary by reasonable observation (*Summit Coal Co. v. Shaw* [1896] 16 Ind. App. 9, 44 N. E. 676). In any case where the defect was a visible one which might possibly have been discovered by a person in the servant's position, if he had been ordinarily observant, it is error to charge the jury, without qualification, that the servant had the right to presume that the appliance in question was in good condition, and that he was not required to inspect the same for defects. *Fordyce v. Edwards* (1895) 60 Ark. 438, 30 S. W. 758, second appeal (1898) 65 Ark. 98, 44 S. W. 1034 (pilot of engine was hung so high that it failed to throw a horse from the track, and a derailment was the result); *Texas Mexican R. Co. v. King* (1896) 14 Tex. Civ. App. 290, 37 S. W. 34 (link bent and piece broken out of drawhead). A charge is erroneous which will probably lead the jury to suppose that a servant is not bound to notice the condition of the appliances used by him. *Wells v. Coe* (1886) 9 Colo. 165, 11 Pac. 50.

ant to understand the dangers incident to its use under normal conditions is perhaps always obligatory,—at least in the case of a

413a. Duty of inspection; when predicable from circumstances indicative of danger.—A situation in which the doctrine which releases the servant from the duty of inspection frequently comes in conflict with, and gives way to, the paramount principle that he exercise proper care, is indicated by those cases in which it is held down that he is entitled to assume the existence of safety in the absence of anything to excite special apprehension of danger, where the appearance of the appliance was not such as to arouse his doubts and make him hesitate in the discharge of his duty to refuse to undertake it;² or unless he had knowledge which should have warned him that it was unsafe to act on such an assumption.

An unqualified charge to the effect that a servant may assume that a telephone pole which he is required to climb is safe and suitable is erroneous. *Cumberland Teleph. Co. v. Loomis* (1889) 87 Tenn. 504, 11 S. W. 356. It is error to instruct the jury that if the defendant's contract obliged him to inspect the place of work, then it was no part of plaintiff's employment to look after its safety, and, if he was injured by reason of defendant's omission to inspect it, there should be a finding in his favor. *Breckenridge & P. Syndicate v. Murphy* (1897) 15 Ky. L. Rep. 915, 38 S. W. 700.

In *Way v. Illinois C. R. Co.* (1875) 40 Iowa, 341, it was held error to refuse to give an instruction that the servant could not recover if he had gone on working when he had knowledge, or might "by the exercise of due care" have had such knowledge. This ruling certainly seems difficult to reconcile with several of those condemned in § 410a, *supra*. But the court was able to distinguish the instruction under review from that which was refused in *Muldooney v. Illinois C. R. Co.* (1873) 36 Iowa, 470 (see section just mentioned), upon the following grounds: "A brakeman, although he may have the means and opportunity of doing so, is not required to go around and under the trucks, with lantern and hammer, for the purpose of ascertaining whether there be any flaw or crack in a wheel or axle. The company employs parties to perform this duty, and the brakeman has the right to suppose that they will perform it properly, and he is justified in leaving the performance of it to them. At the same time he must make a rea-

sonable use of his senses, and if it is apparent and patent, and would have been discovered by the exercise of reasonable and ordinary care in view of the position which the brakeman occupies, the law conclusively presumes that he possesses the knowledge which a reasonable attention would furnish. A rule would be opposed to, rather than promotive of, the interests of humanity as it would encourage the gross negligence of the servant, and would reward it to the extent when it produced the profit of ignorance."

"A servant engaged in the first instance to feed a machine, and incidentally to clean it up, is bound to examine it from a view to ascertain the character of the work which render this operation dangerous." *Stubbs v. Atlanta Cotton-Seed Oil Co.* (1893) 92 Ga. 495, 17 S. E. 746. A servant who is sent to do a piece of work with a machine with which he is not familiar is bound to make inquiry as to the proper method of operation, as was laid down in *Millar v. Madison Co.* (1895) 130 Mo. 517, 31 S. W. 28.

¹ *Johnston v. Oregon Short Line R. Co.* (1892) 23 Or. 94, 31 Pac. 28.

² *Goodman v. Richmond & D. R. Co.* (1886) 81 Va. 576.

³ *James v. Emmet Min. Co.* (1891) 19 Mich. 335, 21 N. W. 361. An instruction to the effect that, "while the servant is not to be held liable for dangers or defects of which the servant is fully informed, yet the servant is authorized to rely upon the master's performance of his duty to furnish safe appliances, and is not to be held liable for any mislending, as it amounts to a statement that the converse of this proposition is true; that is to say, that the master is liable even though the servant mis-

is well settled that a duty of inspection or inquiry is predicable whenever the character of the environment would suggest to a man of average prudence that there is a possibility or a probability of being injured in a certain way.⁴ Such possibility or probability is also frequently assumed to have been suggested with sufficient distinctness to show the servant that some further examination into the conditions was prudent, where he had observed circumstances or incidents which pointed to the existence of that particular danger to which his injury was traceable, and which were therefore to be

had such information as would put a reasonably prudent man on his guard, provided that information did not amount to full information, or, as the average juror would understand the language, absolute certainty. *Illinois C. R. Co. v. Sanders* (1894) 58 Ill. App. 117.

It is negligence not to take notice as to observe whether an event known to be likely to occur has occurred. *Barnard v. Schrafft* (1897) 168 Mass. 211, 46 N. E. 621.

Where a servant has a general knowledge that an appliance is in bad condition, his failure to examine it before using it is negligence. *The Truro* (1887) 31 Fed. 158.

A brakeman has no right to rely upon the supposition that the track on a siding is fully ballasted, and step between the cars in motion, without first examining the character of the roadbed. *Ragon v. Toledo, A. A. & N. M. R. Co.* (1893) 97 Mich. 265, 56 N. W. 612.

A servant is not justified in assuming that a car furnished his employer by a railroad company is in good repair and supplied with proper brakes, if he knows that other cars so furnished have, many of them, been defective. *Roddy v. Missouri P. R. Co.* (1891) 104 Mo. 234, 12 L. R. A. 746, 16 S. W. 1112.

One of the dangers to be apprehended by a brakeman in the ordinary operation of a railway is the misfit of links and pins, and the possibility that an attempt to couple cars may be unsuccessful. Hence, a railroad brakeman who attempts to couple a car without inspecting the coupling pin and link to see if the former is loose, when he has the opportunity to do so, is guilty of contributory negligence. *Renninger v. New York C. & H. R. R. Co.* (1896) 11 App. Div. 565, 42 N. Y. Supp. 813.

The foreman of a switch engine in a railroad yard assumes the increased risk in coupling cars with drawheads of different makes, and must use all necessary

caution to ascertain the kind of cars to be coupled on each occasion. *Henry v. Bond* (1888) 34 Fed. 101.

A switchman who, from his experience in a yard, knows that any two cars which he may have to couple may have draw bars of different heights, is bound at his peril—at least where there is no hurry—to examine all the couplings he has to handle, with a view to ascertaining their condition before he ventures upon the coupling. *Toledo, W. & W. R. Co. v. Black* (1878) 88 Ill. 112.

In *Kelly v. Abbot* (1885) 63 Wis. 307, 53 Am. Rep. 292, 23 N. W. 890, the coupling iron of a foreign car passed over those of a caboose to which the plaintiff's intestate was coupling it, and crushed him to death. A demurrer to a complaint alleging the want of adaptation of the cars to each other, and the negligence of the defendant company in allowing the foreign freight car to be brought on its track and requiring it to be coupled, was sustained, the court saying: "There is no reason stated why the intestate did not or could not have discovered this apparent want of adaptation of the coupling irons of the caboose and car. It was presumably in the daytime, as it is not stated that it was in the night. That the coupling irons were so widely mismatched would seem to have been as observable and readily seen as the entire absence of coupling irons, one or both. It is not to be inferred that this was the only instance when the cars of different roads, brought together to be coupled, were so mismatched. It might rather be inferred that not unfrequently they have coupling irons higher or lower than each other, and that there is no reasonable assurance that they are always adapted to each other in this respect. This would seem to impose the duty upon the brakeman, before going between such cars and the caboose or cars of the road on which he is employed, to couple them together, to

regarded as carrying a definite cautionary or monitory sign.
Compare §§ 135-138, *ante*.

observe more closely and to use more caution than if he was attempting to couple the cars of his own road, which are adapted to each other by construction or selection, in order to ascertain whether their coupling irons would meet or pass each other. There is no allegation that he even looked to see, or that he could not have seen, if he had looked, this clearly apparent difference in the elevation of these coupling irons, or that his attention was diverted." In *Scott v. Oregon R. & Nav. Co.* (1886) 14 Or. 211, 16 Pac. 98, this decision was emphatically condemned as one which went "far towards legalizing manslaughter."

A servant, part of whose employment is to handle and remove disabled cars, has no right to assume that the couplings of a car are perfect. If he does not know its condition he is bound to assume that it may be disabled, and act accordingly. *Arnold v. Delaware & H. Canal Co.* (1899) 125 N. Y. 15, 25 N. E. 1061.

Where it was a part of the regular duties of a switchman to handle defective and broken cars, which were taken from trains and placed upon special side tracks used for the purpose, the mere presence of a car on such tracks was notice to him that it was probably defective, which cast upon him the risk in handling it, and the duty of examining it for the particular defect, although sound cars, improperly loaded, were occasionally placed on the same tracks. *Chesapeake & O. R. Co. v. Hennessey* (1899) 38 C. C. A. 307, 96 Fed. 713.

It is not negligence for a foreman to order an employee to paint a machine, without informing him that others are also at work upon it, where, by the exercise of reasonable care, he can himself see that other workmen are so engaged. *Williams v. Hensler* (1890) 38 Ill. App. 584. One of those workmen unexpectedly put in motion a cogwheel which plaintiff was handling.

A coal shoveler familiar with the fact that tubs used in hoisting coal from a barge are liable to be unlatched on striking the bulkhead, where they have a loose catch, assumes the risk of using such a tub while the hold is so full that he cannot get out of the way if a tub should dump, if he has an opportunity to examine the tubs before using them. *Dolan v. Atwater* (1897) 167 Mass. 274,

15 N. E. 742. A man who has skill to perform the duties of a cooper is chargeable with knowledge that a rope used to hold back in a swinging frame, when in use, is liable to wear out, and negligent if he fails to examine it at reasonable intervals for the purpose of ascertaining its condition. *Schultz* (1893) 7 Wash. 403, 35 Pac. 100. The rope had never been examined. A miner who fails, after examining the roof of the drift he is working, and place necessary to support it, is negligent. *C. Cumberland & E. L. Coal Co.* (1896) 146 Pa. 67, 23 Atl. 221. The servant engaged in drilling, blasting to ascertain whether a hole exploded in a hole which he was to clean out is negligence. *Turner* (1892) 89 Va. 341, 15 S. E. 271.

In a case where a loose joist shaken off the joists on which a man was standing, and falling by the jarring movement of a steam hammer, and fell on a man who was operating the hammer, the man was declared to be at least negligent for the jury whether he should have examined the beams overhead before he began to work. But the decision on another point. *Reading Iron v. Devine* (1885) 109 Pa. 246.

Where a certain kind of coupling frequently slipped past the one who was being united, a brakeman, in handling it, is chargeable with knowledge of its defective condition. *Thompson v. Missouri P. R. Co.* (1891) 51 Neb. 527, 71 N. W. 61. There was no recovery for the death of an employee caused by the collision of his engine with stock which had strayed on to the track through a defective fence, where the defence is that stock were frequently on such track at or near the place of collision; that it was decedent's duty to keep a constant lookout for that, according to his reports during fifteen months prior to the collision, struck stock eight times. *Houston & T. C. R. Co.* (1900) 616, 57 S. W. 918. Affirming (1900) 114 Civ. App. 55 S. W. 1126. An employee in charge of a saw which is liable to drop back beneath planking after it is cut, is guilty of contributory negligence if he does not look to see whether the planking has gone down, where he knows

ory significance

an who has sufficient knowledge of the fact to hold back a saw, when it is not in his out, and is negligent in examining it at reason the purpose of ascer-

Schultz v. Johns (1892) 33 Pac. 130 (Cal.). It has been examined, and fails, after a blast of the drift in which place necessary precautions. *Christner v. L. Coal Co.* (1892) 221. The failure in drilling holes for whether a blast has which he is directly negligence. *Newton v. a.* 341, 15 S. E. 802. A loose beam was on which it was movement caused and fell on a serving the hammer, at least a question he should not have overhead before he the decision was *Reading Iron Works* 9 Pa. 246.

kind of coupling has the one to which brakeman who is chargeable defective condition *P. R. Co.* (1897) 7, 61. There can be death of an engine of his engine was on to the fire engine, where the were frequently seen near the point of decedent's duty to out for them, and his reports, he has prior to the accident times. *Quill v. Co.* (1900) 93 Tex. 126. An employee which is intended to sinking after its customary negligence if he whether the same he knows that it

frequently fails to drop back after use *Johnson v. Hovey* (1894) 93 Mich. 343, 7 N. W. 172. A miner is guilty of negligence if he proceeds to work under a rock after he has observed indications of danger which he thoroughly understands. *Evans v. Chesmond* (1890) 9 Ill. App. 615. An employer is not liable to an employee for injuries sustained by the latter in jumping from a platform to avoid the splashing of molten lead out of a kettle without a hood, near which he was at work, where he was thoroughly familiar with the process of lead melting, had repeatedly seen the lead splash out of that particular kettle, and exposed himself to the danger without complaint, objection, or remonstrance. *Farrill v. Tatham* (1899) 36 App. Div. 319, 55 N. Y. Supp. 199.

A servant assumes the risk from the bursting of bottles of ale which he is engaged in packing, where two bottles, to his knowledge, have previously exploded. *Lehman v. Van Nostrand* (1896) 165 Mass. 233, 42 N. E. 1125.

Knowledge that there is a hole under a canvas stretched on a third-story floor is imputed to a servant who sees his fellow workmen walk around, and not across it, shoves a plank over it, and sees it sag down, and supposes the canvas to be there to catch one if he steps on it. *Muncie Pulp Co. v. Jones* (1894) 11 Ind. App. 110, 38 N. E. 547.

A servant who knows that portions of debris which is being discharged down a chute have previously scattered cannot recover if he is struck by a piece. *Fannessay v. Western U. Teleg. Co.* (1893) 6 Misc. 322, 26 N. Y. Supp. 796.

A servant injured by the fall of a truss during the demolition of a building cannot recover, where it is shown that several of the trusses had already fallen while the work was in progress, and their condition was perfectly apparent to all the workmen. *Caron v. Schell* (1889) 41 La. Ann. 500, 6 So. 813.

A laborer digging a well, the sides of which have fallen several times while he has been engaged on the work, assumes

the risk of another similar occurrence. *Galbreath, H. & S. A. R. Co. v. Lempe* (1883) 59 Tex. 19.

A servant who has the supervision of another employee, and knows that he is an incompetent and careless workman, is not free from negligence if he trusts himself upon a ladder constructed by the employee, without examining it. *Bolton v. Georgia P. R. Co.* (1889) 83 Ga. 659, 10 S. E. 352.

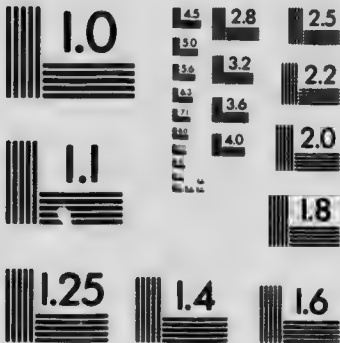
* An employee directed to feed a furnace, which was not a part of his usual duties, cannot be held as a matter of law, to have assumed the risk of being burned because of the blowing open of the furnace door by the explosion of gas, where the risk was not an obvious one, and he had had but slight opportunity to learn of the condition of the furnace, and had never known of the door being blown open before, although it had occurred several times. *LaFortune v. Jolly* (1896) 167 Mass. 170, 45 N. E. 83. Where work in a machine shop, which caused small pieces of chipped iron to be thrown from the machinery, was so carried on that no chips were thrown towards a servant, to his knowledge, till the day he was injured by a piece of chipped iron thrown from a machine operated by a fellow workman, the servant had not assumed the risk of such danger, so as to prevent a recovery from the master for the failure of the latter to establish and enforce rules for protection against such injury. *Smith v. Lidgerwood Mfg. Co.* (1900) 56 App. Div. 529, 67 N. Y. Supp. 533. Where plaintiff was injured by material falling from the walls of a building while he was engaged in excavating sand from the interior, and it appeared that he had seen no bricks or material falling from the wall prior to the injury, the question whether he assumed the risk of such injury was for the jury. *Witkowski v. George W. Carter & Sons Co.* (1901) 60 App. Div. 577, 70 N. Y. Supp. 232.

Whether or not an employee standing on an elevated platform, endeavoring to adjust a hood on a smokestack, was



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speaking generally, is the servant necessarily debarred from maintaining an action, unless the previous incident was of such a nature that any reasonably intelligent man would have understood it, and having been informed of which was thus conveyed, and taken appropriate steps to protect himself from injury.⁸

414. Duty of inspection inferred from the nature of the function charged by the servant.—The decisions cited in the last two groups deal with situations in which all servants, without respect to their particular functions, are not justified in acting upon the assumption that they are not exposed to any abnormal dangers arising from a breach of the master's duties. In another group of cases

guilty of contributory negligence precluding recovery for injuries caused by the slipping of a knot uniting two pieces of rope sustaining a piece of timber on which a tackle used in adjusting the hood was fastened, is for the jury upon evidence that shortly before the accident he noticed that the rope had slackened, and instructed the men below to tighten the same, it not appearing whether the slacking was due to the slipping of the knot or to some unexplained cause. *Folk v. Schaeffer* (1898) 186 Pa. 253, 40 Atl. 401. First appeal (1897) 180 Pa. 613, 37 Atl. 104.

⁸ The mere fact that it was known to the servant that other machines which were of the same character as that which caused the injury had started automatically will not charge him with knowledge of the risk of such an occurrence, if it appears that those machines were not attached to the same pulleys and belts as the one which he was handling when the accident occurred. *Donahue v. Drown* (1891) 154 Mass. 21, 27 N. E. 675.

A switchman who does not know that a coupling pin furnished for use in making a coupling is too large is not, as a matter of law, guilty of contributory negligence in attempting to use it in making the coupling, and in continuing to insert it after the first failure to make it enter the hole, where it often happens that a pin difficult to insert at first can be made to go down. An instruction is erroneous which proceeds on the assumption that a defective condition had been discovered when the pin did not go down at the first attempt. *Missouri, K. & T. R. Co. v. Hauer* (1897; Tex. Civ. App.) 43 S. W. 1078.

The fact that a pole supporting the wires of a telephone company has been condemned and marked for removal is

not, as a matter of law, notice to the employee that it will not stand attached from the wires which are ordered to remove. *Southern Ry. & Teleg. Co. v. Clements* (1891) 1, 34 S. E. 951.

An employee whose business is to examine revolvers which do not explode satisfactorily after a test by loading and firing is not, as a matter of law, bound to examine one which is turned to see if it contains a exploded cartridge, although there is a left one in on a former occasion. *Derson v. Duckworth* (1894) 251, 38 N. E. 510.

A miner is not, as a matter of law, guilty of negligence merely because he made no attempt to inform the master of the actual condition of the mine entry from which slate fell. *Blazenic v. Iowa & W. Coal Co.* 102 Iowa, 706, 72 N. W. 292. A miner ordered by the boss to go into a dark and stifled room in the mine is not bound to test the safety of the room, if he knows that rock and slate are falling from the roof before he enters, as it is the master's duty to provide a safe place to work. The fact that rock in such a case is a danger from which it is possible to escape, does not infer the inference that the place is so forward be safe, and the inference that the place is dangerous. *Island v. Risher* (1895) 13 Ind. App. 158.

The fact that a gang plank was put out from a vessel to the wharf on two different occasions, for the purpose of transferring the captain's trunk to the wharf, does not constitute notice to a workman that the rigging was a safe means of exit. *McDonald v. Son* (1901) 25 Wash. 441, 6

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inant conception relied upon is that, in view of the nature of the work assigned to the servant, it may reasonably be inferred that it was the understanding of the parties to the contract of employment that he should discharge the duty of inspection to a certain extent.¹ The existence of such a duty has been inferred on the following grounds:

(1) That the servant had been put in charge of that part of the plant which was defective or abnormally dangerous.²

It is the duty of the master to furnish and maintain suitable material and appliances for the prosecution of his business, and, in the absence of notice to the contrary, the employee had the right to presume that the employer had complied with its duty in this respect, and to act upon this presumption, unless the character of his employment was such as to devolve upon him the duty of examining and seeing that the particular material and appliances were in proper condition. If such was the duty of the employee, and he negligently assumed they were in proper condition when they were not, and the injury arose from his own failure in this respect, he would be guilty of contributory negligence. *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 554, 8 So. 360. For other examples of similar exceptive language, see *Clapp v. Minneapolis & St. L. R. Co.* (1886) 36 Minn. 6, 29 N. W. 340; *Pennsylvania Co. v. Brush* (1891) 130 Ind. 347, 28 N. E. 615; *Mayer v. Liebmann* (1897) 16 App. Div. 54, 44 N. Y. Supp. 1067; *Missouri P. R. Co. v. Crenshaw* (1888) 71 Tex. 340, 9 S. W. 262; *Austin v. Appling* (1891) 88 Ga. 54, 13 S. E. 955; *Curtis v. Chicago & N. W. R. Co.* (1897) 35 Wis. 460, 70 N. W. 665.

An instruction to the effect that a servant had a right to assume that the defective appliance was safe and suitable, and that it was not his duty to inspect it, is erroneous where there is a question of fact as to whether his duties required him to inspect it. *Cumberland Teleph. Co. v. Loomis* (1889) 87 Tenn. 504, 11 S. W. 356.

A railway company is not liable for injuries to a brakeman on a freight train, alleged to have been due to a defective lantern which he used in giving signals, if the company did not know and had no means of learning of the defect, and the brakeman, although not knowing of it, had the sole care and

custody of the lantern, and by proper diligence might have known its defective condition and reported the fact to the company. *Pennsylvania Co. v. Congdon* (1892) 134 Ind. 226, 33 N. E. 795. A servant injured by a defective track on a tram road of which he had charge cannot recover. *White v. Kennon* (1889) 83 Ga. 343, 9 S. E. 1082. An employee whose duty it was to operate cars upon an elevated tramway, and also from time to time to inspect said tramway and report any defects therein, cannot recover for injuries caused by a displaced rail in the tramway, which he had negligently failed to observe and report. *Cooper v. Butler* (1883) 103 Pa. 412. On the ground that a section master in temporary charge of a hand car must note such defects in it as are discoverable by ordinary care, it was held that he could not recover for injuries caused by a derailment resulting from the fact that the wheel was not properly attached to the axle. *Central R. & Bkg. Co. v. Kenney* (1877) 58 Ga. 485. A servant has been refused recovery for an injury from a defective staircase not under the special care of any employee except himself and a fellow workman. *Stroble v. Chicago, M. & St. P. R. Co.* (1886) 70 Iowa, 555, 31 N. W. 63, 59 Am. Rep. 456. It is the business of a foreman or boss of a gang of men with carts and horses to know whether the horses are fit to work or not, and, if they are not, to send them back to the stable; and he cannot recover against the employer for an injury to his foot by one of the horses in use which becomes unmanageable. *Smith v. Drake* (1889) 125 Pa. 501, 17 Atl. 449.

An employee who, with his own consent, undertakes as a part of his employment the duty of determining when an appliance which he constantly uses has become unsafe or insufficient from such use,—especially where he has shown

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(3) That the servant was assigned to work which involved as one of its essential features the function of remedying certain abnormally dangerous conditions.⁴ This class of cases has been considered under another aspect in § 29, *ante*.

(4) That, in view of the system on which the business of the employer was conducted, it was manifestly intended that the function of inspection should be discharged to a limited extent by the servant.⁵

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experienced carpenter who had assisted in selecting it from a quantity of material, and hoisting it to its place. *Griffiths v. New Jersey & N. Y. R. Co.* (1893) 5 Misc. 320, 25 N. Y. Supp. 812. Affirmed in (1894) 8 Misc. 3, 28 N. Y. Supp. 75, and in (1896) 119 N. Y. 595, 44 N. E. 1124. The primary duty to know whether a piece of timber which has been used for a considerable time as a lever for raising the door of a furnace has become unfit for that purpose rests upon the servant who is in immediate charge of the furnace, and not upon any superior officer. *Allen v. G. W. & F. Smith Iron Co.* (1894) 160 Mass. 557, 36 N. E. 581.

⁴In *Kanz v. Page* (1897; Mass.) 46 N. E. 620, a servant was held unable to recover for injuries caused by the fall of a fragment of a fly wheel which had burst. Holmes, J., said: "When a room has been shattered by an explosion, it is plain to everybody that things are not in their normal condition, that the usual support of part by part has been shaken or interfered with, and that some portion may have been weakened to the point of being ready to fall. If the explosion was of an iron wheel, it is plain that the fragments probably have flown in different directions, and that they may have lodged above or below. When a workman is sent into such a room on the day of the explosion to clear away the ruins, it is manifest that he is taking one of the steps which are necessary to disclose just what has happened. It is not a natural inference on the part of one so sent that the place has been inspected and it is not a natural interpretation of the order to take it as implying that the superior knows that it is safe." A carpenter ordered to go and brace joists is bound to see that they are in a condition to be braced. *Mentzer v. Armour* (1883) 18 Fed. 373.

⁵In *Flood v. Western U. Teleg. Co.* (1892) 131 N. Y. 603, 30 N. E. 106, Vol. I. M. & S.—74.

Reversing (1891) 15 N. Y. Supp. 400, 39 N. Y. S. R. 674, the following reasons were assigned by the court for holding that an action could not be maintained for the death of the foreman of a gang engaged in inspecting the defendant's lines, the accident being due to the fact that a cross arm on one of the poles broke under him: "He had all the opportunity which any in-pector could have to know the condition of this arm, having frequently inspected that portion of the defendant's line where this arm was. He saw it when he went upon it, and careful inspection was the first thing then suggested to him. He knew that he was in a place of danger, and thus was bound, before resting his weight upon the arm, to examine it to see if it was sound and probably adequate to support him. He knew precisely how the defendant inspected its poles and the arms on them, and that it was not its custom to cause the arms on the poles to be inspected by someone climbing up the poles, and hence as to him carelessness in not inspecting the arms cannot be attributed to it. He knew that no one knew the condition of the arm which broke better than he did, and no one in fact knew better than he its sufficiency to bear his weight. If he gave the matter a thought, he knew that he must rely upon his own judgment in placing his weight upon the arm, but before placing his weight thereon he ought to inspect it and see if it was sound and strong enough to hold him, and that he had no right to rely upon the judgment or inspection of any other person."

As a lineman must know that it would be inexpedient and impracticable to have a man or company of men to go and examine each pole upon which a lineman is about to work, and it is easy to determine very quickly whether a pole is badly decayed a little below the surface of the ground, and no skill or experience is required to do it beyond

(5) That it was the customary practice of employees engaged in the same kind of work as the injured person to make an examination under the given circumstances.⁸

(6) That the instrumentality which caused the injury was one which the servant was required to use in the course of his employment. In some cases language is used which is broad enough to be taken literally, to cast upon the servant an unqualified obligation. He is said to be bound to take notice of abnormally dangerous conditions, for the reason that a person who is constantly using an appliance is in a more favorable position than anyone else for detecting such conditions. See § 406, note 2, *supra*. By no courts has the existence of a duty of inspection, considered as an incident of the use of instrumentalities, been asserted more explicitly than by those of Illinois.⁹

that which is possessed by ordinary linemen, he will be presumed to have accepted the risk that some pole of uncertain age may break and fall when a lineman is working on it, if he does not take measures to ascertain its condition before going on it. *McIsaac v. Northampton Electric Light Co.* (1898) 172 Mass. 89, 51 N. E. 524.

It cannot be held as an abstract proposition of law that linemen of telegraph and telephone companies have the right to rely upon the soundness and safety of poles upon which they are working, and that it is the duty of the companies to test and inspect poles, and support such as are insecure, before permitting their linemen to climb them; but the question upon whom the duty of inspection rests is usually one of fact, depending upon the terms of the contract of employment, the lineman's knowledge of the hazards of the work, and his ability and opportunity to discover the dangers incident thereto and avoid them, and other circumstances. *McGorty v. Southern N. E. Teleph. Co.* (1897) 69 Conn. 635, 38 Atl. 359.

⁸ Under the general rules of mining it is the duty of the persons engaged in doing the blasting, as well as of the foreman, to make an examination for the purpose of ascertaining whether every blast has been exploded. *Kelley v. Cable Co.* (1889) 8 Mont. 440, 20 Pac. 669.

Where plaintiff was injured by the falling of a rock from the roof of defendant's mine, it is error, in instructing the jury, to assume that it was the duty of defendant to keep the roof in

safe condition at the point where injury occurred, as the most that plaintiff could ask was a submission of the question to the jury whether, under the custom of the mine and the contract between plaintiff and defendant, it was the duty of defendant or that of plaintiff to keep the roof in safe condition. *Sardy River Cannel Coal Co. v. Co.* (1900) 22 Ky. L. Rep. 1176, 60 S. W. 180.

⁹ "Every workman is bound to know the nature of the instrument he uses." *Pollock, C. B., in Dynen v. Pollock* (1857) 26 L. J. Exch. N. S. 221. Employees are chargeable with knowledge of the condition of the tools and of machinery and appliances which they use or with which they come in contact. *Louisville, N. A. & C. R. Co. v. H.* (1897) 147 Ind. 266, 45 N. E. 58.

It was negligent for a switchman to work five or six days about a steam engine without examining a draw which he knew he might have to use at any moment; and he cannot recover if he suffers injury owing to the fact that a V-shaped piece had been broken off it. *Goulin v. Canada Southern Bridge Co.* (1887) 64 Mich. 190, 25 W. 44.

¹⁰ It is the duty of a servant to keep the machinery which he uses in repair, and, when it is not, to notify it to the employer. *Toledo, W. R. Co. v. Eddy* (1874) 72 Ill. 138, 13 Ill. 99, 92 Am. Dec. 240, where recovery was denied for an accident caused by the fact that the nut which kept a wheel in its place on the upright

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415. When this inference is not drawn.—An examination of the facts involved in the decisions cited under the last section shows that, however sweeping the phraseology may be which the courts have employed in declaring the servant to be subject to a duty of inspecting the instrumentalities, the duty contemplated is far from being one of the same peremptory nature, or of the same scope, as that which is incumbent on the master. Those decisions contain nothing which is in conflict with the principles explicitly laid down in other cases, that a servant is not required to make a more searching examination than is reasonably possible, taking into account the functions discharged by him and the exigencies of his work;¹ and

became loose and allowed the wheel to come off when the brake was operated. The court said that "the condition of the brake was a matter under the special care of the brakeman, and it was his business at all times to see that it was in a fit condition for use, and report defects to the company."

In a case where a yard hand who had been at work for a considerable time, and had ridden many times a day on a footboard which was hung so low that it came into collision with a plank beside the track and threw him, it was held error to instruct the jury that the servant was not bound to test the safety and fitness of the plank. *Peoria, D. & E. R. Co. v. Hardwick* (1892) 48 Ill. App. 562. In another case it was said, *arguendo*, that, if the defective side ladder which gave way had been used on the road while he was a brakeman on the train of which it was a part, he would be presumed to have known of its condition. *Chicago & N. W. R. Co. v. Jackson* (1870) 55 Ill. 495, 8 Am. Rep. 661. Where a fireman was injured by the fall of the "shaker bar" of his engine, owing to the fact that the key which secured it to its post had fallen out, and the evidence tends to show that the defect had existed for six weeks, it is misleading to instruct the jury that a servant has a right to assume that an appliance furnished him is reasonably safe. *Chicago & E. I. R. Co. v. Garner* (1898) 78 Ill. App. 281. A servant's omission to examine the strength of window fastenings by which it is necessary for him to support himself while washing the window from the outside is negligent. *Chicago Consol. Bottling Co. v. Mitton* (1891) 41 Ill. App. 154.

The extent of the servant's obligations in this jurisdiction is made still more clear by the exceptive form of

statement in a recent case, that a servant is not bound to investigate and inspect any part of the property except that which pertains to and is connected with his employment. *Lake Shore & M. S. R. Co. v. Conway* (1897) 169 Ill. 505, 48 N. E. 483, where it was remarked, *arguendo*, that a tower man employed by a railway company to raise and lower gates at a crossing is bound to examine into the condition of the tower and machinery.

A helper in switchyards, whose duties upon any particular car are limited to switching it from one train to another in the yards, is not chargeable with knowledge of the fact that the nut which secures a brakewheel to the staff is missing. *Chicago & E. I. R. Co. v. Kneirim* (1894) 152 Ill. 458, 39 N. E. 324. The position of such an employee was distinguished from that of a brakeman, who is required to be watchful as to the condition of the brakes. See this note, *supra*.

¹ In *Chicago & N. W. R. Co. v. Jackson* (1870) 55 Ill. 495, 8 Am. Rep. 661, it was urged that the servant was guilty of negligence in not seeing that a side ladder on a railway car was defective, and, in attempting to descend, in not placing his feet upon the two lower rounds of the ladder. The court said: "This was a question fairly falling within the province of a jury to determine. But when it is remembered that he occupied a subordinate, although a highly responsible, place requiring vigilance with prompt action, it is not to be expected or required that he should act with that deliberation and circumspection as persons having more time and less pressed to prompt action in the performance of their duty. In the discharge of his duties on a switch he must keep a constant watch for the signal

that he is not bound to make such an examination as is necessary to discover invisible defects are to be discovered.² Compare §§ 407, 408, s.

It will sometimes happen that, even where the servant is charged with a specific duty of inspection, circumstances may occur which will justify him in acting upon the assumption that there is no normal danger to be apprehended, and for that reason omitting inspection which would otherwise be made.³

Whether a servant is bound to look for defects other than those open to his observation in the prudent use of the appliance is ordinarily a question for the jury,⁴ as is also the question whether,

from his superior, which to him is a peremptory order requiring instant obedience. This being so, we could not expect him to deliberately examine a ladder to see whether it was in repair." It was then remarked that the rule laid down in *Illinois C. R. Co. v. Jewell* (1867) 46 Ill. 99, 92 Am. Dec. 240 (see § 415, note 9, *supra*), was to be deemed applicable only in cases where the brakeman knew, or could by reasonable precaution know, of the defect. If the defect was inherent from improper material or from unskilful workmanship, and had not been developed, he should not be held to have known the fact.

² A brakeman whose duty it is to examine a brake chain every trip before starting is not required to go under the car and examine the chain link by link, but has a right to suppose that it was properly tested and inspected before it was placed on the car. *Morton v. Detroit, B. O. & A. R. Co.* (1890) 81 Mich. 423, 46 N. W. 111 (not chargeable with knowledge that the links were not properly welded together). Where an employee in a quarry whose duty it was to oil a derrick, to watch for signals, and give them to the engineer, and to direct the disposition of the slack which was hoisted by the derrick, was killed by the breaking of the mast, which was dry-rotted inside, it was held that the defendant was still liable for the inspection of hidden defects, although the superintendent when he set the deceased to work instructed him how to care for the derrick, and said he would hold him responsible for its proper care. *Jarvis v. Northern New York Marble Co.* (1900) 55 App. Div. 272, 67 N. Y. Supp. 78. In a case where the injured servant could not have discovered the defective loading of a car by inspection, it is error to give an unqualified charge to the effect that, if it was his duty to

see that the loads on cars were in condition, he was chargeable with knowledge of the condition of the load caused the injury. *Galveston, H. & A. R. Co. v. McCray* (1897; Tex. App.) 43 S. W. 275. That a servant is not, by the mere fact of his use of an appliance, charged with the duty of inspecting it for latent defects, was recognized in *Missouri P. R. Co. v. Shaw* (1888) 71 Tex. 340, 9 S. W. 2d 100 (porter injured by defective truck, the defect being such that it could not have been discovered by examining the lower side of the truck).

³ In *Haugh v. Chicago, R. I. & N. Co.* (1887) 73 Iowa, 66, 35 N. W. 100, it was held that a yardmaster, charged with the duty of seeing that cars are properly loaded, may, when he receives an unqualified order to load a car immediately for transportation, assume that it is properly loaded. The car in question came from a siding. The court said: "The most honest business principles would suggest that the car should have been examined in time to enable it to go to the train, and with the despatch which shippers desired. We think that the deceased, in the absence of any information to the contrary, had no right to take this view of the situation. That the care and diligence which he was required of him should be measured by such fact. While he was bound to look at the car and lumber, he was not bound to make the strict examination that he would have been if he had known that he was to make the car and sole examination."

⁴ *Nichols v. Crystal Plate Glass Co.* (1894) 126 Mo. 55, 27 S. W. 2d 100; *Habishaw v. Standard Silver Co.* (1901) 131 Cal. 430, 52 P. 728.

maintenance of an action for an injury due to conditions which would have been discovered if an inspection had been made.

Some of the cases deal with the responsibility arising out of express stipulations entered into either at the time when the servant began work or afterwards.³ Others exemplify the obligation imposed by a special order or notice addressed to the employee in question, whether as an individual or as one of a class.⁴ But most of the decisions which exemplify its operation involve the infringement of rules which prescribe that employees shall examine certain specified instrumentalities. Such rules do not, of course, affect the servant's responsibility where he is neither actually nor constructively

³ See cases cited in note 9, *infra*.

⁴ A railway servant who has been directed by the trainmaster to examine cars used for a special work, and have them repaired if not in good order, and who is injured while using a car which he knows to be imperfect, is guilty of contributory negligence. *Shields v. New York C. & H. R. R. Co.* (1892) 133 N. Y. 557, 30 N. E. 596 (chain which held up trap door in the bottom of a coal car broke and trap door gave way; employee had undertaken to mend it instead of sending it to the shop, as he should have done).

In the cases cited below, no rule is adverted to by the court, and it may perhaps be assumed that the duty was imposed by a special order.

No recovery can be had for the death of a brakeman, caused by a car being off the track at the end of a stub switch when the train was about to be moved, where it was his duty, as the rear man of a switching crew, to examine the cars and see that they were all in proper position, and no other person is shown to have had knowledge of the condition of the car. *Chicago & E. I. R. Co. v. Driscoll* (1898) 176 Ill. 330, 52 Ill. E. 921, Reversing (1897) 70 Ill. App. 91. A verdict for the plaintiff should be set aside when his injury was the result of a difference between the heights of the drawheads of two cars, and he himself testifies that it was his duty to observe the cars and their couplings so as to determine, before attempting to couple them, what kind of link should be used. *Norfolk & W. R. Co. v. Emmert* (1887) 83 Va. 640, 3 S. E. 145. Where a brakeman has authority to examine the loading of cars, and, if the manner in which they are loaded makes it unsafe to couple them, to report the matter to the

roadmaster, with a view to having the load adjusted, he becomes to some extent an inspector of the cars, and, in fact, sees that they are properly loaded, and undertakes to couple them in that condition, he does so at his peril. *Scott v. Oregon R. & Nav. Co.* 14 Or. 211, 15 Pac. 98 (railroad projected over the ends of the tracks). A locomotive engineer, whose duty it is to inspect his engine and to minimize any repair needed, assumes the risk of an obvious defect which he is to report. *Peppett v. Michigan C. Co.* (1899) 119 Mich. 640, 78 N. W. 200 (worn centre casting). In a case where, owing to the loss of bolts attaching the drawhead, a car, when pushed, ran off the track, the car next it, and thus injured a brakeman, recovery was denied on the ground that it was the peculiar duty of a brakeman, and not the special duty of the conductor, to look to the condition of the coupling apparatus when the train was in motion. *Louisville & N. R. Co. v. Lave* (1893) 14 Ky. 850, 21 S. W. 648.

A lineman cannot recover of an electric light company for injuries sustained from electric wires on account of defective gloves which it was his duty to inspect and keep in good condition and to exchange when necessary, though they were thrown him from a wagon, with direction to put them on by a foreman who had no charge of the gloves, and whose direction was no more advisory than anything else. *St. Louis Louisiana Electric Light Co. (Inc.) v. La. Ann.* 869, 17 So. 346.

For a case in which the duty was imposed by a notice, see *Mobile & O. Co. v. Harnes* (1893) 52 Ill. App. 1 (note 7, *infra*).

aware of their existence.⁵ See § 227, *ante*. But if his knowledge of a particular rule is established, the extent of his responsibility must be determined with reference to its provisions, so far as they are valid, and not with reference to the common-law doctrine that he is not bound to inspect the master's plant.⁶

⁵ Where a rule forbade brakemen to attempt to make a coupling unless the coupling appliances were known to be in good order, and there was evidence that the plaintiff did not know of this prohibition, it was held erroneous to charge the jury that there could be no recovery if the plaintiff attempted to make the coupling when the coupling appliances were not known to him to be in good order. *Fordyce v. Yarrowborough* (1892) 1 Tex. Civ. App. 260, 21 S. W. 421.

⁶ A brakeman who agrees to observe a rule requiring him to make an inspection of the brakes is chargeable with contributory negligence, if he fails to discover that the ratchet of a brake wheel is loose. *Matchett v. Cincinnati, W. & M. R. Co.* (1892) 132 Ind. 334, 31 N. E. 792. In one case in the same state, where a brakeman was injured by the breaking of a coupling pin, it was laid down that negligence was predicable of his failure to comply with a rule requiring him to examine the couplings of cars; but the case went off on the point that the rule was unknown to him. *Louisville, E. & St. L. R. Co. v. Utz* (1892) 133 Ind. 265, 32 N. E. 881. A brakeman who is required by the rules of the company to inspect the brakes of cars which he handles cannot recover if he is injured owing to the fact that the ratchet wheel and dog of a brake were defective, and the defect was such that it would have been apparent if the brake had simply been tried. *Chicago & A. R. Co. v. Bragonier* (1886) 1 Ill. 51, 7 N. E. 686. A brakeman was omitted to comply with a rule requiring the hand brakes on cars to be tested before the train starts, and was injured in consequence of the train's running away on a steep grade when the brakes failed to work, was held unable to recover, in *La Croy v. New York, L. E. & W. R. Co.* (1892) 132 N. Y. 570, 30 N. E. 391.

A railway employee injured in attempting to couple cars while standing between them on the short side of a curve is guilty of contributory negligence, where he had ample opportunity to observe that the drawheads were

about one third of the usual length, and a rule of the company known to him required employees to take time to examine all drawheads before making couplings. *Bennett v. Northern P. R. Co.* (1891) 2 N. D. 112, 13 L. R. A. 465, 49 N. W. 408. An experienced head brakeman, whose duty under a rule was to examine into the coupling arrangements of cars before attempting to couple them, was guilty of gross carelessness where he failed to see a defect in the coupling which would have been plainly visible to anyone looking. *Karrer v. Detroit, G. H. & M. R. Co.* (1889) 76 Mich. 400, 43 N. W. 370 (drawbar hung down 6 inches below its proper level). Where it is the duty of a conductor, under the rules, to know that each car is in proper running condition before moving his train, and he fails to make an inspection, and is injured by a defect that might have been discovered, he cannot recover for an injury caused by the failure of the brakes to act properly when a flying switch is being made. *Alexander v. Louisville & N. R. Co.* (1886) 83 Ky. 589. A switchman required by a rule to inspect and take notice of the construction and condition of drawheads cannot recover, where the drawhead which caused his injury was manifestly so short as to be dangerous. *Brooks v. Northern P. R. Co.* (1891) 47 Fed. 687. Where a rule required employees to see for themselves that machinery, etc., was in good condition, a conductor cannot recover where the cause of his injury was a defective fastening of an end gate on a gondola car, the result being that the gate fell backward when he jumped on to it. *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 548, 8 So. 360 (doctrine laid down, *arguendo*, in sending back the case for a new trial).

A fireman who has been sixteen months in the employ of a railway company, has frequently done switching on the siding where there is a cattle chute, and is required by the rules to take note of all dangerous points on the line, is presumed to know the extent of the danger caused by the proximity of the structure to the track. *New York, C.*

417. Limits of the duty under these circumstances.—The general effect of express contracts to examine instrumentalities is to narrow the domain of facts within which the servant is entitled to claim the benefit of the principle that he is entitled to rely upon the proper performance of the master's duties. But it seems to be a legitimate inference from the decisions that, in regard to such examination as may be undertaken in compliance with contracts of this description, they do impose upon him the obligation of using a higher degree of diligence than that which would otherwise have been incumbent upon him. He is required to take notice of apparent defects like those involved in the cases cited in note 5 to this section. But he is not bound to look for concealed defects.¹ *A fortiori* he cannot be declared negligent, as a matter of law, on the ground that he failed to observe merely sporadic and transitory conditions resulting from the acts or omissions of his coemployees.² The extent of his undertaking

& St. L. R. Co. v. Oatman (1896) 146 Ind. 452, 45 N. E. 651.

An employee of a railway company cannot recover for injuries caused by a failure to inspect a defective foreign car, where by the rules of the company known to plaintiff the duty of inspecting foreign cars was cast upon him. *Ft. Wayne, C. & L. R. Co. v. Gruff* (1892) 132 Ind. 13, 31 N. E. 400 (precise defect not mentioned); *Illinois C. R. Co. v. Barlow* (1901) 94 Ill. App. 206 (cracked coupling link).

An instruction that, in the absence of notice of defects, a servant is under no primary obligation to investigate and test the fitness and safety of the machinery, etc., although it is correct in some states of the evidence, is not applicable in a case where the injured servant was charged by the rules of the employer to inform himself as to the condition of the instrumentality in question, and it is a possible inference from the testimony that he might, by taking notice of his surroundings, have ascertained that it was defective. *Illinois C. R. Co. v. Sanders* (1894) 58 Ill. App. 117 (brakeman had made several runs over a defective track).

Where there is a rule requiring trainmen to examine the cars, it is error to instruct the jury that a brakeman had a right to presume that the railroad had used reasonable care to furnish reasonably safe appliances. *Terre Haute & I. R. Co. v. Pruitt* (1900) 25 Ind. App. 227, 57 N. E. 949.

See also cases cited in the following notes.

¹ The foreman of a derrick car was required by a rule of the company employing him to see for himself by using them that the "machinery, tools and material" provided for him were in proper condition for the intended employment, is not, as a matter of law, guilty of contributory negligence in failing to discover a latent defect in the framework of the car, which is concealed by the floor, where it does not appear that he was the inspector of the car. *Chicago & E. R. Co. v. Brannan* (1910) 10 Ind. App. 570, 37 N. E. 190.

A rule requiring an engineer to inspect his engine has no reference to defects in the mechanical construction of the engine. *Galveston H. & S. A. R. Co. v. Smith* (1900) 24 Tex. Civ. App. 57 S. W. 999.

A brakeman on a railroad train uses reasonable care to inform himself of the safety of the appliances to be used by him is not, as a matter of law, chargeable with such negligence as to deprive him of his right to recover, in failing to discover a defect in a brake chain in the same way, notwithstanding a notice to employees of the company that "the duty of every employee is to know that the property with which he is working is in good and safe condition, if not, to report the fact to his immediate superior at once. Such a notice does not change the standard of care which the servant is required to maintain in regard to inspection. *Mobile & O. Co. v. Harries* (1893) 52 Ill. App. 206.

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that he will make such an inspection as is practicable, taking into account the exigencies of the employment. This implied qualification of his responsibility is not infrequently recognized in the phraseology of the rules on this subject.³ If such phraseology is used, the construction put upon the rule is that the servant is bound to make such an examination as his information and opportunities permit.⁴ But even if a limiting clause of this tenor is not used, it

premises upon which they work are safe, nor the law, requires a switchman to discover and remove from near a track in the yards in which he works an oil box which it is the duty of another workman to remove, and which, by reason of nearness to the track, catches his foot, slightly protruding from the foot-board of an engine on which he is riding, whereby he is thrown and killed. *Louisville & N. R. Co. v. Bouldin* (1898) 121 Ala. 197, 25 So. 903.

³ In a case where the cause of the injury was that four of the six spokes which connected the hub with the rim of a brake wheel were broken off, it was held that a brakeman whose agreement to examine the appliances was made at the time when he entered the employment, and included a clause stating that it was his "right and duty under all circumstances to take sufficient time," was entitled to recover. *Pratt v. Lake Shore & M. S. R. Co.* (1892) 63 Hun. 616, 18 N. Y. Supp. 682. The court said: "It is quite clear that it would not have been practicable for the deceased to have performed the duty of an expert examiner before using the machinery of the cars he was required to use in the discharge of his duties. The cars composing the trains he was required to work on were frequently changed in making up trains. The exigencies of the business prevented that deliberation which would obviously be necessary to a proper examination of the machinery. He was required to be attentive and vigilant in the discharge of his duties to discover defects in the machinery, and to refrain from using machinery if he learned it was in a defective condition; and that, we think, was the extent of the requirements of the agreement."

A railroad brakeman whose contract of employment provides that he will, for his own safety, examine the things in connection with which he works before using them, to ascertain as far as he reasonably can their "condition and soundness," is not required to look after

dark for defects in a car which he had reason to believe, and which in fact, had been inspected by the company the same day. *Lake Shore & M. S. R. Co. v. Ryan* (1897) 70 Ill. App. 45 (jury warranted in finding that there was no contributory negligence where the servant was injured by a handhold so badly bent that it could not be grasped).

Where a brakeman, in his application for employment, undertakes, as soon as possible, to make a careful examination of all things near the tracks, so that he may understand the dangers attending them, he assumes at least the risk of all the permanent structures which he had had a chance of examining before the accident. *Quinn v. New York, N. H. & H. R. Co.* (1900) 175 Mass. 150, 55 N. E. 891 (struck by cornice of roof over station platform, while he was sitting on the top of an unusually high car).

⁴ A rule imposing a duty upon employees to examine for their own safety the condition of engines and machinery before using them, so as to ascertain, as far as practicable, their condition and soundness, is reasonable and proper. *Memphis & C. R. Co. v. Graham* (1891) 94 Ala. 545, 10 So. 283 (held to be for jury to say whether a servant injured by a broken drawhead had made a proper examination). The court said: "So far as Rule 140 imposes the duty upon employees to examine for their own safety the condition of the car, engines, and machinery, etc., before using them or exposing themselves on or with the same, so as to ascertain as far as reasonably can be done, their condition and soundness, it is reasonable and proper. It cannot be expected of car conductors or brakemen to make the same careful examination, and to be able to discover defects to the same extent, as that expected and required of the employer or master, or persons intrusted generally with this duty for the public safety or safety of employees; but the character of the general duties to be performed by conductors and

seems to be an unavoidable deduction from the general principle discussed in §§ 408 *et seq.*, *supra*, that a master cannot shift upon his employees his responsibility to them for injuries resulting from defects due to wear and tear, by devolving upon them the duty of inspection, unless they are given time and opportunity to make such inspection as would reveal the defects. And this may be said to be the effect of the decisions.⁵ It is considered that such rules should

brakemen is such that they necessarily become more or less familiar with the appliances and machinery constantly in their use and under their supervision, and know, to some extent, when they are not in proper condition for safe use. To the extent of their information, and the opportunities afforded to make such examination consistently with their other duties, and the circumstances attending, they should observe and obey the rule." *Memphis & C. R. Co. v. Graham* (1891) 94 Ala. 545, 10 So. 283. In *Louisville & N. R. Co. v. Pearson* (1893) 97 Ala. 211, 12 So. 176, this passage was cited with approval, and it was held that a rule of this tenor imposed, within the limits there laid down, a duty upon the servants.

⁵ In *McKnight v. Brooklyn Heights R. Co.* (1898) 23 Misc. 527, 51 N. Y. Supp. 738, a servant was held not chargeable with notice of a defect in a hame strap, which was visible only upon a detailed examination.

A railroad brakeman is not, as a matter of law, guilty of negligence in failing to observe a rule of the company requiring him to inspect the appliances which he is to use, which will prevent his recovery for injuries from a defective brake, where the defects are not so open and visible as to be detected at a glance, and his only opportunity for an inspection is while the train is standing at a station waiting for a connecting train, and is liable to start at any moment. *O'Malley v. New York, L. E. & W. R. Co.* (1893) 67 Hun, 130, 22 N. Y. Supp. 48.

"We are of the opinion that the duties put upon the brakeman by the rule in question adds very little to the duties placed upon him by the rules of law. Something more than the mere making of a rule requiring brakemen to make inspection of the implements and machinery used by them is necessary in order to shield the master from the consequences of a failure to perform the duties of furnishing safe implements and

machinery imposed by law upon him. He must have the appliances in proper condition, and the opportunity for making such inspection. The duty imposed by law upon the companies of furnishing reasonable cars and appliances for the use of the men in its employ, is for the preservation of life and limb, both of which are sacred in the eye of the law; and a policy forbids that the master be, in any manner, relieved of his duty without providing for the protection of the same by some other means. Full as required of the master by the rule, *St. L. & P. R. Co. v. Fry* (1891) 131 Ind. 329, 28 N. E. 989.

Compare, also, *Holmes v. Southern R. Co.* (1898) 120 Cal. 357, 52 Cal. 2d 357, where it was held that an employee was not entitled to an instruction which would have relieved the plaintiff would not have injured if he had followed a certain rule, then the mere fact that such instruction was impracticable or not observed was no excuse him for not following it.

A brakeman receiving a connecting train out on the line cannot be held to the same degree of care as a regular inspector or a man in a shop supplied with tools. *Matchett v. Cincinnati, W. & M. R. Co.* (1892) 334, 31 N. E. 792.

It has been held error to demur to a reply to an answer which alleges that the plaintiff, a brakeman, was called only a short time before the train went out; that he was not continuously, until it started, to examine the lamps and signals, and in consequence of loosening brakes, and therefore was not able to examine and discover the defect in the brake staff which caused the injury; that it was dark, that the train was not lighted; and that he was not carrying an ordinary lantern, which was his duty. *Chicago, St. L. & P. R. Co. v. Fry* (1891) 131 Ind. 310, 28 N. E. 989.

In jurisdictions where the burden of proving that the master is negligent, whether actual nor imputed knowledge of the dangerous conditions, it is

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reasonable interpretation, and that the obligations of the servant should be determined with reference both to the character of the defect and to his ability to make an examination.⁶ Upon this basis the validity of rules or agreements of the ordinary tenor by which servants are obligated to examine appliances may often be upheld.⁷ But if they are couched in terms which indicate a clear and absolute intention on the employer's part to impose a more extensive obligation upon the servant than is thus declared to be permissible, they will be treated—by most courts at all events—as an illegal attempt to subject the latter to the duty which is incumbent on the former, of seeing that the plant is in a reasonably safe condition.⁸

A theory of responsibility which is less favorable to the servant than that which is outlined in the cases so far cited is possibly indicated by the conclusions arrived at, or the language used, in some cases. But it is doubtful whether the standpoint of the courts was in reality materially different from that exemplified in the decisions already cited.⁹

instruct the jury that a brakeman is not bound by a rule requiring him to examine the appliances, unless it is shown that he had been given sufficient time and proper facilities to fully examine and know that such parts and appliances were safe, as such instruction places the burden on the defendant to prove that sufficient time for inspection was afforded. *Terra Haute & I. R. Co. v. Pruitt* (1900) 25 Ind. App. 227, 57 N. E. 949.

The fact that the servant had ample opportunity for examination is emphasized in *Bennett v. Northern P. R. Co.* (1891) 2 N. D. 112, 13 L. R. A. 465, 49 N. W. 408 (note §. *supra*).

On this ground the contributory negligence of the servant was held to be for the jury, where he was injured by reason of his failure to observe a crack extending half way through a brake staff, about 3 inches above the dog, such a defect not being discoverable without a rather minute inspection. *Myers v. Erie R. Co.* (1899) 44 App. Div. 11, 60 N. Y. Supp. 422. There a brakeman had set the brake on a car, and four hours later, during which time he had no specific duties to perform, he was injured, while again attempting to set the same brake, by the breaking of the staff.

It has been declared that rules of a railroad company requiring its employees to examine the cars, machinery,

and appliances which they are expected to use are inoperative so far as they contravene the principle which requires an employer to furnish and maintain suitable appliances, and the right of the employee to presume that this has been done. *Louisville & N. R. Co. v. Pearson* (1892) 97 Ala. 211, 12 So. 176 (knowledge not imputable, as matter of law, where a bolt fastening the end of a handhold which gave way had become rusty).

It has been held proper to refuse an instruction that a railway servant was negligent if he violated a rule prescribing that he should not attempt to couple or uncouple a car, unless he knows the coupling is in proper condition. *Missouri, K. & T. R. Co. v. Wood* (1896; Tex. Civ. App.) 35 S. W. 879.

A requirement that, before a switchman shall couple or uncouple cars, he must "examine and see that the cars or engines to be uncoupled or coupled, the pins, links, drawheads, and other appliances connected therewith, the ties, rails, tracks, and roadbed are in a good, safe condition, and that the cars are so loaded that such work may be safely done,"—has also been held invalid. *Illinois C. R. Co. v. Cozby* (1896) 69 Ill. App. 256.

In *Chicago & A. R. Co. v. Bragonier* (1886) 119 Ill. 51, 7 N. E. 688, holding that a railway company is not entitled to an instruction that, if its officers in

An employee upon whom the duty of inspection is imposed by the master is not relieved from liability for its nonperformance by the mere fact that other agents of the employer who are charged with a similar duty in respect to the same subject-matter have also been negligent in regard to its performance.¹⁰

In Texas, the principle accepted seems to be that it is always a question of fact for the jury to say whether the failure of the servant to examine, in

charge of freight trains habitually cause them to be made up and sent out without affording brakemen an opportunity to examine the brakes, that will not excuse the brakemen for their failure to perform the duty of inspection, the ground was taken that such a situation is controlled by the principle that an employee is not relieved of his obligations by the fact that other employees have failed to do their duty. (See next note.) But when the context of the passage in which the brakeman was thus declared unable to recover is examined, it will be seen that nothing more is meant than that the brakeman was still bound to perform his duty of inspection, so far as was practicable, and that the lack of opportunity for such inspection before the starting of a train would not excuse him for failing to make a due examination of the brakes while the train was on the road. It may fairly be said, therefore, that from the standpoint of this court the extent to which a rule as to inspection is to be treated as operative is really determined with reference to the ability of the servant to comply with such a rule, consistently with an efficient and reasonably expeditious performance of his work. That this is the actual effect of the doctrine laid down by the Illinois supreme court is apparently assumed by the court of appeals in that state, as it has decided, with reference to a notice declaring it to be the duty of an employee to know that the property with which he has to work is in good condition, that, if he used reasonable care to inform himself, considering the opportunities afforded him, and the appliance in question appeared safe, he cannot be charged with negligence on the ground of his having

failed to discover a defect. *M. O. R. Co. v. Harmes* (1893) 52 Ill. 649.

In a decision by one of the courts of appeal the dilemma of the servant is placed by his duty of a rule requiring inspection in as follows: If an inspection in compliance with the rule would have disclosed the defect from which the injury resulted, and he failed to do the prescribed examination, he cannot recover; while, if the defect was not so that a proper inspection would have disclosed it, his recovery is barred, as the accident was an risk of the service. *Alabama O. R. Co. v. Carroll* (1898) 28 C. C. 52 U. S. App. 442, 84 Fed. 77. This doctrine was enunciated in *to a foreign car, as to which the inspection made by employees is, as was said, "about the only one practicable."*

¹⁰*Beall v. Pittsburgh, O. & N. Co.* (1893) 38 W. Va. 525, 17 729 (brakeman injured by the failure of a nut to hold brake wheel standard); *Memphis & O. R. Co. v. Graham* (1891) 94 Ala. 545, 10 10 (fact that inspectors noticed the defect and failed to report it, held no excuse plaintiff). *Chicago & A. R. Co. v. Bragonier* (1886) 119 Ill. 51, 11 688, holding erroneous an instruction the effect that the employment of inspectors to examine the running gear of the cars, but who made examination on the top of the cars, relieved the deceased from the duty of observing whether the brakes needed repair, and that the rule was authority, as it was habitually regarded by the company.

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pliance with a rule, the appliance by which he was injured, was culpable.¹¹

¹¹ *Galveston, H. & S. A. R. Co. v. ment of switches*; *Bookrum v. Galres Nicholson* (1900; Tex. Civ. App.) 57 S. ton, *H. & S. A. R. Co.* (1900; Tex. Civ. W. 693 (engineer did not see that a App.) 57 S. W. 919 (servant did not switch was properly adjusted after his examine engine step, and slipped in con train had backed on to a siding, though sequence of its being covered with the company's rules provided that en-grease; rule required him to examine gineers were responsible for the adjust- all appliances before trusting them).

CHAPTER XXII.

RIGHT OF ACTION FOR INJURIES CAUSED BY DANGEROUS CONDITIONS WHICH THE MASTER HAD PROMISED TO GUARD AGAINST OR REMEDY.

- 418. Introductory.
- 419. Necessity of proving that a promise was given.
 - a. Generally.
 - b. Promise to furnish a new instrumentality.
- 420. Whose promise is binding on the master.
- 421. Recovery dependent upon proof that the servant was induced to continue working.
 - a. Generally.
 - b. Promise having no reference to the servant's safety.
- 422. Reliance upon promise given before work was begun.
- 423. Reliance upon promise given after the work was begun.
 - a. Generally.
 - b. Sufficiency of complaint.
 - c. Admissibility of evidence.
- 424. Rationale of the relations between the parties after the giving of a promise.
 - a. Responsibility for conditions temporarily undertaken by employer.
 - b. Presumption of waiver by servant rebutted.
 - c. Servant absolved from charge of contributory negligence.
- 425. Assumption of risks as a defense.
 - a. During the period covered by the promise.
 - b. After the expiration of the period covered by the promise.
- 426. *Volenti non fit injuria*, as a defense.
- 427. Contributory negligence as a defense in cases where a promise was given; generally.
 - a. During the period covered by the promise.
 - b. After the expiration of the period covered by the promise.
- 428. Contributory negligence, as inferred from the gravity of the injury counteracted.
- 429. Contributory negligence, as inferred from the length of time the servant worked after the giving of the promise.

430. Illustrative cases.

431. Decisions restricting or ignoring the doctrine as to the effect of a promise.

432. Duty of servant to exercise care with respect to the defective instrumentality.

As to the necessity of showing that the breach of the promise was the approximate cause of the injury, see chapter XLIII., *post*.

418. Introductory.—It has already been explained that the fact of a servant's having entered or continued in an employment with knowledge of the abnormal risk to which his injury was due may be considered from two standpoints, *viz.*, as being indicative either of the conclusion that he had voluntarily undertaken that risk, or of the conclusion that he was guilty of contributory negligence in subjecting himself to that risk. See chapters XVII., XVIII., *ante*. It is manifest that the situation is not altered in these broader aspects where the work is continued for the reason that the servant is assured by the master, or by some agent authorized to speak for him, that steps will be taken to remedy the defective conditions to which the abnormal risk is traceable. That the promise was made and that the servant's conduct was influenced by it, are circumstances which merely introduce new factors into the investigation.¹ Both the defenses suggested by the servant's action in exposing himself to a new peril will therefore be equally available to the master, where he has undertaken to remove the cause of that peril.²

In this connection it may be remarked that, in cases of the type under consideration, as well as in those which do not involve the effect of a promise, the unfortunate ambiguity of the phrase "assumption of risks" has produced a confusion between the two defenses.³ See the discussion of this subject in §§ 309, 310, *ante*.

¹Adverting to the effect of such a promise in relation to the defense of contributory negligence, the court remarked, in *Union Mfg. Co. v. Morrissey* (1883) 40 Ohio St. 148, 48 Am. Rep. 669, that it takes the cases in which it is given out of the operation of the general principle that one who voluntarily and knowingly exposes himself to danger by using dangerous instruments cannot be said to be without fault.

²See *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 495, more especially the opinion of Crompton, J., who stated that he founded his judgment on two propositions, *viz.*, that there was no defense under

the principle of law laid down in *Priestly v. Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, and that the plaintiff had not contributed to his injury by his own negligence. The statement in the text is also supported by *Lewis v. New York & N. E. R. Co.* (1891) 153 Mass. 73, 10 L. R. A. 513, 26 N. E. 431; *Schlacker v. Ashland Iron Min. Co.* (1891) 89 Mich. 262, 50 N. W. 839, and many other cases cited in the succeeding sections.

³See, for example, *Schlitz v. Pabst Brewing Co.* (1894) 57 Minn. 303, 59 N. W. 188; *Roux v. Blodgett & D. Lumber Co.* (1891) 85 Mich. 519, 13 L. R. A. 728, 48 N. W. 1092; *Taylor v. Star Coal Co.* (1899) 110 Iowa, 40, 81 N.

The effect thus ascribed to a promise to remove a specific danger is analogous to that ascribed to an express or implied assurance that there is no present danger. See chapters XXIII., XXIV. Not infrequently, indeed, the evidence shows that the servant relied both on an assurance of present safety and on a promise to remove the dangerous conditions.*

An analysis of the decisions involving the effect of a promise to remove a danger shows that the servant is deemed to have no cause of action unless he can prove the following facts:

(1) That a promise was given, either to the effect that the dangerous condition which caused the injury would not be permitted to continue into existence, or that such condition would be remedied.

(2) That the promise was given either by the master himself or by some agent authorized to make it in his behalf.

(3) That the servant's reliance upon the promise was the inducing motive for his consenting to subject himself to the given risk.

If these facts are satisfactorily proved the master may still be held liable by establishing one or other of the following propositions:

(1) That the servant was chargeable, in spite of the promise, with an assumption of the given risk.

(2) That the servant was chargeable, in spite of the promise, with contributory negligence in having undertaken, or in having consented to perform, the work in question.

(3) That, in view of his knowledge of the risk to which he was exposed, the servant did not exercise proper care in performing his duties which he undertook or continued to perform after the promise was given.

419. Necessity of proving that a promise was given.—a. General principle.—As there must have been something amounting to a promise or assurance to the master it follows that a simple protest or complaint by the servant, if not followed by an assurance that the defect will be remedied,

W. 249. "Where the master promises or gives the servant reasonable ground to infer or believe that the defect will be repaired, the servant does not assume the risk of an injury caused thereby within such period of time after the promise . . . as would be reasonably allowed for its performance, unless the danger is so palpable, immediate, and constant, . . . that no one but a reckless person would expose himself to it, even after receiving such promise or assurance." *Virginia C. Wheel Co. v. Chalmy* (Va. 62, 34 S. E. 976).
* *Hawley v. Northern C. R. Co.* 82 N. Y. 370; *Flynn v. Kansas J. & C. B. R. Co.* (1883) 78 47 Am. Rep. 99; *Senzikowski v. Cormick Harvesting Mach. Co.* 58 Ill. App. 418; *Reddon v. R. Co.* (1887) 5 Utah, 344, 15 Miller v. Bullion-Beck & Co. (1898) 18 Utah, 358, 55 Pac.

not cast the responsibility upon the master.¹ Much less will the responsibility be shifted where the complaint is merely that the certain defect increases the difficulty of the work, and not that it is dangerous.² Nor will that result follow where there has been merely a surmise or expectation on the servant's part, based on no specific promise.³ In order to entitle the servant to recover, the master or his representative must have said something which could reasonably be construed as a stipulation to prevent or to remedy the dangerous conditions in question.⁴ But the mere fact that no formal promise was given is not sufficient to exclude the inference of an agreement by the master to furnish or restore normally safe conditions. Any acts or expressions by which the servant gives the proper agent of the employer to understand that he is unwilling to continue in the employment, unless the cause of the danger is removed, constitute a sufficient complaint; and any acts or expressions by which such agent gives the servant to understand that the cause of the danger will be removed, constitute a sufficient promise.⁵ Even a conditional promise

¹ *East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 67, 47 Am. Rep. 319; *Texas & N. O. R. Co. v. Bingle* (1895) 9 Tex. Civ. App. 322, 29 S. W. 674; *Weld v. Missouri P. R. Co.* (1388) 39 Kan. 63, 17 Pac. 306; *Alexander v. Tennessee & L. C. Gold & S. Min. Co.* (1884) 3 N. M. 255, 3 Pac. 735; *Galveston, H. & S. A. R. Co. v. Drew* (1883) 59 Tex. 10, 46 Am. Rep. 261. See, generally, § 290, *ante*.

² *Balle v. Detroit Leather Co.* (1889) 73 Mich. 158, 41 N. W. 216. Compare § 421, subd. b, *infra*.

³ *McKelvey v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 500, 14 S. E. 261; *Southern P. Co. v. Leash* (1893) 2 Tex. Civ. App. 68, 21 S. W. 563.

⁴ A promise cannot be implied where the only remark made by the master's representative in regard to the defective appliance was more in the nature of a rebuke for using it in its then condition than an assurance that it would be repaired. *Shackeltor v. Manistee & N. E. R. Co.* (1895) 107 Mich. 16, 64 N. W. 728 (assistant superintendent, on being informed by a freight conductor that a hand rail was missing on a car, told him to "get it fixed"). A servant cannot recover where the evidence merely shows that he put to his foreman the question: "Why not get a new wire rope?" and that the fore-

man remarked: "That might do." *Purcell Mill & Elevator Co. v. Kirkland* (1898) 2 Ind. Terr. 169, 47 S. W. 311. The fact that the master mechanic of a railway company, when replying to a complaint as to the construction of a car, stated that it ought not to be made use of for coupling with the coupling apparatus on other cars, is not evidence of an assurance by the defendant that its use would be discontinued. *Ft. Wayne, J. & S. R. Co. v. Gildersleeve* (1876) 33 Mich. 133. A promise to get a new hand car, which will relieve a railroad employee's use of a defective car from constituting contributory negligence, is not established by evidence that the foreman directed the employee to use the car with great care until he could get a new one, and that he expected a new one at any time. *McAndrews v. Montana Union R. Co.* (1895) 15 Mont. 290, 39 Pac. 85.

⁵ *Picart v. Chicago, R. I. & P. R. Co.* (1891) 82 Iowa, 148, 47 N. W. 1017. A notification issued to engineers by the master mechanic, directing them to modify their speed on a certain section of the road "until the track can be got into better condition," operates as a declaration that the defects will be remedied, and an engineer has a right to rely on such an assurance. *Flynn*

will be sufficient, in some cases, to fasten responsibility upon the master.⁶ But the servant is, of course, not justified in relying upon a promise, where it is made by a fellow employee who has admitted that he could not do what was required without direction from some superior officer.⁷ See § 420, *infra*.

Reason and analogy are in favor of the position expressly taken in one case that, in order to justify a servant in relying upon his master's promise to repair defective machinery, it is not necessary that any time for making repairs should be fixed, as a reasonable time will be implied in the absence of an express arrangement.⁸

It is not necessary that the promise should have been addressed to the plaintiff individually, provided it was made in his presence, and the stipulated repairs would have removed a danger to which he was exposed.⁹

Whether there was actually a promise to remove the danger is a question for the jury, when it is a matter of implication.¹⁰

b. Promise to furnish a new instrumentality.—There is apparently no adequate ground upon which it can be maintained that a promise to furnish other instrumentalities in place of those from which the servant apprehends danger should not be deemed equivalent to a legal effect to a promise to remedy a defect in some instrumentality the use of which is to be continued. Such equivalence has been asserted or taken for granted in several cases.¹¹ But in some cases

v. Kansas City, St. J. & C. B. R. Co. (1883) 78 Mo. 195, 47 Am. Rep. 99.

⁶ It has been held that where the servant complained of the incompetency of his foreman, and was told that, if such foreman did not do better in the future, he would have to be discharged, it was for the jury to say whether the servant was negligent in remaining in the defendant's employ. *Laning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417.

⁷ *Wilson v. Winona & St. P. R. Co.* (1887) 37 Minn. 326, 33 N. W. 908.

⁸ *Swift & Co. v. Madden* (1897) 165 Ill. 41, 45 N. E. 979, Affirming (1896) 63 Ill. App. 341.

⁹ *Atchison, T. & S. F. R. Co. v. Sadler* (1887) 38 Kan. 128, 16 Pac. 46; *Alton Lime & Cement Co. v. Calvey* (1892) 47 Ill. App. 343.

¹⁰ *Stoutenburgh v. Dow, G. H. Co.* (1891) 82 Iowa, 179, 47 N. W. 1039.

¹¹ *Pieart v. Chicago, R. I. & P. R. Co.* (1891) 82 Iowa, 148, 47 N. W. 1017;

Atchison, T. & S. F. R. Co. v. L. (1895) 56 Kan. 109, 42 Pac.

Atchison, T. & S. F. R. Co. v. (1887) 38 Kan. 128, 16 Pac. 46.

City & P. R. Co. v. Finlayson 16 Neb. 578, 49 Am. Rep. 72.

W. 860; Gowen v. Harley (1887) C. A. 190, 12 U. S. App. 574.

973; *Chicago Drop Forge & Foundry Co. v. Van Dam* (1894) 149 Ill. 33.

E. 1024, Affirming (1893) 50 Ill. 470; *Southern Kansas R. Co. v.*

(1889) 41 Kan. 747, 21 Pac. 46.

In the recent case of *Schlitz Brewing Co.* (1894) 57 Minn. 188, the court said: "In

which the rule has been applied in cases where there was a defect on the part of the master to remedy. But we can see no difference in principle between such cases those where, upon the servant's promise to continue the use, the master's own convenience and purpose induces the servant to continue

are intimations of a theory which would put promises of these two descriptions upon different footings.¹²

420. Whose promise is binding on the master.—In one case it was laid down that, in determining whether the injured servant was justified by a promise in continuing in his employment, the essential inquiry is not what authority the employee who gave the promise really possessed, but what authority the servant supposed him to have.¹ The soundness of this ruling, which is not sustained by any precedents, seems fairly open to question, unless—which is not apparent from the words of the opinion—it is to be taken as being subject to the qualification that a promise has no obligatory effect where the servant's supposition was not a warrantable one, in view of the circumstances upon

short time, upon the promise that the use of all be discontinued at the end of such time. What, for instance, could be the difference on the matter of assuming the risk between a promise to remedy the defects of this particular wagon and a promise to furnish another without such defects? We can see none."

An employee cannot be held to assume the risk of bolts protruding from a coupling of a revolving shaft notwithstanding a promise of the foreman to cover it, on the ground that such promise is not to repair an existing defect in the machinery, but to supply a new or additional appliance which the employer is under no obligation to furnish. *Homestake Min. Co. v. Fullerton* (1895) 16 C. C. A. 545, 36 U. S. App. 32, 69 Fed. 923.

¹² In *Sweeney v. Berlin & J. Envelope Co.* (1886) 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358, the court expressed its opinion, *arguendo*, that a promise which merely concerns a new appliance not attached to the particular machine whose sufficiency is complained of, nor to any machines of the same make, does not fall within the general rule, but it was held that, upon the evidence, there was no promise made, nor any inducement offered him, to take the risk, and the case was finally decided in favor of the defendant on the ground that the servant had simply been requested to continue working with an old machine of a certain type, with the peculiarities of which he had been familiar ever since he had begun work, and therefore assumed the risk of any injury which he might thereafter receive in a service

which he was at liberty to quit. Considering the actual ground of the decision, it seems not unreasonable to infer that these somewhat obscure remarks about the effect of the promise to furnish a new instrumentality are not to be taken in a general sense, but are intended to be applicable merely to a case like that before the court, in which it was considered that the master was not bound to improve the quality of the plant supplied.

In *Indianapolis Union R. Co. v. Ott* (1893; Ind. App.) 35 N. E. 517, it was held that a servant who, until the arrival of others which the master has promised to obtain, uses a lantern which he has ascertained to be defective, assumes the risk of injury as one thenceforth incident to the service, and is not in the same position as if he had used it until promised repairs should be completed. But that ruling was changed on rehearing (1894) 11 Ind. App. 564, 38 N. E. 842, 39 N. E. 529.

In *International & G. N. R. Co. v. Williams* (1896; Tex. Civ. App.) 34 S. W. 161, the court thought that the general principle as to the effect of a promise was not applicable where a section hand was told that a defect in a hand car would be remedied, and, having been transferred to another car, was injured by the defective car running into it.

¹ *Dells Lumber Co. v. Erickson* (1897) 25 C. C. A. 397, 46 U. S. App. 697, 80 Fed. 257 (no error in refusing to instruct that promise was not binding, unless the promisor was in charge of the concern "so as to represent the defendant").

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R. Co. v. Sadler 16 Pac. 46; *Stout v. Finlayson* (1884)

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said: "The cases been applied have

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which it was founded. The precise point thus decided does not to have been raised in any other case. So far as can be inferred from the language of the American courts, the theory upon which the decision is that a promise by an employee is or is not binding upon the employer, according as he had or had not, as a matter of fact, a duty to take such steps as were appropriate, under the circumstances, to secure the safety of the complaining party.² The essential question in this connection, therefore, is whether the party who made the promise was the agent of the employer or a mere fellow servant. From this point of view a binding effect may be ascribed to a promise

¹This principle is laid down in *Ehmcke v. Porter* (1891) 45 Minn. 338, 47 N. W. 1066.

The employer has been held liable for the promise of the undermentioned employees as respects the matters referred to:—Of a general superintendent of a factory to put in a new floor, to replace one which has become dangerously slippery (*Weber Wagon Co. v. Kehl* [1892] 139 Ill. 644, 29 N. E. 714, Affirming [1891] 40 Ill. App. 584); of a railway superintendent to repair a switch (*Patterson v. Pittsburg & C. R. Co.* [1874] 76 Pa. 389, 18 Am. Rep. 412); of an assistant general roadmaster, to repair a switch (*Lake Shore & M. S. R. Co. v. Winslow* [1894] 10 Ohio C. C. 193); of a yardmaster to have running boards put on a yard engine (*Picart v. Chicago, R. I. & P. R. Co.* [1891] 82 Iowa, 148, 47 N. W. 1017); of a section foreman to supply new tools (*Atchison, T. & S. F. R. Co. v. Sadler* [1887] 38 Kan. 128, 16 Pac. 46); of a conductor, that a defect in a car will be repaired (*Louisville & N. R. Co. v. Kenley* [1893] 92 Tenn. 207, 21 S. W. 326); of a foreman in charge of the work in which certain machinery is used, to remedy a defect therein (*Ray v. Diamond State Steel Co.* [1900] 2 Penn. [Del.] 525, 47 Atl. 1017); of a foreman with power to discharge an incompetent servant, that he will be replaced by another (*Galveston, H. & S. A. R. Co. v. Eckols* [1894] 7 Tex. Civ. App. 229, 26 S. W. 1117; *Wust v. Erie City Iron Works* [1892] 149 Pa. 263, 24 Atl. 291; *Little v. Chicago & W. M. R. Co.* [1890] 1 Mich. 289, 47 N. W. 571).

On the other hand, the master is not bound by the promise of an employee who merely makes repairs which have been determined upon by a person in

authority (*Ehmcke v. Porter* [1891] Minn. 338, 47 N. W. 1066); nor by the promise of an agent other than the master, to whom the servant knew to be in charge of such matters (*Chesapeake, O. & A. R. Co. v. McDowell* [1894] 16 W. Va. 1, 24 S. W. 607); nor by the promise of an employee who is a mere fellow servant acting under the instruction of the plaintiff himself, and not as the representative of the master, qualified to give directions as to the continued use of a defective appliance (*Shackleton v. Boston & N. E. R. Co.* [1895] 100 Mass. 10, 64 N. W. 728).

There was held to be no promise by the master as the rule contemplates, where a foreman to whom a yardmaster had authorized to improve a defective track in the yard, so as to lessen the risk, notified the plaintiff that he could not do it without the consent of his superior, but, upon the plaintiff's subsequent application, promised to do it "that he would do it if he had time some Saturday afternoon." *Winona & St. P. R. Co.* (1887) 33 Minn. 326, 33 N. W. 908.

It is error to give an instruction which assumes that an employee is the representative of a railroad company, in matters regarding the repairing of electric machinery, used to facilitate the work of unloading iron from a car onto a steamer, where his promise to repair one of them was made to the company, where another employee was shown to have been in control of the entire work, and no evidence was offered to prove that the former employee was vested with any other authority than of overseeing the loading of the train. *Gulf, C. & S. F. R. Co. v. Ford* (1891) 79 Tex. 619, 15 S. W. 271.

²*Jones v. New American* (1898) 21 R. I. 125, 42 Atl. 508.

does not seem inferred from which they proceed upon the fact, author circumstances, essential question who made the servant.³ In a promise, al

Porter (1891) 45 Mich. 260; nor by the other than the one to be in charge *Peake, O. & S. W.* (1894) 16 Ky. L. nor by the prom is a mere fellow ne instructions of and not a repre a qualified to give continued use of the *Backelton v. Man-* (1895) 107 Mich.

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e an instruction employee was the broad company as of electric lights work of loading steamer, and that one of them bound othor employee is in control of the evidence has been the former em- a any other power e loading of the *P. R. Co. v. Brent* 119, 15 S. W. 561. *American File Co.* 2 Atl. 509.

though the promisor was not a vice principal by virtue of his superiority of rank. See chapters xxviii.-xxx., *post*.⁴ But no right of action can arise out of a promise made by a fellow servant, whether a superior or not, with regard to the mere details of the work.⁵

The question whether the employee in question was authorized to make the alterations requisite to secure the servant's safety is for the jury, whenever evidence has been adduced which is reasonably susceptible of the construction that he was so authorized.⁶

In jurisdictions where the doctrine prevails that every employee, however high his rank, is a mere fellow servant of his subordinates in respect to acts done in carrying on the business (see chapter xxix., *post*), it is evident that the master is bound only by a promise which he has himself made.⁷

The master is liable for the nonperformance of a promise made by his representative, although the servant who received the promise may have requested certain of his fellow servants to take steps for his protection similar to those which the master's representative had agreed to take.

⁴ A promise given by the day foreman of a mine to an employee to cover a coupling of a revolving shaft, which has protruding bolts, dangerous to such employee while in the discharge of his duties, has the same effect as a promise given by the employer, and relieves the employee from an assumption of the risk attending such coupling, since it is within the authority of such foreman to cause the shaft to be covered. The position of the court was that such an act does not require a previous conference with the general superintendent, or the master mechanic, because it does not involve any alteration of the machinery, or interfere to any extent with its operation. *Homestake Min. Co. v. Fullerton* (1895) 16 C. C. A. 545, 36 U. S. App. 32, 69 Fed. 923.

⁵ A statement by a foreman that he intended to move the machinery slowly was not a promise or a warranty of the master that defects would be cured or dangerous places made safe. *Dwyer v. Nixon* (1901) 47 C. C. A. 666, 108 Fed. 751. A servant who asks to have a saw reset and is told by the employee intrusted with that duty to go on working until noon, when he will see what he can do, cannot recover for injuries which he receives before that hour. The neglect, if any, is in a detail of the

management of the machinery, not in a duty of the master. *Wehber v. Piper* (1888) 106 N. Y. 496, 17 N. E. 216. Affirming (1885) 38 Hun. 353.

⁶ *Swift & Co. v. O'Neill* (1900) 187 Ill. 337, 58 N. E. 416, Affirming (1900) 88 Ill. App. 162.

⁷ *Smith v. Howard* (1870) 22 L. T. N. S. 130 (complaint to and promise by foreman not sufficient). In *Allen v. New Gas Co.* (1876) L. R. 1 Exch. Div. 251, 45 L. J. Exch. N. S. 668, 34 L. T. N. S. 541, the court seems to have assumed that a manager's whole duty is performed if he gives directions to repair a defective appliance. The promise here had been given a "considerable time" before the accident, but its effect was not specifically considered.

These decisions embody the doctrine established in *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, which must be taken to have destroyed *pro tanto* the authority of *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 10 Week. Rep. 405, 8 Jur. N. S. 992, in which it was expressly held by Byles, J., and assumed by the other judges, that a promise made by a manager of a factory was equivalent in law to the promise of the employer himself.

⁸ Where a foreman in a car-repairing

421. Recovery dependent upon proof that the servant was induced by the promise to continue working.—*a. Generally.*—After the servant has shown that there has been a promise, actual or implied, on the part of the master, and that this promise amounts to an undertaking to move, not only a danger, but a danger by which he himself is threatened, he still has the *onus* of proving that the inducing motive for his continuance in the employment was his reliance upon the fulfillment of the promise.¹ Recovery cannot be had where the only reasonable inference from the testimony is that the servant continued working because he relied on the master's promise, as given, but merely because of an expectation, based on the defendant's habit, that he would make the repairs in question.² But the mere fact that the servant has some suspicion that the master's assurances will not be made good is not enough to deprive him of his right of action.³

When complaining of defective instrumentalities or machinery, it is not necessary that the servant shall state in exact words that he apprehends danger to himself by reason of the defects, nor need there be a formal notification that he will leave the service unless the defects are repaired or remedied. It is sufficient if, from the circumstances,

the shop has promised to protect an employee while he is under a car for the purpose of making repairs, it is no excuse for the failure of the foreman to keep the promise that the employee also asked others to keep watch. *Missouri P. R. Co. v. Williams* (1880) 75 Tex. 4, 12 S. W. 835.

¹ *Showalter v. Fairbanks, M. & Co.* (1894) 88 Wis. 376, 60 N. W. 257. No recovery can be had where the evidence fails to show that the servant went on working in consideration of the promise. *Erdman v. Illinois Steel Co.* (1897) 95 Wis. 6, 69 N. W. 903. The testimony of the plaintiff that the defendant had promised to make certain repairs is not sufficient to show such reliance upon that promise as will rebut the presumption of an acceptance of the risk, where there is no evidence that the plaintiff complained of the defect as making his work more dangerous, or that he ever thought of quitting his job unless repairs were made. *Bodrell v. Nashua Mfg. Co.* (1900) 70 N. H. 390, 47 Atl. 613. A skilled machinist who on commencing work learned that the machine used by him was defective, and continued to work with it for five months without complaint, and who,

after making complaint to the foreman and being told that there was no time to make repairs, continued working for months, when he again made complaint to the general foreman and was told that it would be fixed after awhile when the machine was reached in the course of the repair, assumed the risk of an injury caused by such defect a week after complaint to the general foreman. *Ball v. Detroit, G. H. & M. R. Co.* 114 Mich. 135, 72 N. W. 145.

² *Southern P. Co. v. Leash* (1898) 10 Tex. Civ. App. 68, 21 S. W. 563. Instruction which tells the jury they must find for the plaintiff, if they believe the evidence that the plaintiff, at the time of the injury, "had reasonable grounds to believe that the defect would immediately cure the defect," has been held misleading and prejudicial to the defendant, as it leaves the jury to infer that the servant may recover if his belief that the defect would be cured was a mere surmise or expectation of his own, based on no specific promise. *McKelvey v. Chesapeake & O. R.* (1891) 35 W. Va. 500, 14 S. E. 241.

³ *Weber Waggon Co. v. Kehl* (1899) 111 Ill. 644, 29 N. E. 714, affirming 40 Ill. App. 584.

was induced by the servant, and, on the part of the master, in undertaking to remove the defect, the inducement is the promise of the master to remove the defect, and the servant's reliance on the promise is the inducement.

machinery it is shown that he apprehended there be defects in the machinery, and the defects be such as to make it dangerous to work on it.

to the foreman, there was no time to make complaint, and was told that while when such on the course of work of an injury week after the foreman. *Hay v. R. Co.* (1897) 145.

Leash (1893) 2 W. 563. An injury where the jury must believe from the plaintiff, at the time the defect was discovered, that the defect was such as to make it dangerous to work on it, and the jury to recover, even if the defect would be removed, or the expectation of the master to remove the defect, is not a promise.

Leash & O. R. Co. (1892) 139 S. E. 261.

Kehl (1892) 139 S. E. 261.

Affirming (1891)

the case, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise.⁴

It is ordinarily for the jury to say whether the servant's reliance on a promise by the master induced him to continue work.⁵

That the servant's reliance on the master's promise was the efficient cause of the injury cannot be inferred where the evidence shows that the servant apprehended no danger from the particular service in which, pending the fulfillment of the promise, he was engaged when he received the injury.⁶ Nor does a promise inure to the benefit of the servant unless he was injured at a time and place covered by it.⁷

b. Promise having no reference to the servant's safety. — Several decisions are based upon the principle that a promise cannot be regarded as the inducing motive of the servant's continuance of work, unless it appears that the immediate purpose of the stipulated alterations was to secure more effectually his personal safety.⁸

⁴ *Rothenberger v. Northwestern Consol. Mill. Co.* (1894) 57 Minn. 461, 59 N. W. 531.

⁵ *Union Mfg. Co. v. Morrissey* (1883) 40 Ohio St. 148, 45 Am. Rep. 669; *Rothenberger v. Northwestern Consol. Mill. Co.* (1894) 57 Minn. 461, 59 N. W. 531.

⁶ See *Holloran v. Union Iron & Foundry Co.* (1896) 133 Mo. 470, 35 S.W. 260, where a servant engaged in moving a derrick across the uncovered girders on the first floor of a building, after the master had promised to furnish more planks, fell into the cellar by reason of his foot slipping from the girder, upon which he placed it without apprehending any danger therefrom.

⁷ A promise to shore up a part of a trench where the servant expects to be presently working will not entitle him to recover for injuries caused by an earthslide at that part of the trench where he was at work when he received the promise. *Showalter v. Fairbanks M. & Co.* (1894) 88 Wis. 376, 60 N. W. 257.

⁸ Where a promise is relied upon either as showing an express assumption of the risk by the master, or as affording a reasonable guaranty that the danger will be removed in time to prevent injury to the servant, it must be shown that what passed between the master and servant "had in view either a transfer of the risk from the servant to the master, or

the removal of the dangerous condition as a protection to the servant. In other words, the master should have induced the servant to waive his right to leave the dangerous employment, either by taking upon himself the responsibility for injuries which might result, or by leading the servant to believe that the duty to repair the appliances, or supply the deficiency, would be performed within reasonable time." *International & G. N. R. Co. v. Turner* (1893) 3 Tex. Civ. App. 497, 23 S. W. 146.

"No case . . . has gone so far as to hold that, where the servant does not complain on his own account, and continues in his employment with full knowledge of the risk, he can recover of the master, because the latter, when the defective condition was called to his attention by the servant, gave assurances, which did not induce the servant to remain, that the defect should be remedied." *Lewis v. New York & N. E. R. Co.* (1891) 153 Mass. 73, 10 L. R. A. 513, 26 N. E. 431, where it was held that no action could be maintained by a servant whose employment required him to go upon a pier which had become unsafe because of the decayed condition of the planking, and who continued in the service with full knowledge of the risk, although he complained of the defects on the ground that "someone was liable to get hurt," and received the mas-

422. Reliance upon promise given before work was begun.—

In few cases the courts have sustained the right of a servant to recover in cases where, before he entered the employment or undertook the work, he had received a promise that certain specific precautions would be taken to secure his safety. In some, at least, of these cases it would seem that the rights of the servant would have been the same even if the promise had not been given. But it is clear that, in every case, there may be the implied obligations of the master in a given instance to determine the actual extent of his duty after the promise has been given is governed by the scope of the express agreement evidenced by that promise.¹

master's assurance that they should be remedied. It was considered that the complaint was made entirely in the interest of the defendant, and referred only to the danger incurred by strangers.

The general rule as to the effect of a promise has no application to a case where neither the master nor the servant contemplated any additional danger to the servant in the use of the defective instrument, but only imperfections in the work done with it. *Tesmer v. Bachm* (1895) 58 Ill. App. 609. Followed in *Chicago Bridge & Iron Co. v. Hayes* (1900) 91 Ill. App. 269. Nor to a case where the remonstrance of the servant is merely to the effect that, with another appliance, the work would be easier, and he himself admits that, before the accident, he never thought that the work involved any danger. *Gowen v. Harley* (1893) 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 973.

An assurance given by the master that the number of hands will be increased will not relieve the servant of his assumption of the risk arising from the insufficiency of the number, where the master's promise was made in his own interest, and with reference to the more rapid despatch of his business, and not with a view to the protection of the servant, and to induce him to remain in the service. *International & G. N. R. Co. v. Turner* (1893) 3 Tex. Civ. App. 487, 23 S. W. 146. This decision was lately followed in another, where recovery was denied upon evidence which showed that the plaintiff, a brakeman, upon an objection being made by the defendant's agent to hauling a car with a defective drawhead, replied that he hoped the drawhead would break, as the

defendant would then have to replace that orders were thereupon given to repair it immediately, but that the man continued to use it for several days. *Industrial Lumber Co. v. Son* (1900) 22 Tex. Civ. App. 101, 1 S. W. 362.

¹ A railway company has been held liable for injuries caused by exposure to extreme cold, where the servant had sent, in an emergency, to clear the snow from the track, and had to go until he had received an assurance that provision would be made for his protection. *Hyatt v. Hannibal J. R. Co.* (1885) 19 Mo. App. 2. A corporation engaged in putting in appliances to move cable cars is liable for injuries to its employee from running of a car over the line where it was under the track in the performance of his duty, where he acted in reliance upon the statement of the foreman that he was superintending the work and that the car would pass until a time considerably later than the time of the accident. *Floettl v. Third Ave. R. Co.* (1893) 18 App. Div. 308, 41 N. Y. Supp. 7. A ship owner is liable for injuries resulting from his violation of a promise to station a man at the hatch of a ship in order to protect laborers in the while the loading is going on. *C. v. Ocean S. S. Co.* (1893) 92 C. 19 S. E. 33. A servant who is told that a boiler which he is to repair be ready for him at a certain time in the absence of any notice to the contrary, rely upon such assurance, the master is liable for an injury occasioned to him by reason of his failure to keep his promise. *Kevance Co. v. Erickson* (1898) 78 Ill. A.

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423. Reliance upon promise given after the work was begun.—
a. Generally.—Stated in its most general form, the doctrine applied by most of the courts is simply this: If it is a reasonable inference from the testimony that the inducing motive of the servant's continuance in the employment was his reliance upon a promise that the dangerous conditions would be remedied, the mere fact that the servant knew of and appreciated the abnormal risk which caused his injury will not warrant a court in declaring that his continuance in the employment rendered him chargeable, as a matter of law, with an assumption of that risk, or with contributory negligence.¹

The doctrine may also be expressed in language which emphasizes the consideration that it is an exception ingrafted upon a general principle.²

¹ "If machinery upon which a servant is employed has become dangerous, and the servant has complained of it, and has been promised that it shall be repaired, but is injured before the defect is remedied, and while he is reasonably expecting the promise to be performed, the promise is a circumstance to be considered by the jury in determining whether he has assumed the risk in the meantime, and whether he was using due care in working when he knew there was danger." *Ceunsell v. Hall* (1888) 145 Mass. 468, 14 S. E. 530. Compare also *Greene v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. 378; *Gulf, C. & S. F. R. Co. v. Donnelly* (1888) 70 Tex. 371, 8 S. W. 52. *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447, 67 N. W. 358.

An instruction that, if a servant relied upon the promise of his master to repair a defective appliance, and continued in the employment a reasonable time to permit the master to repair the appliance, he was not guilty of negligence in so doing,—is not erroneous, although it might have been better to inform the jury that, under the circumstances, the servant had a right, under the law, to continue in the employ of the master, relying upon his promise. *Donley v. Dougherty* (1898) 174 Ill. 582, 51 N. E. 714, Affirming (1898) 75 Ill. App. 379.

An instruction is not bad for the reason that it bases a master's liability for an injury sustained by his servant upon his failure to repair a defect com-

plained of by the servant within a reasonable time after receiving notice, instead of within a reasonable time after promising to repair, where the notice and promise were made at the same time. *Consolidated Coal Co. v. Bokamp* (1898) 75 Ill. App. 605 (notification that roof was in a dangerous condition was given three days before the accident).

² In one case it was said that the rule that a servant accepts the ordinary risks of his employment, and of defects in machinery and appliances of which he knows, does not apply to one who has informed his employer of such defects, and only continues in the employment for a reasonable time. *Lyttle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571. In another case the court remarked that the general rule that the servant assumes, not only the ordinary risks of the employment, but also those superadded by the negligent omissions of the master, where they are known to the servant, is modified where the servant, upon his discovery of a danger arising from such an omission, complains to the master and receives such promises or assurances as to make it reasonable for him to assume that the deficiency will be supplied before he is exposed to injury from it. *International & G. N. R. Co. v. Turner* (1893) 3 Tex. Civ. App. 487, 23 S. W. 146.

See also the following passage, where the standpoint is the same: "Employees on entering into a hazardous employment take the ordinary risks attending that service; but when servants com-

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The rule thus formulated is applicable to cases in which the defective conditions were due to the original construction of the plant, as well as to cases in which those conditions supervened while the plant was being used.³ Nor is its operation confined to latent defects, but extends merely.⁴

In cases where a promise has been given the evidence usually shows that the attention of the master had been called to the existence of the danger by the servant whose safety is menaced by it; and formal exceptions of the general rule commonly refer to the circumstance that the servant has notified the master of the dangerous conditions which he desires to have remedied.⁵ But it is clear, upon principle, that the remedial action of this kind on the servant's part is by no means necessary to fix his rights. A promise given by the master *proprio motu* obviously possess the same virtue and efficacy as one given in response to a complaint by the servant.

Before the master can be held liable as for a failure to perform a promise to remove a specific danger, it is clearly necessary to show that the existing conditions were of such a nature that their maintenance implied culpability.⁶

plain of what appears to them to be an impending peril in a position to which they have been ordered, and they notify the master of the danger, and ask to be relieved, the master cannot refuse to relieve them, insist upon their continuing the work in that position, and, where they remain at his direction, waiting for an inspection which he has promised but neglected to make, relying upon his promise and superior judgment, and fearing the consequences of disobedience, and are injured, be then allowed to say: 'You were guilty of contributory negligence in doing what I directed you to do,' or, 'You assumed that risk when you entered my employment.' Under such circumstances, employees cannot be said to have either heedlessly or voluntarily assumed the risk." *Schlacker v. Ashland Iron Min. Co.* (1891) 89 Mich. 262, 50 N. W. 839.

³ *Swift & Co. v. O'Neill* (1900) 187 Ill. 337, 58 N. E. 416, Affirming (1900) 88 Ill. App. 162.

⁴ *McFarlan Carriage Co. v. Potter* (1892) 153 Ind. 107, 53 N. E. 465, Reversing on rehearing (1898; Ind.) 5 Am. Neg. Rep. 132, 52 N. E. 209, which reverses (1898) 21 Ind. App. 692, 51 N. E. 737, the court said: "A promise

to repair is confession to a breach of duty, and when a master, to right himself, requests and induces a promise either for convenience or to avoid no principle of justice will lay the burden of delay upon the unoffending servant. The whole question is based upon the wrong of the master, and not upon the sophistry to argue that the servant is confiding in his master's promise. It is a reasonable time in which to effect repairs of defects, clearly obvious though they may be, should be chargeable with having the master's duty to him, and not with the additional risk himself."

⁵ See, for example, *Woodward v. Jones* (1885) 80 Ala. 123; *Mfg. Co. v. Morrissey* (1883) 3 St. 148, 43 Am. Rep. 669; *Furnace Co. v. Abend* (1883) 41, 47 An. Rep. 425; *Greene v. Indianapolis & St. L. R. Co.* (1883) 324, 47 Am. Rep. 785, 17 N. W. Counsell v. Hall (1888) 145 Ma 14 N. E. 530, note 1, *supra*.

⁶ Recovery has been denied on the ground that, as the absence of a defect on a angle is not a defect, the employer could not be held liable on the ground that he had promised to guard. *Higgins v. Fanning*

Ordinarily the protection afforded by the promise of a master to repair defective machinery is not postponed until after the arrival of the time at which the promise is to be performed, but commences as soon as it is made.⁷ But if the master has merely made a qualified promise to remedy a defect after the expiration of a certain period, and not till then, the servant cannot recover for an injury received before the end of that period.⁸

Under ordinary circumstances a promise to protect a servant from a certain risk is construed as being merely an engagement that the dangerous conditions will be remedied, so far as that result depends upon the performance of the master's personal duties; not that the sporadic and occasional acts of negligence of servants, which he did not directly control, would not occur again.⁹

b. Sufficiency of complaint.—Any complaint which alleges substantially that the servant remained in the employment for a reasonable

195 Pa. 599, 46 Atl. 102. An employer is not liable where the elevator, in running which the operator was injured, was not out of repair, and was of a kind in ordinary use, though the operator had told the master's superintendent that there should be guards at the sides of the elevator, and the superintendent had promised to provide them. *Leonard v. Herrman* (1900) 195 Pa. 222, 45 Atl. 723 (there the court laid it down that no promise made by the master's superintendent "can give rise to a duty not recognized by law").

Where a floor has always been in the same condition to the knowledge of a servant, the fact that an engineer in charge of boilers led a person employed to assist in shoveling coal under the boilers and to keep their fronts clean, to believe that a new floor would be put in, does not affect the employer's liability; for even if the engineer was authorized to speak for him,—which was not shown in this case,—his promise under such circumstances would have been without consideration or binding force. *Nealind v. Lynn & B. R. Co.* (1899) 173 Mass. 42, 53 N. E. 137.

An employee of an independent contractor engaged by a railroad company to load slack on cars cannot recover from the company for personal injuries caused by the falling of a piece of slack upon the ground that he relied upon the company's promise, made to the contractor's employees, to cool the top of

the pile with water, since the promise to repair is only important to rebut the inference that defects are waived by continuance in employment with knowledge of their existence, and, as the company had omitted no duty, the employee waived nothing by continuing in the contractor's employment. *Branstrator v. Krokuk & W. R. Co.* (1899) 108 Iowa, 377, 79 N. W. 130.

In a New York case it was held that, even if the evidence had shown that a promise had been given,—a conclusion which was declared to be unwarrantable,—no obligation was imposed by it, as the machine had remained unchanged since the beginning of the servant's engagement and the master was not bound to furnish a better one. *Sweeney v. Berlin & J. Envelope Co.* (1886) 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358.

McFarlan Carriage Co. v. Potter (1899) 153 Ind. 107, 53 N. E. 465. Reversing on rehearing (1898: Ind.) 5 Am. Neg. Rep. 132, 52 N. E. 209, which reverses (1898) 21 Ind. App. 692, 51 N. E. 737.

⁷ As, where the promise was to repair a defect in machinery as soon as the "present order" was run out. *Standard Oil Co. v. Helmick* (1897) 148 Ind. 457, 47 N. E. 14, distinguishing cases in which there is a promise to repair generally, i. e., within a reasonable time. See § 429, *infra*.

⁹ On this ground recovery has been denied where, after the master had

time in reliance upon a promise by the defendant to remedy the dangerous conditions is good against a demurrer.¹⁰

On the other hand it has been held in one case that a complaint which fails to allege that the plaintiff relied on the promise to repair or that a reasonable time for repairing had elapsed after the promise was made, will be held bad on special demurrer, but is sufficient for a verdict;¹¹ and in another case that a complaint relying on a promise by the master to remedy a defect is demurrable, unless it alleges that after the promise, a reasonable time had elapsed before the accident for the master to have remedied the defect.¹² But the propriety of thus requiring an averment with respect to the expiration of a reasonable time appears to be quite disputable.¹³

promised a servant employed on a building to protect him from falling material, he was injured by a plank which a fellow servant allowed to drop upon him. *Vogt v. Honstain* (1900) 81 Minn. 174, 83 N. W. 533.

¹⁰ *East Chicago Iron & Steel Co. v. Williams* (1897) 17 Ind. App. 573, 47 N. E. 26; *Brown v. Levy Bros.* (1900) 21 Ky. L. Rep. 1724, 55 S. W. 1079.

A declaration in an action by an employee against his employer for personal injuries, which sufficiently sets out the defect in the machine relied on, avers that the plaintiff notified the defendant of the defect and received a promise that it should be repaired, and that, relying thereon, he went on with his work, is not obnoxious to a demurrer on the ground that it shows that the plaintiff assumed the risk. *Jones v. New American File Co.* (1898) 21 R. I. 125, 42 Atl. 509.

The averment of a complaint in an action by a servant against a master for personal injuries due to a defective machine, that defendant had promised plaintiff that it would repair the machine upon the completion of the job upon which the plaintiff was then working, is sufficient to withstand a demurrer upon the ground that the promise is too uncertain and indefinite as to time of performance, although it does not appear how long it would take to complete the job; but defendant's remedy, if any, is by motion to make more certain. *McFarlan Carriage Co. v. Potter* (1899) 153 Ind. 107, 53 N. E. 465, *Reversing on rehearing* (1898; Ind.) 5 Am. Neg. Rep. 132, 52 N. E. 209, Which

Reverses (1898) 21 Ind. App. 692, E. 737. In the same case it was held that, as a plaintiff need not prove the facts alleged, and shows a prima facie right to recover if he establishes sufficient facts to constitute a cause of action, proof of a promise to repair is not material in which a rip saw was set, sufficient to support a recovery for personal injuries to a servant who continued in the employment in reliance on such promise, although the complaint alleges a promise to repair both the saw and the table, where there was no defect in the saw itself, and plaintiff was injured by the saw.

¹¹ *Consolidated Coal Co. v. B.* (1899) 181 Ill. 9, 54 N. E. 567, *affirmed* (1898) 75 Ill. App. 605. ¹² *Burns v. Windfall Mfg. Co.* 146 Ind. 261, 45 N. E. 188 (overruled). ¹³ The rationale of the Indiana case cited in the last note was that, the servant's knowledge of the defect was solely and independently of the promise.

A complaint which, in effect, alleges that the injured servant was induced to remain in the service by the promise of his foreman that a fellow servant whose incompetence he had complained of would be discharged is complete without a further averment that the plaintiff was injured, was ignorant of the fact that the incompetent fellow servant had not been discharged. To go to the merits would be to plead matters of evidence. *Galveston, H. & S. A. R. Co. v. ...* (1894) 7 Tex. Civ. App. 429, 26 S. W. 1117.

¹⁴ *Consolidated Coal Co. v. B.* (1899) 181 Ill. 9, 54 N. E. 567, *affirmed* (1898) 75 Ill. App. 605.

¹⁵ *Burns v. Windfall Mfg. Co.* 146 Ind. 261, 45 N. E. 188 (overruled).

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For other cases dealing with the sufficiency of the complaint, see § 423, note 8, *infra*.

c. *Admissibility of evidence*.—Evidence that the master or his representative promised to remedy the dangerous conditions in question cannot be introduced unless the promise is specially pleaded.¹⁴ But any evidence which fairly tends to show that the servant's action was induced by a promise which is averred in the complaint is relevant and competent.¹⁵

424. Rationale of the relations between the parties after the giving of the promise.—a. *Responsibility for conditions temporarily undertaken by employer*.—In the opinion of the present writer the most satisfactory theory seems to be that indicated by the following remark, which Byles, J., interjected during the argument of counsel in a leading case where the servant was injured by machinery left unfenced in contravention of the provisions of a statute: "While the machinery was fenced, was not this the contract of the plaintiff, 'I will work with fenced machinery'? After the fencing was broken, was not the contract, 'I will continue to work, if you will restore the fencing'?"¹

admitted, he must specifically aver facts which show that his case falls within the exception to the doctrine which declares such knowledge to be a bar to the action. The court said: "There is an entire absence of allegation as to the time appellee had known of the defect or had promised to repair it. It may have been during all the time that the appellant knew of it, or it may have been at the moment the car was started down the track to the pit, and when repair was impossible before the car went upon it." It would seem, therefore, that the conception entertained was that the responsibility for the defective conditions is not shifted to the master immediately after the promise is given, but only after the lapse of a reasonable period. If this is really the theory of the court, its correctness may well be questioned. No adequate logical reason can be suggested for the doctrine that the master's immunity is prolonged for a more or less considerable period after the promise has been given. The writer confesses his inability to perceive any satisfactory grounds upon which it can be argued that, in spite of the admission of culpability which is implied by a promise, the master should be allowed a period of grace dur-

ing which he will be exempt from liability if an accident occurs. The decision under discussion seems, moreover, to be inconsistent with the doctrine laid down by the same court in the *Potter Case*, cited in note 7, *supra*.

¹⁴ *Malm v. Thelin* (1896) 47 Neb. 686, 66 N. W. 650.

¹⁵ No error is committed where a servant is allowed to answer in the negative the question whether he would have gone to work if the defendant's superintendent had not promised to repair the defect. *Taylor v. Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249.

¹ *Cheske v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405. A similar point of view may possibly be ascribed to the supreme court of Maine which has stated the situation as follows: If it appears from competent evidence that an agreement of the servant, whether made by express words or by implication, to assume a risk has been canceled or terminated, that risk for the future falls back upon the master, and remains upon him until he establishes a new agreement or a renewal of the original agreement by the servant to assume the risk. Whether there has been such an agreement or renewal

In this point of view the effect of the promise is to bring into existence a new stipulation which operates so as to cast upon the master temporarily the responsibility for the particular risk in question. It must be admitted, however, that there is very little, if any, direct authority except that which has just been mentioned for explaining the rationale of the doctrine in this precise form.

All the courts are agreed that the essential effect of a promise to fasten the responsibility upon the master for a certain period. In some of the judicial statements of general principles this responsibility is assumed to follow from the continuance or revival of the liability of the employer which is deduced from the implied terms of the contract of hiring;² while in others—and these are far the most numerous—the language used is so far ambiguous that it is impossible to say with certainty whether the situation contemplated was that which arises from the substitution of another contract, or that which arises from the continuance or revival of the original one.³

is a question for the jury. *Dempsey v. Sawyer* (1901) 95 Me. 295, 49 Atl. 1035.

² See *Woodward Iron Co. v. Jones* (1885) 80 Ala. 123.

³ By giving a promise to make repairs "the master takes upon himself the responsibility of any accident that may occur during that period," i. e., until the repairs are completed. *Pollock, C. B., in Holmes v. Clarke* (1862) 6 Hurlst. & N. 349, 30 L. J. Exch. N. S. 135, 7 Jur. N. S. 397, 3 L. T. N. S. 675, 9 Week. Rep. 419. The views of the judges of the Exchequer Chamber were virtually to the same effect, but expressed in somewhat different language. See text at the beginning of this subdivision, and also subd. b, note 5, *infra*.

"The law charges the master with an assumption of the extraordinary risk pending his promise to repair." *McFarlan Carriage Co. v. Potter* (1899) 153 Ind. 107, 53 N. E. 465.

"The most logical reason of the rule is that, under such circumstances, it must be taken as understood between them that the continued use in the then condition of the instrumentality, being for the convenience and purposes of the master, is to be at his risk, and not at the risk of the servant." *Schlitz v. Pabst Brewing Co.* (1894) 57 Minn. 303, 59 N. W. 188.

"The reason why such a promise modi-

fies the rule which charges the master with risks resulting from defects which he has knowledge is that the master's obligation is a promise to repair less risk where the duty is, upon the master." *Texas & N. O. R. Co. v. [?]* (1895) 9 Tex. Civ. App. 322, 29 S. W. 674.

"The reason for this exception may be stated to be that, when the master has knowledge of the defects, and promises to repair the same, he implies to the servant to continue to work, and that he, the master, will take upon himself the responsibility of any accident that may occur during that period." *Chicago Anderson Lumber Co. v. Sobkowiak* (1894) 153 Ill. 573, 36 N. E. 572.

The reason of the rule is "that the promise of the master a new relationship created between him and the employee whereby the master impliedly promises that the servant shall not be liable for the risk for a reasonable time following his promise." *St. Louis & N. O. R. Co. v. O'Neill* (1900) 187 Ill. 303, 59 N. E. 416.

"The assurance of the employer that the danger shall be removed is an assumption by him that he will assume the risk incident to the danger for a reasonable time. It obviates the objection that the continuance of the servant's service was an implied engagement."

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So far as the servant's actual rights of action are concerned, it is obviously immaterial which of these theories is adopted. But in considering the subject from an abstract standpoint it is not amiss to point out that there seems to be one serious objection to the theory which is based upon the supposition that the original contract is kept alive by the promise. If this result be deemed to follow when the promise is given, it is difficult to offer any adequate reason for the distinction which must then be assumed to exist between the effect of an express promise as to the condition of the appliances, and the effect of the implied promise which the original contract conveys as to the same subject-matter. Prima facie it is decidedly illogical to ascribe to a contract, after its revival or renewal, a greater potency than it possessed in its original form. Nor have any of the authorities undertaken to explain away this apparent anomaly.⁴

him to assume such risks pursuant to the original presumption upon his entering the service." *Eureka Co. v. Bass* (1856) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216.

The master "assumes the whole risk for a reasonable time" after giving the promise. *Pleasants v. Raleigh & A. Air-Line R. Co.* (1886) 95 N. C. 195.

"If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume the risks." Cooley, *Torts*, p. 559. Quoted with approval in *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 225, 25 L. ed. 617.

In a Delaware case the jury were charged that, where a master promises to remedy defects in machinery, and the employee, relying on such promise, continues to use it for a reasonable time, he does so at the master's risk. *Ray v. Diamond State Steel Co.* (1900) 2 Penn. (Del.) 525, 47 Atl. 1017.

It has also been laid down that in cases of this type the presumption of an acceptance of the risk, arising from a continuance in the service, is rebutted. *International & G. N. R. Co. v. Turner*

(1893) 3 Tex. Civ. App. 487, 23 S. W. 146; *Galveston, H. & S. A. R. Co. v. Diez* (1883) 59 Tex. 10, 46 Am. Rep. 261.

In *Greene v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. 378, the court, after mentioning the various reasons assigned for the rule, favors the one which would place it on "the ground of a contract on the part of the employer . . . that if the servant continues in the service in the meantime, and until the defects are remedied, the employer, and not the servant, will assume the risks;" and observes that "if the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has, in law or natural justice, to insist that it shall be done at the risk of the servant, and not his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use, under a promise thereafter to repair it."

"This aspect of the question is thus discussed in *Gulf, C. & S. F. R. Co. v. Brentford* (1891) 79 Tex. 619, 627, 15 S. W. 561. "It would be difficult to find a principle on which to base a rule relieving a servant from obligation to use proper care for his own safety because the master had promised to repair a known defect which exposed him to danger, and had requested him to remain in a service known to be dangerous. It cannot be placed logically on the un-

b. Presumption of waiver by servant rebutted.—Another view is that the deduction which would normally be drawn, that he is intended to assume the new risk in remaining in a service in which that risk must be constantly incurred, is rebutted by evidence that the promise was relied on. In other words, that waiver of a common-law right of action which, apart from the promise, would be imputed to the servant, as a consequence of his continuance of work, will not be inferred where a promise has been given.⁵ This theory is essen-

equal situation of master and servant in a country in which all men are free to serve or not to serve any particular employer. If it be placed on the ground that the promise to repair and request to continue in the service rebut the ordinary presumption that the servant assumes the known risk incident to the given employment, it will be difficult to maintain it in a case in which the servant continues in the service with a knowledge that the defect has not been repaired, and that he is in constant danger from the use of the defective thing. If it be placed on the broad, but very indefinite, ground that justice and policy require such a rule, it will be difficult to give a reason why the same rule should not exist in all cases in which injuries result from the use of defective appliances or implements known by employer and employee to be defective, and their use dangerous; for the law implies an undertaking on the part of the employer to furnish reasonably safe machinery, implements, and appliances, and to repair them when out of order; and it implies a request to continue in the service, and to use them until notified that this is no longer desired, unless the employment is for a definite period. When there is no express promise to repair, or request to continue in the service, the employee assumes the risks incident to a service conducted with machinery, implements, or appliances known by himself as well as the employer to be defective and dangerous. This being true, it is difficult to perceive that there should be a difference, on grounds of policy or justice, between the liability of the employer based on an implied promise or obligation and request, and that based upon an express promise to repair, and request to continue in the service in any case in which the employee knows that the defect has not

been repaired, but continues to use the defective thing, or to work with something known to him to be needful to his safety. . . . When the cause of the injury is the direct act of the master or his representative, it can be said that the servant remaining in employment is the proximate cause of the injury, even though the servant has known that the master or his representative had frequently done the same or similar acts which imperilled his safety; for the act which in such cases causes the injury is the wrongful act of the master or of his representative, the result of the exercise of the master's power, and hence the proximate cause of the effect, from which the master ought not to be permitted to be free from liability on the ground that the servant knew he had, before the happening of the injury, done as that from which the injury resulted, but still remained in his service. The force of this reasoning is considerably impaired by the fact that the common-law assumption that the master is to be determined is whether the master tends to exempt the servant from charge of contributory negligence by exposing himself to danger, and the court proceeds to discuss the rights of the servant with reference to the defense of contractual acceptance of risks. The remarks of the court, though an exception in this one respect, are in judgment perfectly sound in so far as they emphasize the logical difficulty of ascribing any greater efficacy to an express promise, than to an implied promise, in a case where both promises are made by the same contracting party, and an express promise can have no greater effect than that of binding him to certain conditions which the promise itself requires him to maintain.

⁵In *Clarke v. Holmes* (1891) 15 Q.B. 414, 31 L.J. Exc.

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the same as that discussed in the preceding subdivision of this section, the only difference being in the standpoint with reference to which it is enunciated.

Servant absolved from charge of contributory negligence.—In case it has been observed that the reason upon which the rule as to the effect of a promise rests is that the promise "relieves the servant from the charge of negligence by continuing in the service after the discovery of the extra perils to which he would be exposed."⁶ As an exposition of the juristic situation, however, this form of statement is logically defective, inasmuch as it ignores the fact that the servant's continuance of work with knowledge of an abnormal risk is indicative not only of the conclusion that the servant was negligent, but also of the conclusion that he impliedly agreed to assume the risk. In some cases this defect is avoided by a form of statement in which mention is made both of the responsibility resting on the master and of the servant's exemption from the charge of contributory negli-

356, 8 Jur. N. S. 992, 10 Week. Rep. 405, we find Chief Justice Cockburn arguing as follows: "It was, indeed, strongly urged upon us, on the part of the defendant, that as the plaintiff, upon becoming aware that the machinery was no longer properly fenced, instead of refusing to go on, as he might have done, continued to perform his service with a knowledge of the increased risk to which he was exposed, he must be taken to have voluntarily incurred the danger, and is, therefore, in the same position as if he had originally accepted the service as one to be performed on unfenced machinery. I am, however, of opinion that there is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied. In the latter case, it seems to me that the servant by no means waives his right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfil his obligation." This conception of a promise, being an evidential factor which tends to rebut the inference of waiver, is also relied upon

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in the following cases: *Gorman v. Des Moines Brick Mfg. Co.* (1896) 99 Iowa, 257, 68 N. W. 674; *Picart v. Chicago, R. I. & P. R. Co.* (1891) 82 Iowa, 148, 47 N. W. 1017; *Union Mfg. Co. v. Morrison* (1883) 40 Ohio St. 148, 48 Am. Rep. 669; *Louisville & N. R. Co. v. Knicker* (1893) 92 Tenn. 267, 21 S. W. 326; *Powers v. Standard Oil Co.* (1898) 53 S. C. 358, 31 S. E. 276.

In a syllabus written by the court in a recent Kansas case, the somewhat singular language is used, that if the employer instructs the servant to go ahead and use certain defective tools, promising that he will send them in for repair, and the employee continues to use the tools under such promise, this is a waiver on the part of the company of the assumption of risk by the employee. *Missouri, K. & T. R. Co. v. Puckett* (1901) 62 Kan. 770, 64 Pac. 631. It is apprehended that the term "waiver" is properly, if not exclusively, applicable only to those cases in which a right of action is relinquished, and not to those cases in which a person sued does something which disables him from relying on a certain defense.

⁶ *Missouri Furnace Co. v. Abend* (1883) 107 Ill. 44, 47 Am. Rep. 425. Similar language is used in *Chicago Bridge & Iron Co. v. Hayes* (1900) 91 Ill. App. 269.

gence.⁷ But it seems to be decidedly preferable, in defining the effect of a promise with relation to the question of the servant's negligence, to say that the contract evidenced by the promise, whether be regarded as being entirely new, or as being simply a continuance of the original one (see subd. *a*, *supra*), differs from the ordinary contract of employment in this respect,—that, even in jurisdictions where the servant's continuance of work with knowledge of an abnormal risk is considered to render him chargeable, as a matter of course, with negligence, the inference of culpability ceases to be a *peremptory* one as soon as it is shown that the continuance of work was induced by a promise to remove the cause of danger.

425. Assumption of risks as a defense.—*a. During the period covered by the promise.*—An obvious corollary from the principle explained in § 424, subds. *a*, *b*, *supra*, is that, as long as the promise is running which is conceived to be covered by the promise, the defense of an assumption of the given risk cannot be relied upon by the master. This doctrine is affirmed or taken for granted in all the decisions cited at the place referred to.¹

It is not disputed that, if no specified time is designated by the promisor for the restoration of safe conditions, the suspension of the master's right to avail himself of this defense continues for a reasonable time.

¹ As, where it is said that the effect of a promise is to continue or revive the liability of the employer, and to absolve the employee from the imputation of contributory negligence, springing out of the continued service. *Woodward Iron Co. v. Jones* (1885) 80 Ala. 123. Or that evidence of the giving of a promise tends to rebut the inference of contributory negligence and of a waiver of the servant's right of action. *Powers v. Standard Oil Co.* (1898) 53 S. C. 358, 31 S. E. 276.

² That the servant's nonassumption of the given risk is essentially a conclusion of law, which may be drawn whenever it is clearly established that a categorical promise to remedy the defect was given, and no evidence has been introduced which can fairly be regarded as indicating that only a qualified responsibility was undertaken by the master, would seem to be the more rational doctrine, in view of the effect ascribed to a promise. But in one case the court seems to have adopted the broad theory that it is for the jury, even when such a promise

has been proved, to determine which party the risk lies. *Deming Sawyer* (1901) 95 Me. 295, 41035, where the plaintiff, who was injured at a saw, notified his employer that he would not continue working at its defective condition, and the employer promised to remove the defect at a more convenient time for him, but the plaintiff returned, and to run the saw as easily and carefully as he could, notwithstanding its defective condition: upon which the plaintiff, making no reply or other test, at once went back to work on the saw, as directed, and was soon afterwards injured thereby.

In this point of view it is difficult to see of notice that, under a statute providing that an assumption of the risk shall not be inferred, as a matter of law, from the mere fact that the servant was aware of the risk, it has been held by the jury to say whether such an assumption shall be inferred from evidence that a promise was given. *Bodie v. Clinton & W. C. R. Co.* (1901) 61 S. C. 29 S. E. 715.

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able period.² See §§ 429, 430, *infra*. The rationale of the relations created between the parties by the giving of the promise seems to require that, in determining whether this period had expired in the given instance, the mere fact that the servant had observed, some time after the promise was given, that the dangerous conditions had not been remedied, is not to be treated as a controlling element; and that, in spite of his knowledge that the fulfilment of the promise had been delayed, it may still be an open question whether he was not justified in continuing to perform his duties. But there is also some authority for the doctrine that the promise is no protection to a servant who observes, after the lapse of an appreciable interval, that the dangerous conditions still exist.³ This doctrine the present writer considers to be entirely untenable, for the reason that there is no apparent ground upon which it can be maintained, as a rigid and unvarying proposition of law, that the servant's knowledge which, *ex hypothesi*, had existed at the time when the promise was given, took on another evidential significance from and after the particular moment when he discovered once more that the risk still existed.⁴

² See *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216; *Swift & Co. v. O'Neill* (1900) 187 Ill. 333, 58 N. E. 416; both cited in § 424, note 3, *supra*.

³ Wharton, Neg. § 221. In *Gulf, C. & S. F. R. Co. v. Brentford* (1891) 79 Tex. 619, 15 S. W. 561, the court strongly indicated its preference for this theory.

The objection to the theory on this score is thus elaborated in *Texas & N. O. R. Co. v. Bingle* (1895) 9 Tex. Civ. App. 322, 20 S. W. 674: "It seems to us that such a view, unless it be limited to cases in which the servant has been guilty of negligence, disregards the effect of the promise of the master, as taking upon himself the risk incurred by the servant in doing the work. If the servant, by the promise, is at first justified in remaining in the service, and does not in so doing take upon himself responsibility of the danger incurred, how can it be said that he makes it his own when he continues to work with the defective appliance at the time he receives his hurt? Such a doctrine would entirely destroy the force of the promise as an assumption of responsibility by the master, and force the servant to stop working with the imperfect appliance, notwithstanding such promise, until the repair had been made. Of course, in supposable cases the servant may not be warranted in continuing to

use the machinery, though a promise to repair be made, for the danger may be so great and patent that no prudent man would incur it; or the servant may, by subsequent carelessness of his own, add to the risk assumed by the master, in either of which cases the promise to supply the defect could not avail him. But in our opinion the mere fact that the servant, acting under such a promise, knows at the time he receives his injury from the defective condition that it has not been removed, does not impose upon him the risk, any more than did his continuance in the service with knowledge of the defect at the time the promise was made. The opinion in the *Brentford Case* (see preceding note) deals mainly with the defense of contributory negligence, rather than with that of assumption of risk, and is not a decision of the point now under consideration, though there are expressions in the opinion which seem to controvert the exception to the general rule, arising from a promise to repair. A limitation, generally recognized, upon the doctrine that the promise to repair places the risk upon the master is that the servant can rely upon the promise only for a reasonable time for the master to comply with it; and must not himself be guilty of a want of due care contributing to his injury."

In those exceptional cases where the inference of an assumption of the risk is negative,¹ evidence showing that the servant's chance of work was voluntary (see § 302, *ante*), the fact that a promise was given manifestly does not affect the servant's position so far as it depends upon the availability of that defense.²

b. *After the expiration of the period covered by the promise.* It has been laid down that, if the time for the fulfilment of the promise had gone by before the accident, and the servant knew that the promise had not been performed, there is a very strong argument that he was no longer relying upon the promise, but had decided to take the chance. This qualified form of statement would seem to justify the inference that the inability of the servant to maintain the action is due to his own fault. This court not to be a conclusion of law, even where it appears that the accident occurred after the expiration of the period expressly or impliedly fixed for the fulfilment of the promise. If this is the meaning of the remark, the present writer ventures to express the opinion that such a doctrine is not a sound one. The master's acceptance of the responsibility is, *ex hypothesi* (§ 424, *supra*), merely temporary, and there is a manifest logical contradiction involved in a doctrine which would permit a jury to find that that responsibility still existed after the period during which he had agreed to undertake it had come to an end. The only rational view seems to be that, as soon as the period contemplated for the removal of the dangerous condition has terminated, the servant's position is precisely what it would have been if no promise had been given; that is to say, he reassumes the burden of the risk.

426. Volenti non fit injuria, as a defense.— Under the modern English doctrine that the question whether the action is barred depends upon the operation of the maxim, *Volenti non fit injuria*, is almost invariably left to the jury, one which is to be determined by the jury (see § 377, *ante*).

¹In a case where the servant was injured while working, subject to the provisions of a statute which provided that laborers who hired themselves out to serve on plantations had not the right of leaving the person who hired them, and that they could not be sent away by the proprietor until the term of their engagement had expired, unless good and just cause could be assigned, it was held proper to charge the jury that, if they found that the plaintiff had been employed under a contract for a specified time, and was discharging his duties under such contract, then and in that case it was immaterial whether the defendant, upon being informed of the incom-

petency of the assistant engineer, used to discharge him or refused to do so. *Fairier v. Carroll* (1883) 11 Ann. 699.

²*Canasell v. Hall* (1888) 14 Q. B. 470, 14 N. E. 530.

³*Illinois Steel Co. v. Mann* 170 Ill. 200, 40 L. R. A. 781, 417, Reversing (1896) 67 Ill. 319; *Trotter v. Furniture Co.* 101 Tenn. 257, 47 S. W. 425 (1898).

⁴In evidence sustained where the plaintiff had worked several days after the expiration of the time when a new appliance was to be furnished.

an assumption of the servant's conduct, the fact that a servant's position is not a defense.⁵

the promise. It is of the promise now that it has been held that he was not to take the risk.⁶ By the inference it is deemed by the court that it appears that the promise was not expressly or impliedly made. This is the meaning of the opinion in *the acceptance of the promise* is merely temporary, and in a theory of liability still existed. It had come to be as soon as the conditions were met, it could have been assumed the risk.⁷ The modern English law is barred by the most invariable rule (see § 377, *ante*), it is

ent engineer, promise or refused to do so. *Holl* (1883) 35 L. R. (1888) 145 Mass.

v. Mann (1897) 1 A. 781, 48 N. E. 67 Ill. App. 66. *G. R. Co. v. Duluth*, 67, 47 Am. Rep. *Signature Co.* (1898) W. 425 (demurrer where the servant was to have been

clear that a diminished importance attaches to the fact that a promise was given. In the ordinary type of cases it is a merely corroborative circumstance, which tends to sustain the justifiability of a conclusion which the jury usually has a right to draw, even if this element is not present.¹

In the United States no decision has, it would seem, been rendered in which the provinces of the court and jury have been delimited with special reference to this defense. Judging from analogy, it may be supposed that, in a case where it was advisedly relied upon, the juridical situation would be regarded as identical with that which would have existed if the defense of assumption of risks had been raised. See § 376, subd. *b*, *ante*.

427. Contributory negligence as a defense in cases where a promise was given; generally.—*a. During the period covered by the promise.*—The question whether a servant was guilty of contributory negligence in view of the testimony which is commonly produced in cases of the kind under review will be found to depend upon two considerations, *viz.*, whether the election to take the risk was prudent, and if so, whether due care was exercised by the servant in view of the fact that the employment involved an unusual amount of danger.¹ (See chapters XVIII., XIX., *ante*.) But some cases seem to disclose a confusion of thought upon the subject.²

It is manifest that contributory negligence of the latter description merely involves a special application of the general principle that everyone is bound to use that degree of care which the circumstances require, and as the danger covered by the promise is, *ex hypothesi*, greater than that which the servant would ordinarily be called upon to incur, the inquiry in cases dealing with this aspect of his conduct is merely whether he has exercised the increased degree of care de-

¹ See *Wallace v. Culter Paper Mills Co.* (1892) 19 So. Sess. Cas. 4th series, 915; *Foley v. Webster* (1892) 2 B. C. 138, in both of which the plaintiff was allowed to recover, although he fully appreciated the risk.

In one Australian case it was held that the maxim, *Volenti non fit injuria*, was a bar to the action where the servant had continued to use a defective boiler after receiving a promise that it would be repaired. *Simat v. Silva* (1887) 8 New So. Wales, L. R. (L.) 415. But this was decided before the modern English doctrine was established by the rulings of the court of appeal and the House of Lords, and is in any event irreconcilable with *Clarke v.*

Holmes (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405. See § 423, subd. *b*, *supra*.

² These two points are manifestly quite distinct, and are properly differentiated in *Counsell v. Hall* (1888) 145 Mass. 469, 14 N. E. 530.

³ See, for example, *Corcoran v. Milwaukee Gaslight Co.* (1892) 81 Wis. 191, 51 N. W. 328, where the court appears to waver between a theory which would deprive the servant of a right to recover on the ground of negligence in continuing to work, and the theory that he did not take appropriate precautions in view of the dangers of the situation.

manded by the increased peril. These cases will be reviewed in a later section (432), and our attention will first be given to those which exemplify the more special and characteristic effects of the promise, and illustrate that form of contributory negligence which consists in staying in a position which necessitates exposure to a continuous risk greater than a prudent man would consent to in the absence of the promise.

The general principle underlying the decisions is that the effect of the promise is merely to strengthen the servant's position in resisting the inference that might be drawn as to his want of care in exposing himself to the particular danger to which the promise related. The promise does not, *ipso facto*, entitle the servant to recover. The result would seem to follow, therefore, that the correct theory of the effect of a promise in this connection is simply this,—that in many instances in which, if the element of a promise were abstracted, a servant would have been held negligent, as a matter of law, the presence of the promise renders it necessary to submit the case to the jury.⁴ B

⁴ It has never "been held that the promise of a master to repair a defective machine or implement used in his business, and known by both [him and the servant] to be dangerous, will relieve the servant from the ordinary result of contributory negligence on his own part, though cases may be found in which stress was laid on the fact that such a promise was made." *Gulf, C. & S. P. R. Co. v. Brentford* (1891) 79 Tex. 619, 15 S. W. 561. Disapproving an instruction which permitted the plaintiff to recover merely by reason of his having continued to work in reliance on the promise, and without regard to the question whether he may not have been negligent in the premises. In another case an instruction was held erroneous which in effect declared, as a conclusion of law, that, if the master promised repairs, he was liable, without regard to the character of the defects, or the probability or improbability of danger, or to the question whether, all things considered, the plaintiff was or was not so negligent in continuing to work that he ought not to recover. *McKelvey v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 500, 14 S. E. 261. Compare *Counsell v. Hall* (1888) 145 Mass. 468, 14 N. E. 530; *International & G. N. R. Co. v. Williams* (1891) 82 Tex. 342, 18 S. W. 700, which are to the same effect.

⁵ In a leading case, where the court declared that, apart from the promise, the servant's continuance of work would have been negligence *per se*, the following language was used: "We may add that it was for the jury to say whether

the defect in the cow catcher was such that none but a reckless, utterly careless of his safety, man could have used the engine without removing it. If, under all the circumstances, and in view of the promise, the engineer, by not removing the engine, then the company will be excused for the omission to supply better machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect was under the circumstances, and as a matter of law, absolutely conclusive of want of due care on his part." *Hough v. P. R. Co.* (1879) 100 U. S. 25, 25 L. ed. 612, 617.

"As the risks to be incurred by a servant, under such circumstances (after a promise), are not assumed by him, but by the master, the loss falls upon the latter, unless the risk to the servant is so great that the effect of the law will forbid persons, under such a promise, to take it, and seek compensation in the courts; but, less, having taken it, the servant is not to be held negligent for his own carelessness in performing his duty, if he has increased the risk and contributed to his own injury. Although the promise may be given, the law does not relieve the servant of the duty to exercise ordinary prudence in using reasonable care for his safety. But in determining whether or not due care has been exercised in a given case, the promise has its natural effect upon a man's ordinary prudence as to be taken into consideration." *Texas & N. O. R.*

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doctrine upon the subject is usually enunciated in the unqualified form that the case is prima facie for the jury whenever it is proved that a promise was given.⁵

It is not very material, however, to determine which of these logical standpoints is to be regarded as the appropriate one. For practical purposes the adoption of either involves the result that, in order to preclude the servant from recovery, it must be shown that there is some special reason, apart from the mere continuance of work, for imputing to him contributory negligence. Whether there was such

Bingle (1895) 9 Tex. Civ. App. 322, 29 S. W. 674.

In another case the language used is that a servant who has been promised by the master that an incompetent and unsafe fellow servant shall be removed may remain for a time in the service, without being conclusively chargeable, as a matter of law, with contributory negligence, even though, without such promise, he would have been so chargeable. *Lyberg v. Northern P. R. Co.* (1888) 39 Minn. 15, 38 N. W. 632.

It has been aptly remarked that, relying upon the promises of a master to remove the cause of danger, "the most prudent workmen will often take risks, not merely on account of their own necessities, but in consideration of their employers, whose interests require their continued service." *Union Mfg. Co. v. Morrissey* (1883) 40 Ohio St. 148, 48 Am. Rep. 669.

"No doubt, a defect thus arising in machinery may be such that no man of ordinary prudence would run the hazard of working on it. If a jury should find that a party complaining had materially contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that a plaintiff who has materially contributed to his own injury, by his own negligence, cannot recover, although he may show negligence in the opposite party. But the question whether the injury of which a plaintiff complains is to be ascribed wholly to the negligence of the defendant, or whether the plaintiff has had any share in bringing it about, is one wholly for the jury. In the present case, the jury have determined this question in favor of the plaintiff, and we are bound by their decision." *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405. See also *Williams v. Whittall* (Q. B. D.; 1885) 2 Times L. R. 165, 80 L. T. Journ.

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reason in any given case is a question which involves a consideration of the two elements which indicate what may be termed the aggregate amount of the danger to which the servant has exposed himself by continuing work, *viz.*, the imminence and greatness of the peril, and the length of time during which the exposure to it has continued. On the one hand, the more serious the peril, the more rapidly will the permissible period of continuance run out. On the other hand, the fact that under the doctrine of probabilities some accident will sooner or later occur as a result of exposure to an even moderate peril, where it is constantly incurred, for a considerable period, justifies the assumption that, the longer the time that has elapsed without a fulfillment of the promise to remedy a defect, the more certainly has the ser-

(1896) 67 Ill. App. 332 (inadequate number of employees); *Texas & N. O. R. Co. v. Bingle* (1897) 91 Tex. 287, 42 S. W. 971, Denying Writ of Error in (1897) 16 Tex. Civ. App. 653, 41 S. W. 90, First Appeal (1895) 9 Tex. Civ. App. 322, 29 S. W. 674.

Clarke v. Holmes (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, seems to overthrow the authority of a *nisi prius* ruling made by Martin, B. in the same year, to the effect that where work is being carried on, part of which is unsafe without certain precautions which the employer promises to provide, and he goes away leaving general directions to get on with the work, and in his absence the dangerous work is carried on before the precautions have been taken, and an injury results to a workman engaged on another part of the work, while knowing of the danger, the latter cannot recover against the employer. *Smith v. Dorell* (1862) 3 Fost. & F. 238. But the effect of the promise was not discussed.

The New York court of appeals in one case adopted the theory that there is a formal distinction between the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue work under a promise that the defect shall be remedied. *Lanning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417. In *Succency v. Berlin & J. Envelope Co.* (1886) 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358, the court seems to concede that, if the promise there made had related to the removal of a defect in a part of the machine, he

would not necessarily have been guilty of negligence. In both of these cases *Clarke v. Holmes* is cited with approval in a circumstance which leaves no doubt as to the actual position of the court, which is significant in view of the New York decisions commented upon in *infra*.

Under the Missouri doctrine revised in § 301, *ante*, it is plain that the duty of the servant to go to the jury on the question of his contributory negligence is not in any way dependent upon having received a promise from the master that the danger will be removed. *Pauck v. St. Louis Dressing & Finishing Co.* (1901) 159 Mo. 467, 61 S. W. 806. But the following statement possibly has no special reference to the doctrine: "It would be simply inconsistent to hold that if an employee, thinking the machinery he is using is to some degree unsafe, reports its condition to his employer and is then told to continue to use it for a short time, and that it will be immediately repaired, and then his obedience to instructions, continues to work cautiously, believing that he will by great care avoid an accident until the evil is remedied, and is injured in violation of all these precautions, his master is not guilty of negligence, but that the servant is, and that therefore there can be no recovery. Such a rule, too, would be as bad for the master as it is for the servant. It certainly is not the law." *Conroy v. Vulcan Iron-Works* (1875) 105 Mo. App. 105.

In *Hobbes v. Worthington* (1861) 10 Fost. & F. 533, Willes, J., charged the jury as follows: "If the defendant knew of the defect, and undertook to repair it, and the plaintiff went on working, relying on their repairing it, the

been guilty of negligence in continuing in the employment.⁶ It is obvious that, in most instances, both these elements must be considered to some extent. Ordinarily, therefore, it may be said, in mathematical language, that the rights of the servant are determinable with reference to the sum of two variable quantities, though in the nature of the case it usually happens that the principal stress is laid upon one or other of these.

b. After the expiration of the period covered by the promise.—It is clear that, in all cases where the circumstances were such that, if the promise had not been given, the servant's continuance of work would have rendered him chargeable, as a matter of law, with contributory negligence, this defense furnishes a conclusive bar to the action, if the injury was received after the expiration of the period during which the servant was justified in relying on the performance of the promise.⁷ On the other hand, in cases where contributory negligence would not have been viewed as a necessary inference in point of law, the only effect of the expiration of the period covered by the promise is to introduce another evidential item for the consideration of the jury.

428. Contributory negligence, as inferred from the gravity of the risk encountered.—The general rule which is applicable in this connection has been thus laid down: "If the nature of the defects in the machine is such as to create an open, imminent danger such as no prudent man, careful of his life and limb, and none but a reckless man, would risk,

they may be liable. If the plaintiff complained of the defect, and the defendants promised that it should be remedied, he is not to be deprived of his remedy, merely because, relying on their promise, he remained in their employment."

"The probability of suffering injury is measured in some degree by the length of the period of exposure. One may be especially watchful to avoid danger for a time, while the same degree of watchfulness would not be so likely to be exercised continuously." "Reasonably prudent men may expose themselves, for a brief period of time, to possible risks, not of the gravest kind, when they would refuse to do so continuously." *Luberg v. Northern P. R. Co.* (1888) 39 Minn. 15, 38 N. W. 632.

Woodward Iron Co. v. Jones (1885) 80 Ala. 123. In a later case this court again defines its position as follows: "If the employee continues to expose himself to the danger by remaining in

the service longer than this [i. e., a reasonable period], he does so in the face of the fact that the promise of the employer is violated, and that he has no reasonable expectation of its fulfillment. He can no longer, therefore, rely upon the promise, and must know that his continuance in service under such circumstances is equally as hazardous and hopeless of remedy as if no assurance or promise had ever been made. A promise already broken can afford no reasonable guaranty of the fulfillment of any expectation based on its disappointed assurances. . . . The risk, therefore, again becomes his own, and his conduct, as we have said, although not necessarily or *per se* negligent, may or may not become negligent according to the circumstances of the particular case." *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216. To the same effect, see *Bridges v. Tennessee Coal, I. & R. Co.* (1895) 109 Ala. 287, 19 So. 495.

then the injury results from his own negligence, . . . but the nature of the defect is not such as to impress a prudent man with a feeling or consciousness of imminent danger, then the master is liable."¹

The first half of this statement expresses the rule in the form in which it would naturally take in cases in which the servant's right of recovery is denied. It implies that the mere giving of a promise will not of itself suspend the operation of the principle that a servant cannot recover for an injury of which his own negligence was an efficient cause, and that he will, therefore, be unable to maintain an action wherever the danger to which he was exposed after receiving the promise is such that no man of ordinary prudence would have run the risk of remaining in the employment even for the briefest period.

The second half of the statement expresses the rule in the language which is appropriate to cases in which the servant's right of recovery is conceded. It affirms the principle, applied or enunciated in numerous cases, that the master's promise will entitle the servant to recover for any injury received within a reasonable time after the

¹ *McKelvey v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 500, 14 S. E. 261. (defective hand car likely to jump track at any moment); *Morbey v. Home Min. Co.* (1894) 53 Kan. 7, 9 Pac. 122 (shaft insufficiently tightened—servant already injured once by falling of rocks); *Brewer v. Tennessee C. & R. Co.* (1896) 97 Tenn. 615, 37 S. E. 549 (employee continued to use walk, upon dismounting from car, piece of timber originally 18 inches after it had been worn until it was 2 or 3 inches wide on top).

² "Where an employee knows that the danger is great and immediate, such as a reasonably prudent man would not assume, he cannot recover for an injury, even though he remained in the employer's service in reliance upon the latter's promise to remedy the defects which produced the danger." *Indianapolis & St. L. R. Co. v. Wm.* (1887) 114 Ind. 20, 14 N. E. 721, 15 N. E. 824. A promise to an employee by a vice principal, to make the place where he is at work safe, does not relieve the employee from the obligation to leave a place which is manifestly or immediately dangerous. *Miller v. Bullion-Breck & C. Min. Co.* (1898) 18 Utah, 353, 55 Pac. 58.

Similar language is used in *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405; *District of Columbia v. McElligott* (1886) 117 U. S. 621, 29 L. ed. 946, 6 Sup. Ct. Rep. 884; *Kane v. Northern C. R. Co.* (1888) 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; *St. Louis, A. & T. R. Co. v. Kelton* (1892) 55 Ark. 483, 18 S. W. 933; *Texas & N. O. R. Co. v. Bingle* (1895) 9 Tex. Civ. App. 322, 29 S. W. 674; *Harvey v. Alturas Gold Min. Co.* (1893; Idaho) 31 Pac. 819; *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447, 67 N. W. 359; *McAndrews v. Montana Union R.* Co. (1895) 15 Mont. 290, 39 P. (defective hand car likely to jump track at any moment); *Morbey v. Home Min. Co.* (1894) 53 Kan. 7, 9 Pac. 122 (shaft insufficiently tightened—servant already injured once by falling of rocks); *Brewer v. Tennessee C. & R. Co.* (1896) 97 Tenn. 615, 37 S. E. 549 (employee continued to use walk, upon dismounting from car, piece of timber originally 18 inches after it had been worn until it was 2 or 3 inches wide on top). In a case where a laborer was injured by the fall of a gravel bank which he had requested his employer to watch, it is error to charge the jury that, in terminating the question of contributory negligence, they need only inquire whether the plaintiff continued at his work longer than was reasonably sufficient to enable the employer to provide someone to watch the bank. Such an instruction would leave the jury at liberty to find the plaintiff to have been free from contributory negligence, although they may have been misled from the evidence that no man of ordinary prudence would have neglected to watch the bank. *District of Columbia v. McElligott* (1886) 117 U. S. 621, 29 L. ed. 946, 6 Sup. Ct. Rep. 884.

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ise was given, unless the danger which the master agreed to remove was such that no prudent man would have exposed himself to it.³

Usually, of course, it is a question of fact for the jury whether the defect was one of such nature that only an imprudent man would have continued to use the defective appliance.⁴ The mere fact that the servant was aware that the danger to which he would be exposed was serious is not necessarily conclusive against him. The promise, and its natural effect upon a man of ordinary prudence, are to be taken into consideration.⁵

When the imminence of the danger is relied upon as a circumstance which precludes the servant from recovery, it is necessary to show that the injury was caused by an event which might reasonably have been expected to occur in consequence of the existence of that particular danger to which the master's promise related.⁶

429. Contributory negligence, as inferred from the length of time the servant worked after the giving of the promise.—The circumstances accompanying the promise are sometimes of such a nature as to show that the servant was placed under a preemptory and immediate obligation to discard the defective instrumentality altogether, or to dis-

² *Brownfield v. Hughes* (1889) 128 Pa. 134, 18 Atl. 340; *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412; *Conroy v. Vulcan Iron Works* (1876) 62 Mo. 35; *Rothenberger v. Northwestern Consol. Mill. Co.* (1894) 57 Minn. 461, 59 N. W. 531; *Greene v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 249, 47 Am. Rep. 785, 17 N. W. 378; *Harris v. Hewitt* (1896) 64 Minn. 54, 65 N. W. 1085; *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447, 67 N. W. 358; *Homestake Min. Co. v. Fullerton* (1895) 16 C. C. A. 545, 36 U. S. App. 32, 69 Fed. 923; *Atchison, T. & S. F. R. Co. v. Midgott* (1895) 1 Kan. App. 138, 40 Pac. 995; *Sioux City & P. R. Co. v. Finlayson* (1884) 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860; *Southern Kansas R. Co. v. Croker* (1889) 41 Kan. 747, 21 Pac. 785.

³ *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 225, 25 L. ed. 617; *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405; *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447, 67 N. W. 358; *Schlitz v. Pabst Brewing Co.* (1894) 57 Minn. 303, 59 N. W. 188; *Jensen v. Hudson Sawmill Co.* (1897) 97 Wis. 73, 73 N. W. 434; *Taylor v. ar Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249.

⁴ *Texas & N. O. R. Co. v. Bingle* (1895) 9 Tex. Civ. App. 322, 29 S. W. 674. A finding, in answer to a special interrogatory, that the danger of using a defective appliance was great, apparent, and continuous, will not overcome the effect of a general verdict for the plaintiff, where there is no finding that an ordinarily prudent man would not have used it under the circumstances. *Indianapolis Union R. Co. v. Ott* (1894) 11 Ind. App. 564, 38 N. E. 842, 39 N. E. 529. See also last note.

⁵ An engineer is not, as a matter of law, negligent in taking out a locomotive with the "chafing-irons" in a defective condition, where he has reported the defect, and the foreman of the roundhouse has promised to repair it when the trip is finished; the only probable imminent danger in such a case being that the engine may part from the tender, and that is not a personal danger but one merely affecting the property of the railroad. A collision which causes the engine to override the tender, and thus cuts off the escape of the engineer, is not an event which is expected to be anticipated. *Greene v. Minnec. & St. L. R. Co.* (1883) 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. 378.

continue its use until it should be restored to a normally safe condition.¹ But in the great majority of instances, the mere fact of giving the promise necessarily implies that the servant is expected to work on. Sometimes the promise is given in words which obligate the master to bring about a restoration of normally safe conditions within a definite time. Under such circumstances it is presumably the duty of the servant to determine, immediately after giving of the promise, whether he will incur a risk which he may possibly have to endure for the entire specified period.² More usually, however, the time at which the promise is to be fulfilled is not expressly mentioned. The legal effect of the promise is then considered to be that normally safe conditions will be restored in a reasonable time."³ In most of the cases in which this phrase is discussed with reference to specific facts, it is used to define the length of the period during which the servant may continue in the employment, without being necessarily chargeable with negligence.⁴ But

¹ In one case it was considered that the promise of the master in response to a servant's complaints, to furnish a new appliance, amounted to an implied condemnation of the appliance in use, and did not relieve the servant from the imputation of negligence in continuing to use the old appliance. *Purcell Mill & Elevator Co. v. Kirkland* (1898) 2 Ind. Terr. 169, 47 S. W. 311. The servant there was injured by the breaking of a wire rope, which supported him while he was painting a smokestack. The court emphasized the fact that the work to be done was only a temporary job, and took the ground that, as it was apparently the understanding of the master that the old rope was to be discarded, the servant was negligent in proceeding to use it without giving the master time to supply a new one. The case is merely a decision upon the evidence, and cannot be regarded as having established any definite legal principle.

If the promise to repair the defective appliance was accompanied by an order to turn it over to the proper agent of the defendant for the purpose of having the repairs made, the servant cannot recover if he goes on using it without any necessity. *Pleasants v. Raleigh & A. Air-Line R. Co.* (1886) 95 N. C. 195.

² Some cases bearing upon one phase of this situation are cited in § 430, note 1, *infra*.

³ *Swift & Co. v. Madden* (1897) 165 Ill. 41, 45 N. E. 979, holding that it was not error to refuse an instruction which

would disable the servant from recovering if the jury found that the promise was indefinite as to the time when the defect should be repaired, and that he continued to work from day to day with the knowledge that no repairs had been made. *S. P. Standard Oil Co. v. Helmick* (1897) 148 Ind. 457, 47 N. E. 14 (*arguendo*).

⁴ See *Lytle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 239, 47 N. W. 100; *Swift & Co. v. Madden* (1897) 165 Ill. 41, 45 N. E. 979; *Ferriss v. Berlin Iron Works* (1895) 90 Wis. 541, 63 N. W. 234; *Breckinridge Co. v. Hicks* (1894 Ky. 362, 22 S. W. 554; *Conroy v. Iron Works* (1876) 62 Mo. 102; *Atchison, T. & S. F. R. Co. v. Midgett* (1895) 111 Mo. 138, 40 Pac. 995; *Louisville & N. R. Co. v. Kenley* (1892) 92 Tenn. 21, 21 S. W. 326; *Woodward Iron Works v. Jones* (1895) 80 Ala. 123; *Missouri Ice & Cold Storage Co. v. Abend* (1883) 107 Ill. 41, 45 N. E. 979; *Illinois C. R. Co. v. Creighton* (1895) 63 Ill. App. 1; *Rush v. Missouri P. R. Co.* (1887) Kan. 129, 12 Pac. 582; *Huber v. Son & S. Co.* (1895) 1 Marv. (Del.) 41 Atl. 92 (charge to jury).

Other cases using the same form of expression are cited in the following note.

An instruction as to the effect of the promise is deemed to be erroneous if it omits to notice the qualification of the doctrine by which the servant is excluded from recovery if he continues to work beyond a reasonable time (*St.*

we have already seen (§ 425, *supra*), it is also appropriate as a description of the period within which the defense of assumption of risks is not available to the master. So far as appears, the permissible length of the period is determined with reference to the same considerations, whether the former or the latter defense is relied upon. But this aspect of the question has never been discussed; and it seems to be at least open to argument whether identical standards should always be applied in both of these instances.

It is primarily a question for the jury whether the servant had, at the time of the accident, exceeded the limits of the allowable period of continuance of work.⁵ A "reasonable time" has been defined by some courts as being the time which would reasonably be allowed for the performance of the promise;⁶ by others as the time within which the defect might reasonably have been remedied;⁷ and by others as the time which may elapse while the servant is reasonably expecting the promise to be performed.⁸

In connection with the length of the period which has elapsed since

v. Jacob Dold Packing Co. [1900] 84 Mo. App. 565; or if it gives the jury to understand that the servant is not justified in relying on it, unless the dangerous conditions are to be remedied immediately (*McCormick Harvesting Mach. Co. v. Sendzikowski* [1897] 72 Ill. App. 402).

⁵*Joliet, A. & N. R. Co. v. Velie* (1891; Ill.) 26 N. E. 1036; *Union Mfg. Co. v. Morrissey* (1883) 40 Ohio St. 148, 48 Am. Rep. 669; *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447, 67 N. W. 358; *Belair v. Chicago & N. W. R. Co.* (1876) 43 Iowa, 662; *Ferriss v. Berlin Mach. Works* (1895) 90 Wis. 541, 63 N. W. 234; *Louisville & N. R. Co. v. Kenley* (1892) 92 Tenn. 207, 21 S. W. 326; *Morback v. Home Min. Co.* (1894) 53 Kan. 731, 37 Pac. 122; *Taylor v. Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249; *Mann v. Lake Shore & M. S. R. Co.* (1900) 124 Mich. 641, 83 N. W. 596.

It is error to charge a jury, without qualification, that a servant who continues to work for six months after ascertaining the existence of a defect is absolved from the charge of contributory negligence, if he notified the master of the existence of the defect which he discovered, and the master promised that the defect would be repaired. *International & G. N. R. Co. v. Williams* (1891) 82 Tex. 342, 18 S. W. 700.

⁶*Rothenberger v. Northwestern Consolid. Mill Co.* (1894) 57 Minn. 461, 59

N. W. 531; *Porody v. Chicago, M. & St. P. R. Co.* (1882) 5 McCrary, 38, 15 Fed. 205.

⁷*Harris v. Hewitt* (1896) 64 Minn. 54, 65 N. W. 1085. In *Illinois Steel Co. v. Mann* (1897) 170 Ill. 200, 40 L. R. A. 781, 48 N. E. 417, it was held error (three judges dissenting) to refuse an instruction to the effect that the servant may, while relying on the promise, remain in the service only for such time as would be reasonably sufficient to enable the master to remedy the defect.

⁸*Counsell v. Hall* (1888) 145 Mass. 468, 14 N. E. 530. The better opinion is that a "reasonable time" means the "time which would elapse while the servant is reasonably expecting the promise to be performed." *Mann v. Lake Shore & M. S. R. Co.* (1900) 124 Mich. 641, 83 N. W. 596. It is "for the jury to say whether or not such time had elapsed as would preclude all reasonable expectation that the defect would be remedied." *Taylor v. Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249.

In a standard treatise it is laid down that the servant can recover for an injury caused by the defect "within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." *Shearn & Reif Neg. § 96*, quot-

the giving of the promise with regard to an inorganic agency of business, it is proper to consider the frequency with which the servant was called upon to handle the defective appliance after the promise was received, the opportunities he may have had to examine the appliance and the necessity for making that examination, in view of his complaint as to its condition, and the right he had to suppose it had been repaired in pursuance of the promise.⁹ In determining whether the danger incident to a continuance of work with an incompetent subordinate, for a certain period, was such that a prudent man would not have exposed himself to it, even on the faith of the master's promise to remove him, the circumstances to be considered are "the general nature of the employment, the nature and extent of the danger necessarily and generally incident to it when carried on in connection with an incompetent subordinate, as well as the particular nature of the work being done during the period, . . . [covered by the master's promise] and the opportunities which the plaintiff's position afforded for self-protection during a brief period by watchfulness, . . . by so ordering the employment . . . as to lessen the risk of injury to his want of skill."¹⁰

The permissible duration of the period of continuance of work with an incompetent subordinate is necessarily abbreviated where the master has indicated by his conduct or action that he has done all that he intends to do for the present.

approved with approval in *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612.

In *Illinois Steel Co. v. Mann* (1897) 170 Ill. 200, 40 L. R. A. 781, 48 N. E. 417, three of the judges considered the true doctrine to be that the responsibility of the master continues until he fulfills his promise, or notifies the servant of his inability or unwillingness to do so, or until such a length of time has elapsed as would, under all the attending circumstances, make it unreasonable for the servant to rely upon the promise. (The views of the majority of the court are stated in note 7, *supra*.) This doctrine was also adopted in *Texas & N. O. R. Co. v. Bingle* (1897) 91 Tex. 287, 42 S. W. 971.

In *Stephenson v. Duncan* (1889) 73 Wis. 404, 41 N. W. 337, the declaration was held fatally defective for the reason that it averred that the defendant had ample time to put the appliance in safe condition between the time when the plaintiff informed him of the defect and the time of the injury. This allegation was held to imply that the plaintiff continued in his employment beyond the

time within which he might reasonably expect the defendant would keep the promise and remedy the defect.

On the ground that the question whether a reasonable time to execute repairs had elapsed when the accident occurred was not logically identical with the question whether the servant continued work for more than a reasonable time, it has been held that a complaint in an action for personal injuries to an employee, which denies contributory negligence, alleges that plaintiff complained of defects in the machinery used by him, and that defendant promised to remedy them, and that plaintiff was injured within six days after the promise does not show contributory negligence on the part of plaintiff because of the other allegation that sufficient time for the fulfillment of the promise had elapsed at the time of the injury. *Daugherty v. Midland Steel Co.* (1903) 23 Ind. App. 78, 53 N. E. 844.

⁹ *Belair v. Chicago & N. W. R. Co.* (1876) 43 Iowa, 662.

¹⁰ *Lyberg v. Northern P. R. Co.* (1903) 39 Minn. 15, 38 N. W. 632.

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way of remedying the dangerous conditions, and what has been done is insufficient to afford protection.¹¹

430. Illustrative cases.—In the preceding sections the two main elements involved in cases where a promise has been given have been discussed under their general aspects. In the present section it will be shown how the courts have dealt with evidence presenting various combinations of those elements,—that is to say, longer or shorter periods of continuance in the employment, and dangers of a more or less serious description.

In any case where a prudent man could be justified in remaining in the service at all after the discovery of the danger covered by the promise, the servant cannot be regarded as negligent where he continues to work under a well-founded belief that steps to secure his safety will be taken almost immediately.¹

"In a case where the master had promised to guard defective appliance, it was held erroneous to instruct the jury that if the defendant, pursuant to his promise, erected a guard for the defective appliance a certain time before the accident, but the guard so erected was insufficient, which fact the plaintiff well knew, yet he continued to use the appliance so adjusted without complaint, then he voluntarily assumed the risk of operating the appliance. *Lally v. Crookston Lumber Co.* (1901) 82 Minn. 407, 85 N. W. 157.

In *Morbach v. Home Min. Co.* (1894) 53 Kan. 731, 37 Pac. 122, it was laid down that the servant "should leave his dangerous employment within a reasonable time on discovery of the master's method of doing business, when he finds that the master will not remedy the danger or fulfil his promise in that respect."

¹*Fairbank v. Haentzsch* (1874) 73 Ill. 236 (danger from moving machinery,—no specific time mentioned in promise); *Senzikowski v. McCormick Harvesting Mach. Co.* (1895) 53 Ill. App. 418 (defective machine,—no specific time mentioned in promise); *Schlacker v. Ashland Iron Min. Co.* (1891) 89 Mich. 253, 50 N. W. 839 (mining company liable for the death of a miner who was directed to remain at work by the mining captain, after complaining of expected danger, and, being left there for two hours, was killed in consequence of so remaining).

In *Madara v. Pottsville Iron & Steel Co.* (1894) 160 Pa. 109, 28 Atl. 639, a father was held entitled to recover for the death of his son, occasioned by the

fact that the platform upon which he was working was obviously too narrow, where the accident happened within twenty minutes after the father had been induced by the boss in charge of the work to allow the deceased to remain temporarily at his employment by the promise that he should be taken right down.

A servant is not, as a matter of law, guilty of contributory negligence because he works in the neighborhood of dangerous machinery from which the covering has been torn away, by continuing in the employment after discovery of the danger, when he has notified the superintendent of the defect, and the latter has directed him to continue at work until noon of the same day, at which time he promises to remedy the defect. *Roux v. Blodgett & D. Lumber Co.* (1891) 85 Mich. 519, 13 L. R. A. 48 N. W. 1092. Where a servant who had asked defendant, his employer, to repair a defect in a circular saw with which plaintiff was working, was assured that it would be repaired in a short time, he is entitled to recover for an injury occasioned by the defect, occurring about twenty minutes thereafter. *Virginia & N. C. Wheel Co. v. Chalkley* (1900) 98 Va. 62, 34 S. E. 976. The right of a servant to recover is a question for the jury, where, after notifying the master that a saw was so coarse as to be dangerous, he returned to work, upon receiving a promise that the defect would be remedied the same day. *Dempsey v. Sawyer* (1901) 95 Me. 295, 49 Atl. 1035. A hole in a road 1½ ft. x 3 ft. in area and 1½ ft. deep does

Courts are particularly inclined to put a lenient construction on the servant's continuance of work, where his immediate desertion from his post would cause extreme inconvenience to his employer or to the public, and he may therefore be regarded as having exposed himself to danger from motives of duty. Such cases present themselves where the servant is in control of some machinery used in the business of transportation, which, as is well known, is not infrequently found to be out of order at a time when it will greatly inconvenience traffic to withdraw it temporarily from use.²

The servant has also been allowed to recover in many other cases in which there was no special reason for anticipating that the defect would be speedily repaired, and in which there was nothing to indicate that either the master or the community at large would have

not constitute a defect so imminently dangerous that a teamster employed in hauling bark over the road was not justified in relying on his employer's express promise to repair the defect before he returned with another load the following morning. *Nelson v. Shaw* (1899) 102 Wis. 274, 78 N. W. 417.

A miner is justified in continuing his work, where his foreman has promised that a pile of debris, which would obstruct his escape in case of accident, would be removed as soon as the following morning, where there is no indication that any such accident is likely to happen before the promise can be kept. *Kelly v. Fourth of July Min. Co.* (1895) 16 Mont. 484, 41 Pac. 273.

A miner injured by the fall of coal from the roof of the room where he worked is not necessarily chargeable with negligence for failing to saw props of the right length for use and put them up, when the straw boss promised to send someone to do so right away, but failed to keep his promise prior to the accident. *Sugar Creek Coal Min. Co. v. Peterson* (1897) 75 Ill. App. 631, Reversed in (1898) 177 Ill. 324, 52 N. E. 475.

Where a promise does not designate any time at which an incompetent fellow servant will be removed, the plaintiff may reasonably infer that he will be removed at once, or as soon as possible, and the jury, in determining whether he was guilty of negligence in continuing to work, may justifiably consider that such an inference will naturally influence his conduct. *Lyberg v. Northern P. R. Co.* (1888) 39 Minn. 15, 38 N. W. 632.

² In *Greene v. Minneapolis & N. W. R. Co.* (1883) 31 Minn. 248, 4 Rep. 785, 17 N. W. 378, the action was held not to be barred, where an employee was injured while running a defective engine to a certain station, his superior officer having promised to repair it there, if there was time, and, if not, to repair it on his return.

In *Kane v. Northern C. R. Co.* (128 U. S. 91, 92 L. ed. 339, 9 S. Rep. 16, where it was held that an employee on a train owes it to the public as well as to his master, not to leave his post, and that the absence of a passenger on one of the cars did not create a presumption so imminent as to subject him to a charge of recklessness in continuing to work, upon receiving an assurance from the conductor that the defective car would be thrown out of the train before it reached a station a few miles from the place where he noticed the defect.

In another case it has been held that a master is not necessarily negligent for allowing an incompetent engineer to take to the end of the trip a defective engine, at the request of his superior (master mechanic), an engine the defect of which is a disabled air pump. *Flann v. Kansas City, St. J. & C. R. Co.* (1883) 78 Mo. 195, 47 Am. R. 100.

In *Hawley v. Northern C. R. Co.* (1880) 82 N. Y. 370, some stress was laid on the fact that a promise had been given to repair the track which caused the injury had been given; but the grounds of the decision in the *Lyberg* case favor seem to have been that the defect was imperfect, and that the danger was not so imminent that the master was necessarily negligent in obeying the

prejudiced to an unusual extent, if the servant had concealed his personal interests by quitting the employment immediately after he discovered the danger in question. A number of decisions of this type are collected in the note following.

In *Clarke v. Hobbs*, (1862), 7 Hurlst. & N. 937, 31 L. J. 41, 1 N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 105, where the machinery which caused the injury had remained uncorrected for about a year, and the servant had made frequent complaints, the court of exchequer chamber upheld a verdict absolving the plaintiff of the charge of contributory negligence in continuing to work during that period. But the question whether the time of continuance was unreasonable was not specifically raised either by the court or by counsel.

An electric railway company was held liable for an injury to a motorman caused by a defective piece of track, where the company promised the day before the accident to have the defect remedied but neglected to do so. *Harris v. Hewitt* (1896), 64 Minn. 54, 65 N. W. 1085.

In *Behr v. Chicago & N. W. R. Co.*, (1876), 43 Iowa, 662, the court refused to say, as a matter of law, that a brakeman waived his objection to a defective drawbar by continuing in the service about three months, during which he had occasional opportunities for ascertaining whether the master's promise had been kept.

A servant is not, as matter of law, to be held negligent for continuing to use a defective block for shiftings, where he called attention to its condition three days before the accident and had been promised that safer ones would be furnished promptly. *Lehigh Valley Coal Co. v. Warwick*, (1898), 28 C. C. A. 540, 55 U. S. App. 435, 84 Fed. 806.

A brakeman is not, as matter of law, negligent in continuing to use a defective lantern six days after the conductor has promised to furnish a new one. *Atchison, T. & S. F. R. Co. v. Leavitt* (1895), 56 Kan. 109, 12 Pac. 313.

A section hand is not, as matter of law, guilty of contributory negligence in remaining in the employ of a railroad company for three or four days after learning of a defect in the brake of a hand car on which he has been employed, where the road master states that he will have the defect remedied, and the section hand has himself transferred to another car, on which he is

injured by the defective car running into it. *International & G. N. R. Co. v. Welch* (1896), Tex. Civ. App. 34 S. W. 101.

A servant is not, as matter of law, guilty of contributory negligence in continuing to work for two or three days on an inclined tramway, some boards of which have become loose, where the superintendent has promised to secure them. *Geeson v. Vulcan Iron Works* (1876), 62 Mo. 35. Remaining at work about fifteen days after a promise to render a slippery floor is not such an unreasonable length of time as to charge a servant with knowledge that there was no intention to change the same. *Webb v. Wagon Co. v. Kehl* (1891), 40 Ill. App. 585, affirmed in (1892), 139 Ill. 614, 29 N. E. 711.

In *Leach v. Co. v. Bass* (1886), 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216, the court set aside a verdict for a miner where the tendency of the fuses supplied, to hang fire, had become known to him six days before he was injured through his returning to the mine in the belief that the fire communicated to the fuse had been extinguished; and the court set aside a verdict for a miner the effect of the plaintiff could not recover if he continued work beyond a reasonable time. This case was followed in *Deer v. Graham* (1892), 2 Colo. App. 240, 29 Pac. 1047, where a judgment for the plaintiff was reversed because the trial judge had not given an instruction indicating to the jury the law as to reasonable time.

When a man drew the attention of his superintendant to the danger arising from the constant fall of pieces of coal from the roof of a gangway which was being cleared without being timbered, it is for the jury to say whether he was negligent in continuing to work for three or four days in reliance upon the assurance of the superintendant that there was no danger, and that the defective conditions would be removed. *Redden v. Utah P. R. Co.*, (1887), 5 Utah, 344, 15 Pac. 262. A nonsuit should not be granted in an action for injuries sustained in a mine, where plaintiff has shown that the place was dangerous, that he reported such con-

With respect to dangers created by the incompetency or untidiness of a servant, it has been laid down that contributory negligence will not be inferred in any case where the injured servant was justified in supposing that by the use of additional care he might safely per-

dition to the agents of the employer the day before the accident, who promised to watch the same and timber it when necessary, and assured him of its safety, and directed him to continue work; and, in reliance on such promises and assurances, he did so and received the injuries complained of. *Miller v. Bullion Beck & C. Min. Co.* (1898) 18 Utah, 358, 55 Pac. 58. Where a servant in a mine who was exposed to the risk of injury, owing to the loose condition of the rock in the roof of a mine, went on working in reliance upon the superintendent's promise to have the place of work made secure, and was injured within twenty-four hours afterward by the fall of some apparently solid rock which was carried down with a portion of the loose rock, he was held not to have remained at work for an unreasonable time. *Taylor v. Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249.

A common laborer injured owing to the want of a guard on an endless chain, and the want of sufficient light, two days after a promise was given to remedy the dangerous conditions, was allowed to recover in *Jensen v. Hudson Sawmill Co.* (1897) 98 Wis. 73, 73 N. W. 434.

Where the collar of a wood-working machine, called a "shaper," was out of order, in such a way that the hands of the operator were liable to be jerked against the knives, the court refused to hold, as a matter of law, that a servant could not reasonably wait two weeks for the fulfillment of the promise of the superintendent to remedy the defects in the machine, although the latter had repeatedly made the same promise before and failed to keep it. *Meyer v. Gundlach-Nelson Mfg. Co.* (1896) 67 Mo. App. 389.

In *Rothenberger v. Northwestern Congol. Min. Co.* (1894) 57 Minn. 461, 59 N. W. 531, the court refused to set aside a verdict to the effect that a period of ten days was not an unreasonable period during which to continue work in a mill, although the defects in the machinery might have been remedied in about two days if all the other repairs had been postponed to the task of removing the danger complained of.

The case was left to the jury. The servant was injured two days after the giving of a promise of repair, on the reason of the fact that the bearing of a saw became worn, the result of which was that a portion of the batten was broken off and struck him. *Bell & C. v. Applegate* (1901) 23 Ky. L. Rep. 62 S. W. 1124.

It is not negligence, as a matter of law, for a servant who is operating a machine used for converting pig iron into "chant iron," to continue work for a week after a promise has been given to remedy defects therein. *East Chicago Iron & Steel Co. v. Williams* (1899) Ind. App. 573, 47 N. E. 26.

It is a question for the jury whether an employee in charge of a steam engine was so reckless that he could not recover, where the evidence is that he received a promise that, as soon as certain workmen returned, repairs would be made in a defective valve in a pipe which permitted an escape of steam into the cylinder, sufficient to start the pump; that a new pump was ordered but the valve was not repaired; that the escaping steam, while sufficient to start the old pump, had not started the pump until the occasion of the injury to the employee, which occurred thirty days after the promise to repair. *Hann v. Lake Shore & M. S. R. Co.* (1900) 124 Mich. 641, 83 N. W. 57.

A servant who has received a promise that the valves of a hydraulic crane which were so much out of order that the crane was not under control, would be repaired, cannot be held, as a matter of law, to have waited so long as to the benefit of such promise, when he was injured within six days after the promise was made. *Dougherty v. Land Steel Co.* (1899) 23 Ind. App. 53 N. E. 844.

A servant injured a few hours after receiving a promise that better repairs would be provided is entitled to recover. *Swift & Co. v. O'Neill* (1900) 183 Ill. 337, 58 N. E. 416. Affirming (1900) Ill. App. 162.

A servant injured by the upsetting of a truck loaded with hot iron, owing to the fact that the truck and track were out of repair, may recover, where it

his duties; nor where he might reasonably have thought that he could supervise the other servant's conduct, so as temporarily to avoid any danger from his presence.'

The comparative rarity of the instances in which the courts have undertaken to declare, as a matter of law, that even the giving of a promise would not excuse the servant for remaining in the employment, is indicative of the extreme reluctance with which they interfere with the verdicts of juries on this class of cases. Some illustrative decisions are cited in the note below.⁶

431. Decisions restricting or ignoring the doctrine as to the effect of

appears that the accident happened two or three days after a promise had been given to remedy the defect. *Roy v. Diamond State Steel Co.* (1900) 2 Penn. (Del.) 525, 47 Atl. 1017.

Evidence that the master's representative had promised to increase the number of servants in a few days is sufficient to take the case to the jury, who have then to decide whether the plaintiff continued to work for more than a reasonable time after such promise. *Joliet, A. & N. R. Co. v. Velie* (1891 Ill.) 26 N. E. 1086.

Curran v. A. H. Stange Co. (1898) 98 Wis. 598, 74 N. W. 377 (servant in sawmill resumed work in reliance on a promise to furnish another sawyer, and was injured a few hours afterward).

The work of directing the movement of logs as they are rolled down an incline is not so extremely dangerous, in view of the incompetency of a fellow workman who starts such logs, that the court should charge, as a matter of law, that the workman injured was guilty of culpable negligence in remaining at work, notwithstanding the employer's promise to put a competent man in the place of the negligent employee. *Cro's Lake Logging Co. v. Joyce* (1897) 28 C. C. A. 250, 55 U. S. App. 221, 83 Fed. 989 (time of continuance not stated).

Maitland v. Gilbert Paper Co. (1897) 97 Wis. 476, 72 N. W. 1124 (engineer in charge of stationary engine injured by incompetency of a fireman, - not stated how long after the promise the accident occurred).

A verdict for a blacksmith injured through the incompetency of a helper will not be set aside where the injury was received four days after the master promised to furnish another assistant, and the testimony leaves it doubtful whether he ought, as a reasonable man, to have apprehended the occurrence of

some accident. *Leberg v. Northern P. R. Co.* (1888) 39 Minn. 15, 39 N. W. 632.

*A locomotive fireman who, after complaining of the absence of a shield on the glass indicating the oil supply for the cylinder, and receiving the engineer's promise to see that a shield is furnished, leaves the terminal station where the shield can be procured; and proceeds on a trip, knowing that the promise has not been and cannot be fulfilled until the return, has been held unable to recover for an injury caused by the bursting of the glass. *Albrecht v. Chicago & N. W. R. Co.* (1901) 108 Wis. 530, 53 L. R. A. 653, 84 N. W. 982. In this case the essential ground of the decision seems to have been the imminence of the danger; but stress was also laid upon the facts that the fireman never expected to use the engine after the trip on which he was about to start,

and that it was the regular course of the business to have such defects remedied at the end of each trip.

A servant's horse with an old and rotten harness upon it constitutes a combination of conditions so likely to cause an accident that, if the servant is injured in driving the animal, he cannot recover on the ground that he had received, three days previously, a promise that the harness would be repaired or a new one furnished. *Leresque v. Jasson* (1895) 165 Mass. 16, 42 N. E. 335. An independent reason for denying recovery in this case was that a new harness had been turned in, in accordance with the promise, and might have been used.

An experienced employee cannot recover if he continues, even for an hour or two, to encounter the obvious and immediate danger of using a cracked saw to cut steel plates. *Erdman v. Illinois Steel Co.* (1897) 95 Wis. 6, 69 N. W. 993.

a promise.—In Scotland the scope of the doctrine with regard to the effect of a promise has been considerably restricted by two cases, owing to the fact that both cases were decided with relation to the sufficiency of the complaint, it is difficult to say what the precise theory is which prevails in that country.²

In Massachusetts a decision has recently been rendered in which the court shows some inclination to limit the application of the doctrine respecting a promise, to cases in which the servant was c

¹According to one of these the doctrine inures to the advantage of the servant only in cases where the negligence of the master consists in the violation of a statutory duty. *Crichton v. Keir* (1863) 1 Sc. Sess. Cas. 3d series, 107, Distinguishing on this ground *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405 (see §§418, 420, *supra*). The precise ruling was that in an action by a railway laborer to recover for an injury caused by the unfitness of a horse, allegations that the master was aware of the animal's unfitness, had promised to provide another, and had induced the plaintiff to go on working by a promise of giving him an assistant to lessen the dangers, which promise the master had not fulfilled, show that the plaintiff knew of the danger of working with the horse and had no claim against the master. The position taken was simply that the servant had been working all along with the same horse. He was accordingly neither in a better nor a worse position in consequence of his resumption of work at the request of the defendant, while the implied contract remained the same as before. The theory thus adopted as to the effect of the English decision cited is based upon what the present writer conceives to be a misunderstanding of its rationale. It is submitted that there is nothing in the opinions which can fairly be construed as a declaration that the doctrine propounded was applicable only in cases where a statute had been violated. Nor does such a theory receive any support from the subsequent English cases in which a promise was involved. In *Smith v. Harwood* (1870) 22 L. T. N. S. 130, the case went off on the point that the servant by whom the promise was made was a mere fellow servant, and the scope of the doctrine as to the effect of a promise was not discussed under its general aspects. In *Williams v. Whittall* (Q. B. D. 1885) 80 L. T. Journ. 101, 2

Times L. R. 165, the action in which the servant was allowed to recover was brought under the employers' liability act of 1880. But it cannot really be inferred from the language of the court that it was intended to confine the scope of the decision to such cases. The statement of Bowen and Fry, in *Thomas v. Quartermaine* (1887) 18 Q. B. Div. 685, 56 L. J. Q. B. 310, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, that the effect of the decision in *Clarke v. Holmes* was, the mere fact of the servant's knowledge of a risk created by a breach of duty was not sufficient to bar his claim, can not fairly be construed as a categorical expression of opinion that the doctrine thus declared to have been established was never applicable, unless a breach was involved.

In the second of the Scotch cases referred to in the text, it was held that a complaint was demurrable on the ground that the plaintiff had averred in effect that the plaintiff was well acquainted with the work done, that he knew there were no materials furnished for making improvements, the defects of which caused injury, and that he had complained this to the foreman, and had received a promise that the necessary materials would be supplied. *McGee v. The Iron Co.* (1883) 10 Sc. Sess. Cas. 2d series 955.

In *McAulay v. Brownlie* (1884) 10 Sc. Sess. Cas. 2d series 975, and in *Grille v. Gray* (1863) 1 Sc. Sess. Cas. 2d series 768, the evidence showed that injured workmen knew of the dangers which they were exposed, and that they received a promise from the foremen that the cause of the danger would shortly be removed. The question of the servants' acceptance of the risk or contributory negligence was not discussed, the cases being made to turn upon whether the foremen were principals or not.

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unlie (1860) 22 975, and *Se*, Sess. Cas. showed that the of the danger d, and that they on the master's e of the danger ved. The ques ceptance of the gence was not ng made to turn men were vic

ing the defective appliance, and to deny its benefits to an employee whose functions are to keep certain parts of the appliance in order.² No reasons are suggested for drawing this distinction, and, so far as the decision is based upon the existence of such a distinction, it seems to be of very questionable correctness. But on the facts it is doubtless sustainable for the reason that the promise was not given by any employee who was authorized to make it in the employer's behalf.

In one Wisconsin case it was said to be quite doubtful whether the rule that a servant is entitled to go on work for a reasonable time after a promise to remove a danger, without his being charged with an assumption of the risk, is applicable to any other cases except those in which machinery or tools are found to be defective.³ But it will be apparent, on referring to § 421, note 8, *supra*, and note 5 to the present section, that the Federal decision cited by the court⁴ does not warrant this expression of doubt,—at all events with relation to the circumstances involved.

In a New York case in which recovery was denied on the ground that the injury was caused by a simple appliance, the defects of which were understood as fully by the servant as by the employer, and that, for this reason, no negligence was imputable to the master, the court declined to attribute any differentiating significance to the fact that the employer had promised to furnish a safer instrumentality.⁵ The

¹*Silvia v. Wampunog Mills* (1900) 177 Mass. 194, 58 N. E. 590. There the hand of a picker boss was caught, while he was repairing the machine, in the beater of a picker which started owing to the fact that a shipper was defective and allowed the belt to shift. Recovery was denied upon evidence which showed that he had made no complaint to the overseer, but that two or three days before the accident he had observed the shipper to be defective, and had taken it to the boss machinist, who had no authority over him, to get a new one, and, as there were none on hand, had put it back, by the orders of the machinist, who promised to procure another in a few days.

²*Shonatter v. Fairbanks* (1894) 88 Wis. 376, 60 N. W. 257 (trench caved in).

³*Gowen v. Harlow* (1893) 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 973.

⁴*Harsh v. Chockering* (1886) 101 N. Y. 396, 5 N. E. 56 (ladder not being provided with spokes slipped under a servant who had mounted it to light a lamp). The following extract from the majority opinion (Ruger, Ch. J., dis-

sent) shows the position of the court with regard to the main and subsidiary questions involved: "As a general rule it is to be supposed that the master who employs a servant has a better and more comprehensive knowledge as to the machinery and materials to be used than the employee, who has claims upon his protection against the use of defective or improper materials or appliances while engaged in the performance of the service required of him. The rule stated, however, is not applicable in all cases, and where the servant has equal knowledge with the master as to the machinery used or the means employed in the performance of the work devolving upon him, and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof. In considering the application of the rule just stated, due regard must be had to the limited knowledge of the employee, as to the machinery and structure on which he is employed and to his capacity and intelligence, and to the fact that the servant has a right to rely upon the master to protect him from danger and

injury, and in selecting the agent from which it may arise. . . . In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master of which the employee has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and who uses the ordinary tools employed in such work, to which he is accustomed and in regard to which he has perfect knowledge, can hardly be said to have a claim against his employer for negligence, if in using a utensil which he knows to be defective, he is accidentally injured. It does not rest with the servant to say that the master has superior knowledge, and has thereby imposed upon him. He fully comprehends that the instrument which he employs is not perfect, and if he is thereby injured it is by reason of his own fault and negligence. The fact that he notified the master of the defect and asked for another instrument, and the master promised to furnish the same, in such a case, does not render the master responsible if an accident occurs. We have been referred to no adjudicated case which upholds the liability of a party under circumstances of the same character as those presented by the evidence here. A rule imposing such a liability in the case considered would be far reaching, and would extend the principle stated to many of the vocations of life for which it was never intended. It is one of a just and salutary character, designed for the benefit of employees engaged in work where machinery and materials are used of which they can have but little knowledge, and not for those engaged in ordinary labor which only requires the use of implements with which they are entirely familiar. The plaintiff was of the latter class of laborers, and the work in which he was engaged was not of a character which would entitle him to the protection of the principle referred to."

Later New York cases in which the doctrine of this case has been approved are cited in note 8, *infra*. It has also

been followed in other states, as by the subjoined rulings:

One employed to make general repairs about a building is guilty of negligence in attempting to ascend a ladder on a slippery floor, without him ranging, under his duty of general pairing, some appliance, fixt guard to make the foot of the ladder secure, although the employer had only promised to procure a safe *Corcoran v. Milwaukee Gaslight Co.* (1892) 81 Wis. 191, 51 N. W. 32. An employer is not liable for personal injuries sustained by his employee of an obvious defect in a ladder, the nails being partially drawn from the steps, and which have been easily remedied with a nail or brick if a hatchet or hammer were obtainable, although he had informed the employer thereof and the latter had promised to remedy it. *Mcador v. Store & M. S. R. Co.* (1894) 132 N. D. 290, 37 N. E. 721. The rule that the master is responsible for damages resulting to a servant from defects in machinery and appliances of which the servant has notified him and which he has promised to repair governs cases in which machinery or tools that are in the work are discovered to be seriously defective while in use, and in which tools or machinery are necessary for the safe performance of the work. It has no application to cases where the service required is manual labor without tools or machinery, and where no such tools or appliances are necessary to the performance of the work with a reasonable degree of safety. *Gowen v. Harley* (1893) 150 C. A. 190, 12 U. S. App. 574, 58 U. S. 973, where it was held that a servant could not recover damages for the breach of his employer's promise to furnish skids for the purpose of transferring a box weighing about 250 pounds from a railroad car to another, only a few feet away. The general principle is stated down in *Marsh v. Chickering* (1891) 101 N. Y. 396, 5 N. E. 56, was applied, but the decision was also based on the consideration that the promise was that a danger would be removed, and that additional facilities for doing the work would be furnished.

In a short *per curiam* judgment it has been held that a painter who uses a defective ladder, knowing its defective condition, assumes the risk of its use.

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effect of this decision, when taken in connection with two other rulings of the same court⁷ is to establish in this state the doctrine that, notwithstanding a promise of the master to render the conditions safer, the risks arising from the character or condition of simple appliances, are assumed by the servant, in so far as they are known to him, while, in the case of appliances not coming under that description, the effect of such a promise is to shift the responsibility to the master for a certain period.⁸

cannot recover the injuries sustained by falling therefrom, although his employer promised to supply him with a better ladder, directing him to use the defective one in the meantime. The decision was put on the broad ground that the servant had wantonly and recklessly encountered a risk of an obvious character. *St. Louis, A. & T. R. Co. v. Kelton* (1892) 55 Ark. 483, 18 S. W. 933. No cases are cited, but the decision was probably based on *Marsh v. Chickering*, *supra*.

In *Illinois Steel Co. v. Schymannowski* (1896) 162 Ill. 461, 44 N. E. 876, the court seems to consider that this qualification of the general rule is referable, not only to the fact that the danger in such case is obvious, but that the continued use of the tool after knowledge of the defect, and after the lapse of more than a reasonable time since the promise to remedy it was made, indicates recklessness. This introduction of the factor of reasonable time is not justified by anything said by the New York court, and it must therefore remain somewhat doubtful whether the New York ruling would be followed in Illinois without reservation, if the consideration here emphasized were eliminated from the case.

In Missouri it is held that to continue using even a simple appliance in reliance upon the master's promise is not negligence, as a matter of law. *Warner v. Chicago, R. I. & P. R. Co.* (1895) 62 Mo. App. 192.

⁷ *Lanning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417; *Sweeney v. Berlin & J. Envelope Co.* (1886) 161 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358. See § 426, note 6, *supra*. The actual date of the latter of these cases is subsequent to that of *Marsh v. Chickering*, *supra*, though it was decided in the same year.

⁸ In *Spencer v. Worthington* (1869) 44 App. Div. 496, 60 N. Y. Supp. 873, the court rejected the contention of counsel

that this doctrine had been adopted in New York. But the writer confesses his inability to see how any other conclusion is possible, when the language used and the facts discussed in the cases cited in the last note, and in *Marsh v. Chickering*, are collated. In the earlier cases the doctrine of *Clarke v. Holmes* (1861) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, was expressly approved. In *Marsh v. Chickering* that doctrine is not followed, and the differentiating element relied upon is unquestionably the simple character of the appliance.

In the *Spencer Case* the court expressed the opinion that the distinction suggested by counsel did not rest on any logical foundation. In this opinion the present writer fully agrees, for reasons stated in the text. But he is unable to concur in the inference which seems to be drawn by the court from this absence of any logical foundation for the distinction, *viz.*, that the doctrine of *Marsh v. Chickering* is applicable to all kinds of appliances, since it was held that no recovery could be had by a servant who was injured, while oiling machinery with a can which had a short spout, after the employer had promised to furnish one with a long spout. Such, also, seems to be the effect of two other decisions, in both of which contributory negligence was held to be a bar to the action, and the legal consequences of an assurance that there is no present danger was distinguished from those of a promise of future protection. In one, an employee engaged in moving sand from a sand bank, and familiar with that kind of labor, was denied recovery for an injury caused by the caving in of overhanging gravel and sod, notwithstanding the prior promise of his employer to make the bank secure in a day or two. *McCarthy v. Washburn* (1899) 42 App. Div. 252, 58 N. Y. Supp. 1125. In the other, an action was held not to be maintainable for an injury resulting

It is difficult to see any rational ground upon which the distinctness thus indicated can be sustained. Its adoption can, it would seem, be justified only upon the hypothesis that one or other of the following propositions is a correct statement of the juristic situation: (1) That in the case of simple appliances, the promise of the master does not in any way, alter or shift his responsibility, even temporarily. (2) That the quantitative value of the constructive knowledge imputed to the servant with regard to the defects in such appliance is different from the quantitative value of such actual knowledge as he may acquire in regard to more elaborate instrumentalities. (3) That the danger of handling simple appliances like ladders, spades, axes, &c. is, as a matter of law, so serious as to require the application of a rule that the master's promise will not warrant a continuance of service where the hazards to which the servant will be exposed are so imminent that no prudent man would encounter them. All three propositions are manifestly untenable: the first because it entails an anomaly of gauging the effect of an express stipulation by the nature of the subject-matter to which it relates; the second, because it involves a logical absurdity; the third, because it ignores the most obvious facts. The conclusion arrived at by the New York court on appeal is possibly to be explained by the fact that its attention was not properly directed to the rationale of the effect ascribed to a promise, as being essentially a stipulation by the master to accept temporarily the responsibility for any accident that may occur. See § 4 subd. *a*, *ante*. It seems not reasonable to suppose that, if due prominence had been given to this aspect of the relations of the parties, the learned judges who concurred in the decision in *Marsh v. Chickering* would have been more fully alive to the anomaly of the position to which that decision commits them. It is evident that, so far as other jurisdictions are concerned, the authority of *Marsh v. Chickering* and the cases in which it has been followed is, to say the least, greatly impaired by the omission of the courts to discuss adequately the numerous decisions which, as the preceding sections of this chapter indicate, embody a doctrine essentially inconsistent with that adopted in New York.

In a Maine case the doctrine as to the effect of a promise has, for some reason which is not apparent, been altogether ignored.⁹

from the fall of a brick through the unplanked floor beams of a building under construction, although the employer had previously promised to safeguard him. *Hannigan v. Smith* (1898) 28 App. Div. 170, 50 N. Y. Supp. 845. But the correct theory, it is submitted, is rather that the earlier cases cited in note *supra*, represent the sound doctrine, and that the exception to that doctrine which is embodied in *Marsh v. Chickering* is untenable. See text.

⁹In *Conley v. American Exp.* (1895) 87 Me. 352, 32 Atl. 965, it

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432. Duty of servant to exercise care with respect to the defective instrumentality.—The fact that the master has promised to repair a defect does not relieve the servant of the duty of using reasonable care for his safety.¹ If the servant, by his own negligence in the manner of using the defective appliance, brings injury on himself, the master will not be liable.²

It has been laid down that, in view of the servant's knowledge of the existence of an abnormal danger, a greater degree of care will be required of him than if he had not known of the defect;³ and that it is always an essential question, whether the servant's own care and precautions were proportionately increased in view of his knowledge of the danger.⁴ On the other hand the position has been taken that where an employer directs a servant to continue using a defective tool, and at the same time promises to have it repaired, the employee is not bound to use extra care in using the tool. All that is required of him, it is said, is that, for the purpose of protecting himself against injury, he shall exercise that degree of care which a man of ordinary prudence would exercise when employed in a dangerous service of a similar description.⁵ For practical purposes, however, it may be presumed that the apparent conflict between the standards of duty thus defined is merely superficial. It will hardly be contended that a servant was in the exercise of ordinary care, if his conduct, while he was using a defective appliance, was merely as cautious as that of a prudent person using the same appliance in a sound condition. However this may be it is clear that the employer cannot hold the servant to the exercise of an unerring choice of the best method of obviating difficulties and lessening danger. If the servant uses reasonable and ordinary judgment, he does all that can be required; and the fact that

held that, as a thoroughly familiar with the complicated apparatus, the plaintiff could not recover for injuries received from a fall while he was trying to push to a sliding door, although he had already received a promise that it should be repaired.

¹ *Texas & N. O. R. Co. v. Bingle* (1895) 9 Tex. Civ. App. 322, 29 S. W. 674. An employee having the supervision of another employee, and knowing that the latter is an incompetent and careless workman, who trusts himself upon a ladder constructed by the latter, without examining it, cannot recover from the master, although the latter failed to keep his promise to discharge the incompetent employee. *Bolton v. Georgia P. R. Co.* (1889) 83 Ga. 659, 10 S. E. 352.

² *Schlitz v. Pabst Brewing Co.* (1894) 57 Minn. 303, 59 N. W. 188. A servant does not assume the risk from defective machinery by continuing to use the machinery, where he relies upon the promise of the master to remedy the defect; but he may be guilty of contributory negligence in performing an act rendered necessary by such defect. *Gannett v. Des Moines Brick Mfg. Co.* (1896) 99 Iowa, 257, 68 N. W. 674.

³ *Heador v. Lake Shore & M. S. R. Co.* (1894) 138 Ind. 290, 37 N. E. 721.

⁴ *Jones v. New American File Co.* (1898) 21 R. I. 125, 42 Atl. 509.

⁵ *Missouri, K. & T. R. Co. v. Puckett* (1901) 62 Kan. 770, 64 Pac. 631.

his judgment may not prove to be absolutely the best does not release the employer from liability.⁶

The doctrine deducible from several decisions is that a servant after intermitting the use of the defective instrumentality to which the promise relates, is beginning once more to work with it after the lapse of a period reasonably sufficient, if proper diligence has been exercised, to have effected the restoration of normally safe condition. He is entitled to act upon the presumption that the defect no longer exists, and is not bound to institute an examination for the purpose of ascertaining whether the promise had been performed, unless there is some indication of danger which would put a prudent man on inquiry.⁷ The rule thus laid down is merely a special application of the general principle discussed in §§ 354, 355, 409, *supra*. In New York, on the other hand, it would seem that the servant is deemed not to be in the exercise of ordinary care if, under the circumstances, he takes it for granted that the dangerous condition has been remedied; and he is bound to make an examination.⁸

⁶ *Illinois C. R. Co. v. Creighton* (1895) 63 Ill. App. 168.

⁷ An engineer who has received a promise that his engine will be repaired, and is absent on sick leave for several days afterwards, is not, as a matter of law, negligent in taking out the engine at the end of that period, without specific information that the repairs have been completed. *Northern P. R. Co. v. Babcock* (1894) 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978. Whether one who knew that a machine was defective, and had made complaint as to its condition, was justified in operating it without making an examination, after returning to his work several days later, on the supposition that it had been repaired by the employer as promised, is a question for the jury. *Keegan v. Walker* (1898) 172 Mass. 56, 51 N. E. 449. That an employee, on Monday morning, went to work upon a platform which, the Saturday night before, he knew to be insecure, but which the person charged with the duty of making repairs promised to repair, without making any examination to see if such repairs had been made, is not conclusive of want of due care precluding recovery for injuries received from the insecurity of the platform. *Chapman v. Southern P. Co.* (1895) 12 Utah, 30, 41 Pac. 551.

A hole in a private roadway 18 inches deep, 1½ feet one way, and about 3 feet the other way, near the foot of a descent of about 11 feet in a distance of

105 feet, is not so imminently dangerous as to make it contributory negligence as a matter of law, for a teamster in the employ of the owner of such roadway to drive down the hill without first ascertaining whether his employer had deemed his promise to repair sufficient. *Nelson v. Shaw* (1899) 100 N. D. 274, 78 N. W. 417.

It is proper to instruct the jury that a servant may presume that the employer has complied with his promise to repair a defect in machinery which is apparent upon a casual inspection. The servant is not required to inspect the machine before using it in order to ascertain whether or not the repairs have been made, unless there is something about the condition of the machinery which would cause an ordinarily prudent person to make an examination. *Missouri, K. & T. R. Co. v. Smith* (1899) 20 Tex. Civ. App. 362, 50 S. W. 601.

⁸ It has been held that an employer who knows that the machine at his work is out of repair, and that his low servant has been ordered to use it on a specified day, is guilty of contributory negligence as will preclude recovery for an injury resulting from such defect, in subsequently going to work upon the machine of his own accord, without ascertaining whether or not it had been repaired. *See Roche* (1896) 149 N. Y. 132, 43 N. E. 420, Reviewing (1893) 4 Misc. 1.

he has some positive, tangible ground for supposing that the repairs have been undertaken and completed.⁹ In none of the decisions cited is it explained why the general principle just referred to, that a servant is prima facie entitled to rely upon the master's performance of his obligations, should be deemed subject to an exception in this class of cases.

Under any view of the servant's obligations it is clear that he is chargeable with knowledge of the conditions, where the defect was one of such an obvious kind that, if he had been making ordinary use of his eyesight at the time he was injured, he could not have failed to observe that it had not been repaired.¹⁰

The obligation of the servant to use due care after he has received a promise of repairs does not go to the extent of a requirement that he shall himself take active steps to lessen the danger covered by the promise.¹¹

N. Y. Supp. 118 (sausage-filling machine had a defective valve, which caused it to start suddenly and push the piston head into the meat cylinder, so that the fingers of the operator were liable to be caught). In *Carlson v. Walsh* (1900) 56 App. Div. 551, 67 N. Y. Supp. 516, recovery was denied to a servant who, upon resuming work, was injured by the sudden starting of machinery which the master had promised to repair several weeks previously.

⁹ Where a servant resumed the use of a freight elevator several weeks after he received a promise that the automatically closing gates guarding the shaft of the elevator would be repaired, it was held that he was justified in assuming that they were operating properly, the evidence being that during the period that had elapsed since the promise was given, he had seen lumber on the premises, and had been told that carpenters were at work. *Larkin v. Washington Mills Co.* (1899) 45 App. Div. 6, 61 N. Y. Supp. 93.

¹⁰ This was the position in *Brewer v. Flint & P. M. R. Co.* (1885) 56 Mich. 620, 23 N. W. 440. In the second of the New York cases just cited a second and

apparently independent ground for the conclusion arrived at was that it was broad daylight when the servant resumed working, and he could have seen the defect if he had looked.

¹¹ The fact that a railroad engineer could repair a defective footboard himself, or run the locomotive with it entirely removed, does not render him guilty of contributory negligence in continuing to use it in its defective condition, where the rule of the company provides that employees shall report defects or repair them themselves, and he has reported the defect to the proper person, and been twice assured that it will be repaired. *Gibson v. Minneapolis, St. P. & S. S. M. R. Co.* (1893) 55 Minn. 177, 56 N. W. 686. Nor is an employee whose duties require him to pass under a coupling of a revolving shaft having protruding bolts under any obligation to turn aside from his ordinary duties and construct a box to cover such coupling, after the foreman's attention has been called to the defect and he has promised to send carpenters to cover it. *Homestake Min. Co. v. Fullerton* (1895) 16 C. C. A. 545, 36 U. S. App. 32, 69 Fed. 923.

CHAPTER XXIII.

RIGHT OF ACTION FOR INJURIES RECEIVED IN OBEYING DIRECT ORDERS.

- 433. Introductory.
- 434. Necessity of showing that an order was given.
- 435. — and was given by some employee who represented the master.
- 436. — and was the inducing motive of the servant's act.
- 437. — and was negligent under the circumstances.
- 438. Assumption of the risk, as a defense.
- 439. Contributory negligence usually negatived by evidence that servant acted under direct order.
- 440. Considerations upon which this doctrine is based.
 - a. Master and servant not upon the same footing.
 - b. Servant entitled to rely on the master's performance of duties.
 - c. Order considered to be an implied assurance that there is no abnormal danger.
 - d. Necessity for prompt obedience.
 - e. Direct order considered as tending to negate voluntary assumption of risk.
 - f. Direct order considered as tending to produce confusion of mind.
- 441. Direct order not a justification where it was given without authority.
- 442. — nor where a prudent man would have refused to comply with it.
- 443. — nor where the servant fully appreciated the danger.
- 444. — nor where the servant executed it in a negligent manner.

The cases in which the duty to which the order related was outside the scope of the servant's original contract are collected in chapter XXV., *post*.

As to the extent to which the order of a superior employee is an excuse for doing an act violative of a rule, see § 366, note 10, *ante*.

433. Introductory.— The fact that the servant, at the time he was injured, was complying with a direct, specific, personal order of his master, or his master's representative, has, it is well settled, a material bearing upon the question whether he can hold the master responsible.

ble.¹ Broadly speaking, the evidential significance of this fact will be found to be simply this,—that, as it goes to show that the servant's ignorance of the risk to which his injury was due was excusable, or that his action was not entirely voluntary, it tends to negative the availability of the various defenses which, as has been shown at length in chapters XVII.—XX., *ante*, are essentially dependent upon proof that the servant voluntarily encountered a danger which was, or ought to have been, comprehended by him.

As a condition precedent to establishing his right to recover for an injury, on the ground that it resulted from his compliance with a specific and direct order, the servant must establish the following propositions:

(1) That an order was given.

(2) That the order, if not given by the master himself, was given by his representative, within the scope of the authority conferred on him.

(3) That the act which led to the injury was done in obedience to the order.

(4) That the order was a negligent one under the circumstances.

The defenses open to the master are the same as those which are available in cases where a specific and direct order is not an evidential element,—*viz.*, that, having a full comprehension of the risks which an obedience to the order involved, the servant was chargeable either with an assumption of those risks, or with contributory negligence in complying with the order, or with contributory negligence in respect to the manner in which he executed the order.

As regards the essential element on which all these defenses are based,—*viz.*, the servant's knowledge of the danger,—it is not amiss to draw attention to the fact that this element is also involved in the investigation of the question as to whether the order was negligent. It will be seen, by referring to § 437, *infra*, that one form of negligence in giving an order is that which consists in not accompanying it by proper instruction and warning, where the person giving it ought to have seen that there was a probability that the servant did not appreciate the danger to which he was being exposed, or had not sufficient intelligence or technical skill to enable him to protect himself.

434. Necessity of showing that an order was given.—It is very sel-

¹ *Halen v. Case* (1886) 142 Mass. 316. 7 N. E. 877, holding, in regard to a case where the act in question was done in obedience to an order, that an instruction requested by the defendant, which enunciated the doctrine as to the effect of the plaintiff's knowledge of the conditions, was properly qualified by the addition of words drawing the attention of the jury to the aspect of the evidence.

dom that the significance of the words or gestures which were the inducing cause of the act which resulted in the injury complained of can be a matter of doubt. But it is clear, both on principle and authority, that, in order that the servant may receive the benefit of inferences as may be drawn from the fact that he was complying with an order, it is not necessary to show that the directions given were of a formally imperative character.¹

435. — and was given by some employee who represented the master.—On general principles it is manifest that, where the order in question was not given by the employer himself, he cannot be made responsible for an injury caused by obedience to it, unless it proceeded from an agent who had authority to give such a direction with regard to the subject-matter. See chapter xxxiii., *post*. But whether it is also requisite, in order that the master may be charged with responsibility, that the directing employee should be a vice principal in the sense in which that term is understood in cases where the defense of common employment is relied upon, is a question which, under the authorities as they stand, can scarcely be said to have been definitely settled.

In most of the cases cited in the present chapter the servant giving the orders was one who, under the recognized exceptions to the doctrine of common employment, was a vice principal, either because he was a general representative of the master as respects the management of the whole business, or a particular department thereof,¹ or because he was a superior servant in a state where such superiority constituted a vice principalship at common law.² In some cases the directing

¹ A workman who said to the foreman when told to clear the track as a train was coming, "There are two stones on the track;" and was told, "It is time you were getting them off," is justified in considering this an order to take them off. *Stephens v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 221, (1888) 96 Mo. 207, 9 S. W. 589.

² *Kean v. Detroit Copper & Brass Rolling Mills* (1887) 66 Mich. 277, 33 N. W. 395 (superintendent); *Illinois Steel Co. v. Schymanowski* (1895) 59 Ill. App. 32 (superintendent); Affirmed in (1896) 162 Ill. 447, 44 N. E. 876; *Hawkins v. Johnson* (1885) 105 Ind. 29, 55 Am. Rep. 169, 4 N. E. 172 (foreman of factory); *Shortell v. St. Joseph* (1891) 104 Mo. 114, 16 S. W. 397 (engineer in charge of construction); *Colorado Leadland R. Co. v. O'Brien* (1891) 16 Colo. 219, 27 Pac. 701 (foreman in charge of construction); *Norock v. Michigan C. R. Co.* (1886) 63 Mich. 121, 29 N. W. 525 (su-

perintendent of construction track); *Norfolk & W. R. Co. v. Ward* (1894) Va. 687, 24 L. R. A. 717, 19 S. E. 108 (foreman in charge of work of extension); *Coyne v. Union P. R. Co.* (1893) 133 U. S. 370, 33 L. ed. 651, 10 S. W. 2d 382 (foreman of railway construction); *Indiana Car Co. v. Parker* (1890) 100 Ind. 181 (master mechanic); *Orviston v. Overton* (1882) 87 Ind. 410 (foreman of road master to trackman).

³ In one case the order was given by a second mate. *Jones v. St. Louis, I. & M. R. Co.* (1890) 43 Mo. App. 100. In others the order was given by a foreman master to a laborer. *Patterson v. Western North Carolina R. Co.* (1896) 96 N. C. 455, 1 S. E. 863; *East Tennessee & G. R. Co. v. Duffield* (1891) 12 Lea, 63, 47 Am. Rep. 219; *Brads v. Louisville & N. R. Co.* (1893) 14 L. Rep. 688, 21 S. W. 346; *Stephens v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 221; *Schroeder v. Chicago & A. R. Co.* (1886) 63 Mich. 121, 29 N. W. 525 (su-

ployee was one for whose negligence the master had been declared liable by a statute in force in the jurisdiction where the injury was received.³

But there are also some decisions which, when collated with others rendered by the same court, would seem to indicate that a master may be bound by an order given by an employee who is not a vice principal.⁴ Whether such a doctrine, if it is really embodied in the cases cited, can be justified on strictly logical grounds, is very doubtful. A mere co-servant who takes upon himself to give an unauthorized order is clearly guilty of negligence, and there is no apparent reason why this fact should not be deemed to let in the defense of common employment.⁵

Different considerations are, of course, controlling where the servant is seeking to exonerate himself from the charge of contributory negligence. See § 411, *infra*. Under such circumstances the essential question is merely whether the injured servant was justified in obeying the order; and in determining that question it is not material to inquire whether the directing party was a vice principal. This aspect of the subject is obviously in need of elucidation by the courts. As the decisions stand, there would seem to be some grounds for saying that a servant may, upon the same facts, fail or succeed in his action, ac-

(1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094. In others the order was given by a conductor to a brakeman. *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698; *Shadd v. Georgia, C. & N. R. Co.* (1895) 116 N. C. 968, 21 S. E. 554; *Richmond & D. R. Co. v. Rudd* (1892) 88 Va. 648, 14 S. E. 361; *Norfolk & W. R. Co. v. Ampey* (1896) 93 Va. 108, 25 S. E. 226; *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 675, 22 S. E. 83; *Greer v. Louisville & N. R. Co.* (1893) 94 Ky. 169, 21 S. W. 649.

³ In the following cases the order was that of a section foreman to a laborer: *Jones v. Galveston, H. & S. A. R. Co.* (1895) 11 Tex. Civ. App. 39, 31 S. W. 706; *Texas & P. R. Co. v. Lewis* (1894) Tex. Civ. App. 26 S. W. 873. See also *Rihjian v. Woonsocket Rubber Co.* (1895) 164 Mass. 214, 41 N. E. 265 (fellow servant deputed to instruct a new employee as to the manner of doing work); *Last Chance Min. & Mill. Co. v. Ames* (1896) 23 Colo. 167, 47 Pac. 382 (order of ship-tender to minor).

The following cases were decided with reference to statutes which preclude railway companies from relying on the de-

fense of co-service: *Central R. Co. v. De Bray* (1883) 71 Ga. 406; *Fox v. Chicago, St. P. & K. C. R. Co.* (1892) 86 Iowa, 368, 17 L. R. A. 289, 53 N. W. 259; *Strong v. Iowa C. R. Co.* (1895) 94 Iowa, 380, 62 N. W. 799; *Frandsen v. Chicago, R. I. & P. R. Co.* (1873) 36 Iowa, 372; *Smith v. St. Paul & D. R. Co.* (1892) 51 Minn. 86, 52 N. W. 1068.

⁴ This remark is applicable to cases in which the order was given by the captain of a ship to a seaman (*Williams v. Churchill* [1881] 137 Mass. 243, 50 Am. Rep. 304); by the foreman of a gang of trackmen to one of them (*Cook v. St. Paul, M. & M. R. Co.* [1885] 34 Minn. 45, 24 N. W. 311; *Burlington & C. R. Co. v. Liche* [1892] 17 Colo. 280, 29 Pac. 175); or by a conductor to a brakeman (*Louisville, E. & St. L. Consol. R. Co. v. Utz* [1892] 133 Ind. 265, 32 N. E. 881; *Piquegno v. Chicago & G. T. R. Co.* [1883] 52 Mich. 44, 50 Am. Rep. 243, 17 N. W. 232; *Denver, T. & G. R. Co. v. Simpson* [1891] 16 Colo. 55, 26 Pac. 339).

⁵ In *Wright v. Southern R. Co.* (1897) 80 Fed. 260, an improper order of a section foreman was treated as being the negligence of a fellow servant.

ording as the defense interposed is common employment or contributory negligence.

436. — and was the inducing motive of the servant's act.—On general principles it is clear that a servant cannot recover on the ground that, when the accident occurred, he was complying with an order, unless it is shown that the order was the operative influence led to his doing the act. It was the immediate cause of the injury.

437. — and was negligent under the circumstances.—Whether a given order was a negligent one is ordinarily determined by the application of principles which have been discussed under their moral aspects in earlier chapters of this treatise. Negligence may be attributed to the master even though he has no knowledge, either actual or constructive, of the probable result of the servant's compliance with the order would involve.¹ The principle is thus easily prevented, however, in respect of the question whether the peril was or was not known actually or constructively to the servant. See chapters x., xi., and xii.

If there is evidence tending to show that the master was, or the servant was not, chargeable with knowledge of the peril which compliance with the order would involve, and that the master was not, or ought to have been, aware of the servant's ignorance in this respect, the master may properly be found guilty of negligence if it is shown that he gave the order without instructing the servant as to the

¹The fact that an order was given and acted upon by the plaintiff's co-servants is wholly immaterial as an element, where he did not hear it himself, but simply followed their example in doing what he did. *Aercock v. Michigan C. R. Co.* (1886) 63 Mich. 121, 29 N. W. 525. A direction to a servant to "hurry up" her work is not a fact which can be supposed to distract her attention or to affect her power of observation two hours afterwards. *Harold v. Pfister* (1896) 92 Wis. 417, 66 N. W. 355. An angry summons from the master's representative, which the servant complies with so hurriedly that he inadvertently leaves the place of work in a dangerous condition, will not excuse him for shortly afterwards forgetting that condition, the consequence being that he suffers injury. *Brennan v. Front Street Cable R. Co.* (1894) 8 Wash. 363, 36 Pac. 272 (servant was late on the morning when the accident occurred, and was so hurried when he was called that he left open a manhole containing machinery, and stepped into it a short time afterwards, while performing his duties in great haste).

²Where the employer had no edge which should have led him to suppose that the charge in a cart had not been exploded, it is no ground to order a servant to manipulate a churn drill. *O'Neil v. O'Leary* (1895) 164 Mass. 411, 41 N. E. 662.

A tug is not liable for injury to a man who is a member of its crew, falling into the water and being rescued between the boat and wharf, jumping ashore to attach a line, in obedience to the orders of the master, the distance from the wharf (5 feet) not so great as to render the necessarily dangerous to a man of ordinary strength and activity. *Trotter v. Tugboat Co.* (1897) 82 Fed. 111.

In a case where the master ordered his servant to drive a load through a passageway over a board sign was hung, the result that he was injured, it was held that the question of negligence was left to the jury, upon a charge that the ignorance of the plaintiff and the defendant were equal, so that he was either without fault or in equal fault.

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ence of the peril.² See chapters VII, XI, XVI, *note*. A *fortuitous* is negligence a proper inference where the servant is not only not chargeable with knowledge of the peril, but was also physically and mentally incapable of performing, with reasonable safety, the work to which that peril was incident.³ But the question whether negligence shall be predicated on account of the servant's ignorance or unfitness is determined with due reference to the consideration that the employer or his representative is entitled to assume that the servant will exercise ordinary care in carrying out the order.⁴ Compare § 302, *note*.

As a servant is presumed to have accepted the responsibility for any injury which is caused by one of the ordinary risks of the employment (§§ 259-269, *note*), negligence is not predicable of an order which merely exposes him to such a risk.⁵

In several cases it has been held that, if the facts are otherwise such as to negative culpability, the master cannot be found guilty of negligence merely because the testimony also shows that he or his rep-

the plaintiff could not recover, *Haley v. Great W. Co.* (1893) 9 Utah, 163, 3 Pac. 692.

In *Sullivan v. T. W. Mfg. Co.* (1873) 113 Mass. 390, where the defendant had a verdict, the court remarked, in discussing the correctness of the charge given by the trial judge, that where a boy fourteen years old is injured by moving cogwheels, it is competent for him, although he obeys the order, to show that the employer was negligent in exposing him to peril which he was incapable of appreciating without proper instructions. Compare § 237, *note*.

² *Kehler v. Schenck* (1892) 151 Pa. 505, 25 Atl. 130 (young and inexperienced boy ordered to leave his ordinary work of slate picking and drive a dump cart).

³ It was not negligence to order inexperienced railway employee who was working in a roundhouse and railway yard, to clean an engine which at the time was standing still, and who was injured by its being moved while he was under it, where he was not told to go under the engine and there was no reason to suppose that he would do so. *Spencer v. Ohio & W. R. Co.* (1891) 130 Ind. 181, 29 N. E. 915.

⁴ *Boys v. Detroit & M. R. Co.* (1870) 20 Mich. 105, 4 Am. Rep. 364; *The Pequot* (1899) 96 Fed. 623 (seaman sent about to take the turn out of the top gallant stail without its being clued up).

Linberg v. Cox

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representative gave directions by which the injured person was required to use special haste in performing the work in hand.⁶

The omission to give proper orders may, under certain circumstances, be no less culpable than the giving of an improper order. But negligence cannot be inferred on this ground where the master's representative simply failed to give an order to do something which would have the effect of securing them against some danger which the servant could appreciate as well as his superiors, and from which he could protect himself no less effectually than if he had received an order.⁷

438. Assumption of the risk, as a defense.—The principle that a servant, when he is directed either by his master, or by a fellow employee under whose control he is placed, to perform a certain piece of work, or to perform it in a certain place, will ordinarily be justified in obeying the orders so given, without being necessarily chargeable with an assumption of the risks incident to the work, has been recognized in several cases.¹ For practical purposes, however,

⁶The necessity of keeping a construction train out of the way of regular trains being one of the risks incident to the employment of a laborer working on the construction train, he is not entitled to recover on the ground that he and his co-servants were hurried by their superior in the performance of a certain piece of work which it was desired to complete before the arrival of a regular train, and consequently became confused, and failed to act in concert as they should have done. The servant's rights are not enlarged, under such circumstances, by the fact that the order was accompanied by an oath. *Coyne v. Union P. R. Co.* (1889) 133 U. S. 373, 33 L. ed. 655, 10 Sup. Ct. Rep. 382. A jury would not be warranted in finding that an oath addressed to a sailor who knew what to do was sufficient to shift the responsibility for a misstep, on the ground that it confused him and drove him forward into the danger, where the words accompanying the oath carried no specific or wrong direction as to the manner in which the plaintiff should act. *Williams v. Churchill* (1884) 137 Mass. 243, 50 Am. Rep. 304 (plaintiff became entangled in the loose end of a tow rope while acting in obedience to the directions of the master, after he had just cried out with an oath, "You won't get that rope fast"). Merely directing a servant to work "quick" does not render a master liable for injuries

received by him in operating a machine the dangers from which were open and obvious. *Ruchinsky v. French* (1891) 168 Mass. 68, 46 N. E. 417 (verdict for plaintiff rightly directed). An order "proceed quickly, and not waste so much time" in doing a certain part of work in hand, does not show negligence. *Wanner v. Kindel* (1893) 4 Colo. 168, 34 Pac. 1014.

In *Taylor v. Carver Mfg. Co.* (1890) 140 Mass. 150, 3 N. E. 21, and *Chapman v. Merchants' Woolen Co.* (1888) 138 Mass. 182, 15 N. E. 579, the evidence showed that the servant had been ordered to hurry with his work; but the effect of this element was not discussed.

⁷A railroad company is not liable for the negligence of a section foreman in failing to direct persons in charge of a hand car upon a track in front of a passenger train to desert the car and get out of the way if they knew of the approach of the train and of the danger of attempting to save the car before the train reached them. *Texas & P. R. Co. v. Felt* (1899) 34 C. C. A. 530, 92 Fed. 100.

¹*Cook v. St. Paul, M. & M. R. Co.* (1885) 34 Minn. 45, 24 N. W. 389. *Strong v. Iowa C. R. Co.* (1895) 137 Iowa, 380, 62 N. W. 799.

In some cases there is traceable to the exception that an order has an effect analogous to that ascribed in some instances to a promise by the master to remove a certain cause of danger (

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principle is not of much importance, as the ultimate question to be determined in this as in all other classes of cases when the defense of an assumption of the risk is put forward is simply whether the servant had knowledge, actual or constructive, of that risk, and encountered it without being subjected to what the law regards as coercion. "There is no doubt of the general rule that one who, knowing and appreciating the danger, enters upon a perilous work, even though he does so unwillingly and by order of his superior officer, must bear the risk."² No differentiating significance, therefore, can be ascribed to the fact that the injury was received as the result of obeying an order, where it appears that the servant was merely directed to do something which was a part of the regular work of the establishment in which he was employed, and that the risk to be encountered was fully comprehended by him.³ Similarly, in cases where the only possible inference from the testimony is that the responsibility for any injury that might result from the risk in question had, in consequence of his having remained in the employment with a full knowledge of that risk, been shifted to the servant before the date of the accident, the mutual obligations of the parties are in nowise modified by the fact that the immediate occasion of his being in the position in which he was when the injury was received was his compliance with an order.⁴

ter XXII., *post*); that is to say, it operates as an implied stipulation on the master's part that he will take upon himself the responsibility for any injuries resulting from obedience to the order. See *Indianapolis & C. R. Co. v. Love* (1858) 10 Ind. 554, where the master is said to "assume the risk." The phrase that "the master became subject to all the risk of an accident" is used in *Kehler v. Schwenk* (1892) 151 Pa. 505, 25 Atl. 130.

²*Ferren v. Old Colony R. Co.* (1887) 143 Mass. 197, 9 N. E. 608.

³*Demora v. Deering* (1899) 93 Me. 272, 44 Atl. 922 (servant required to take a position which would ordinarily be taken under the normal conditions of the work); *Fitzgerald v. Honkomp* (1892) 44 Ill. App. 365. One ordered by his foreman to clean rolls in a mill, and who has equal knowledge with the foreman of the danger in attempting to clean them on the front side, assumes the risk of attempting to clean them from that side, whether he ought to have obeyed the order of the foreman or not. *Kean v. Detroit Copper & Brass Rolling Mills* (1887) 66 Mich. 277, 33 N. W. 395.

In *Wilson v. Tremont & S. Mills* (1893) 159 Mass. 154, 34 N. E. 90, where a servant of full age was injured while attempting to hold a bag which was being filled with cotton taken from a dryer, over spikes driven in a beam so high that he could only reach it with his fingers, the court said: "The mere fact that the defendant told him to take the cotton from the dryer did not make a concealed danger of that which was obvious before, or render involuntary his assumption of a risk which was evident to and part of his regular work, and which he knew to be such and understood."

⁴*Linch v. Sagamore Mfg. Co.* (1887) 143 Mass. 206, 9 N. E. 728 (servant injured by explosion of steam pipe caused by his letting steam into it while it was full of water, the danger of doing this being known to him. No recovery, though he was acting under orders, and unwillingly); *Hoth v. Peters* (1882) 55 Wis. 405, 13 N. W. 219 (servant injured by fall of lumber from a car which was slippery from frost and ice cannot recover, though he assumed the place of danger by the direction of the foreman).

A carpenter sent to do some work in

The effect of the decisions, as a whole, may be said to be this,—the doctrine which declares that a servant acting under the direct orders of the master or a superior coservant does not assume the risk incident to the work is not applicable except where the service is a special one, and not even then where the danger is obvious to a person of ordinary prudence and intelligence.⁵ In other words, the master does not make himself an insurer of the servant's safety because the latter is requested to incur a danger, provided that danger is manifestly incident to the employment.⁶

439. Contributory negligence usually negatived by evidence that servant acted under direct order.—For reasons explained in §§ 2319, *ante*, it is plain that negligence cannot be predicated of a servant's obedience to an order, where he had no knowledge, actual or constructive, of the dangerous conditions to which such obedience would expose him.¹ Under such circumstances the fact that a direct order was given obviously becomes wholly immaterial. But there is a large class of cases in which that fact is treated as a differentiat-

a brewery, and there directed to place a stringer in a certain room, from which he is driven out by the fumes of ammonia, who when ordered by the superintendent of the brewery to try again, saying that the work must be done, makes another attempt, in which he is seriously injured, assumes all the risk, and cannot recover. *Beittemiller v. Berger & E. Brewing Co.* (1888) 22 W. N. C. 33, 12 Atl. 599. An employee of ordinary intelligence, who knows that trenches are liable to cave in, and that the one in which he is working has just partially caved in at a distance of a few feet, assumes the risk of returning to his work therein upon an order of the superintendent. *Showalter v. Fairbanks, M. & Co.* (1894) 88 Wis. 376, 60 N. W. 257.

Where a section hand got on a hand car, which he had for three months known to be defective, in obedience to an order of his foreman to go home to dinner, an instruction regarding the liability of an employer who orders a servant into a position of extra hazard is inapplicable and misleading. *Burlington & C. R. Co. v. Liche* (1892) 17 Colo. 280, 29 Pac. 175.

⁵ *Stuart v. New Albany Mfg. Co.* (1896) 15 Ind. App. 184, 43 N. E. 961.

⁶ In *Welch v. Brainard* (1895) 108 Mich. 38, 65 N. W. 667, it was held that an employer is not liable for an injury to a servant caused by the fall of en-

silage 10 feet deep, resulting from the latter's undermining the same, although the former directed the work to be done by undermining, instead of by taking from the top.

¹ As, where the appearance of a wall, in which a servant was ordered to use a support himself while washing down, did not indicate its weakness, and he had no knowledge of the length of time it had been in use. *The Ethel* (1899) 96 Fed. 446.

A street-railway conductor who, in an emergency and by order of the company's foreman, goes to work to release the brake of a car standing on the track over the pit in the station, and is injured by another car which ran into the track, because a switch was negligently left open, is not chargeable with fault or neglect in accepting the employment, where he had never worked in the pit previously, nor been advised of the risks and dangers of the situation. *Stucke v. Orleans R. Co.* (1898) 50 Mo. Ann. 188, 23 So. 342. On the ground that it was for the jury to say whether the servant, a miner, realized the extent of the danger, it was held that negligence was not inferable, as a matter of law, where he obeyed an order to go down the pit to help to extricate another miner whom earth had fallen on, and was injured by a second earthslide. *Frank v. Burlington & C. Min. Co.* (1899) 19 Utah 56 Pac. 419.

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element, and in which the courts apply a doctrine which, in so far as it is susceptible of formal enunciation, may be stated as follows: Although the circumstances, when abstracted from the fact of the giving of the order, may be such as to justify a court in holding that the servant appreciated the danger to which his injury was due, and was negligent in subjecting himself to that danger, such a conclusion is, in a large number of instances, not warrantable, if the testimony goes to show that the immediate occasion of his being subjected to that danger was his compliance with the order.² The effect of this doctrine is that, where the servant, in obedience to an order, performs a duty which, though dangerous, is not so dangerous as to threaten immediate injury, or where it is reasonably probable that the work may be safely done by using more than ordinary caution or skill, he may recover, if injured.³ It will be seen that this rule, when analysed,

² "Questions arise whether the action of a servant is his voluntary act, or done in obedience to the commands of the master or one in authority over him. When an act is performed by a servant in obedience to a command from one having authority to give it, and the performance of the act is attendant with a degree of danger, yet in such case it is not requisite that such servant shall balance the degree of danger, and decide with absolute certainty whether he must do the act, or refrain from it; and his knowledge of attendant danger will not defeat his right of recovery, if, in obeying the command, he acted with that degree of prudence that an ordinarily prudent man would have done under the circumstances." *Chicago Anderson Pressed Brick Co. v. Sobkowiak* (1894) 148 Ill. 583, 36 N. E. 572. If the master, knowing of the existence of abnormal dangers, commands and urges the servant to do something which involves exposure to him, and an accident happens in consequence of the servant's obedience, his previous knowledge of those dangers will not, of itself, prevent his recovering damages. *Moline Plow Co. v. Anderson* (1885) 19 Ill. App. 417. That a servant may often be deemed to have used ordinary care for his personal safety, when acting under the express invitation or advice of the master, when, but for that circumstance, his conduct would be deemed clear evidence of negligence, was recently laid down in *Butler Bullast Co. v. Hoshaie* (1901) 94 Ill. App. 68.

³ In *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412,

where the injury was caused by a defective switch, the court said: "Let it be considered that the switch in question was dangerous, yet, doubtless, many trains had passed over it safely, and hence a man of common prudence might well conclude that, though it was more than ordinarily dangerous, yet many more trains might in like manner be passed over it safely. Under such a state of facts the conductor might properly rest upon the judgment of his superiors who requested him to continue its use, hoping that by extra care and skill he might avert accidents until the switch was reconstructed or properly repaired. On the other hand, if the defect was so great that obviously, with the use of the utmost skill and care, the danger was imminent, so much so that none but a reckless man would incur it, the employer would not be liable."

In a case where an engineer was injured by the derailment of his locomotive, due to the fact that he was complying, under protest, with an order to run it to a certain station at a greater rate of speed than the customary rate of 12 miles an hour, the question whether he was guilty of contributory negligence in so running, when he knew, in a general way, of the defective condition of the track, was held to be for the jury. The court said: "It would be a very unjust rule which would allow a master to shield himself from responsibility for the consequence of his own negligence by alleging those acts, not inevitably or immediately dangerous, to have been negligent, which his servant performed by his express order." *Hau*

amounts to nothing more than a statement that, in determining what ordinary care on the part of a given individual, all the circumstances of his position should be regarded, including, in cases like the present, the servant's orders, the demands of his duty, the apparent risk to be met, and the purpose of his action, no less than his physical su-

ley v. Northern C. R. Co. (1880) 82 N. Y. 370. Affirming (1879) 17 Hun, 115, and following the Pennsylvania case *supra*, which has also been approved in *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205, and *Richmond & D. R. Co. v. Rudd* (1892) 88 Va. 648, 14 S. E. 361 (following the Pennsylvania case, where a brakeman who was engaged in uncoupling a car without a stick, in contravention of rules, but by order of the conductor, was thrown off the flat car where he was standing and run over).

"Whether it be the fault of an employee to obey an order of his superior depends upon whether it would be rash and dangerous to do so; and where there was no apparent danger so to do it would not be fault on his part." *Central R. Co. v. De Bray* (1883) 71 Ga. 406.

Whether or not a section hand was guilty of contributory negligence in attempting, in pursuance of the direction of the track foreman, a vice principal, to board an electric car moving at the rate of three or four miles an hour, precluding recovery for his death, caused by falling from the car and being run over by it, is for the jury. *Chattanooga Electric R. Co. v. Larson* (1898) 101 Tenn. 406, 47 S. W. 489.

Negligence is not a necessary inference from evidence showing that plaintiff's intestate, while in the employ of defendant as a carpenter, was helping to take down an iron pipe used in the erection of a steel grain elevator; that he was ordered by the general foreman of construction to take a pair of tongs and go up on the scaffold, 18 feet above the floor, and stand on a board 1 foot wide, and assist in holding the upper sections of the pipe from turning, while the lower section was being unscrewed by the combined strength of three men, of whom the foreman was one; and that, while engaged in doing this, he fell off and was killed. *William Graver Tank Works v. O'Donnell* (1901) 191 Ill. 236, 60 N. E. 831.

The negligence of a member of a section crew in jumping from a train going out 4 miles per hour, to a station plat-

form, in broad daylight, in obedience to the command of the conductor, who was his direct superior, and after fellow laborers had jumped and landed safely, is not so obvious as to be a necessary legal conclusion, but is a question for the jury. *Northern P. R. Co. v. Egle* (1896) 163 U. S. 93, 41 L. ed. 82, 12 Sup. Ct. Rep. 975, Affirming (1893) 100 U. S. 471, 12 U. S. App. 271, 56 Fed. 260. Negligence is not inferable, as a matter of law, where the evidence shows that a brakeman who was injured by striking against a skid, when complying with an order to dismount at night from a train moving at the rate of from 4 to 6 miles an hour, used his lantern and got off carefully. *Central R. Co. v. De Bray* (1883) 71 Ga. 406.

Evidence of an order from a conductor to a brakeman to cut off some cars from a slowly moving train introduces an element which prevents a court from saying, as a matter of law, that he was negligent in attempting to disconnect the cars by going in between them. Under such circumstances he may well have understood that, even if the order was not a specific direction to go in between the cars, he was authorized to connect them apart by going in between them in such a mode as appeared to him, in the exercise of ordinary care, to be necessary. *Hannah v. Connecticut River R. Co.* (1891) 154 Mass. 529, 28 N. E. 68.

A brakeman cannot be held negligent because, on a dark, cold, and stormy night, when he had to act promptly, he complied with an order of his conductor to take up and use a coupling link which was lying on the ground near the track, although it turns out that the link was not suitable for the purpose for which it was required. *Denver, T. & G. R. Co. v. Simpson* (1891) 16 Colo. 55, 26 Pac. 339.

A servant may recover on evidence which shows that he obeyed the order of his superintendent to hold the outer end of a plank, which rested at its inner end on the edge of a wagon bed; that his duty was to lower it slowly to the ground after a heavy barrel which was to be unloaded had been rolled on the inner end, and in this manner

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form a skidway for the barrel; that the barrel, being forcibly run against the plank, thrust it off of the wagon bed and fell upon it; and that the servant's arm was broken by the shock thus caused. *Beard v. American Car Co.* (1897) 72 Mo. App. 583.

On the ground that the danger was not inevitable nor imminent, the contributory negligence of the servant was held to be for the jury to determine, where the evidence was that, in taking down a furnace, the rear plate, weighing about a ton, and resting on an old brick foundation wall, was disconnected from the front plate, and inclined back against another furnace, 4 inches distant; that after it had so stood for a day to plaintiff's knowledge, he was directed by his employer, under whose immediate orders the work was being done, to take out the front wall bricks, and, on plaintiff saying the best way was to take the plate down first, defendant said that plaintiff should do as he told him; that another person also suggested to defendant that the plate was dangerous, and should be fastened; that the defendant, nevertheless, did nothing, and the plate fell because of the rear foundation giving way, plaintiff's work not affecting it. *Reese v. Clark* (1901) 198 Pa. 312, 47 Atl. 994.

To the same effect, see *Stuart v. Evans* (1883) 49 L. T. N. S. 138, 31 Week. Rep. 706, per Williams, J.; *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876; *Norfolk & W. R. Co. v. Ampey* (1896) 93 Va. 108, 25 S. E. 226 (servant knew that appliances for coupling were defective, but believed that the coupling ordered could be safely made by hand); *Louisville, E. & St. L. Consol. R. Co. v. Utz* (1892) 133 Ind. 265, 32 N. E. 881 (fact that brakeman walked along the top of a train moving at a high rate of speed not necessarily a bar to his action, where he was acting under orders); *Indiana Car Co. v. Parker* (1885) 100 Ind. 181 (workman not necessarily negligent in changing from one part of his work to another); *Harkins v. Johnson* (1886) 105 Ind. 29, 55 Am. Rep. 169, 4 N. E. 172 (rule that servant must at his peril choose

the safer of two methods of doing his work, not applicable where a servant drove a wagon by express orders along a particular way, and was caught by a shaft which he was stepping over, having found that it was too low to admit of his passing underneath it while seated in the wagon); *Central R. Co. v. De Boer* (1883) 71 Ga. 406 (brakeman not necessarily negligent in getting off a moving train by the orders of the conductor); *Payne v. Mower* (1899) 88 Ill. App. 169 (servant adopted dangerous method of arranging planks to be cut by a rip saw, and had his hand injured); *Harrison v. Denver & R. G. W. R. Co.* (1891) 7 Utah, 523, 27 Pac. 728 (ordered to take down a shaft at night); *Thompson v. Chicago, R. I. & P. R. Co.* (1900) 86 Mo. App. 141 (engine hostler's helper obeyed orders of hostler to couple two tenders so constructed as to come dangerously close together, he not being aware of this fact); *Britton v. Northern P. R. Co.* (1891) 47 Minn. 340, 50 N. W. 231 (section man not necessarily negligent in attempting, at the command of his foreman, to remove a hand car out of the way of a slowly approaching engine); *Colson v. Craver* (1899) 80 Ill. App. 99 (employee operated circular saw without a helper, knowing that it was ordinarily operated by two men); *Aerfolk & W. R. Co. v. Ward* (1894) 90 Va. 687, 24 L. R. A. 717, 19 S. E. 849 (servant entered an unusually narrow ditch under peremptory orders to dig it deeper, and it caved in upon him); *McFadden v. Sollitt* (1901) 94 Ill. App. 271 (workman directed by his employer to go under an overhanging bank of earth to assist in placing stone on a wall, not obliged to balance the degree of danger); *Wierzbicki v. Illinois Steel Co.* (1901) 94 Ill. App. 400 (servant knew that the rope on a spool was in an untwisted, loose, and raveled condition); and decisions referred to in this and the next sections.

In an action by a trackman for injuries sustained while attempting to draw a spike in a dangerous manner with a sledge, an instruction that, if the jury believed that defendant's foreman instructed plaintiff to draw spikes in a

ligence.⁴ The practical result of such a doctrine, when stated in terms of the servant's knowledge, is that the servant may maintain an action, unless he not only knows what is the risk to be encountered, but also that it will probably be attended with injury which he cannot avoid by the exercise of care and caution.⁵

In other cases the extent of the servant's right of action is indicated by a restrictive form of statement, and he is said to be entitled to obey a specific command of his superior without incurring thereby the imputation of contributory negligence, unless the execution of that command involves a hazard to which no ordinarily prudent person would have subjected himself;⁶ or unless a reasonably prudent person in the situation and with his knowledge of the danger would not have obeyed the command;⁷ or unless the danger was so "apparent,"⁸ or "obvious,"⁹ or "clear,"¹⁰ or "manifest,"¹¹ or "glaring,"¹² or "imminent"

more dangerous manner than plaintiff had been accustomed to draw them, yet if plaintiff, from his experience, knew that by obeying the order he was undergoing more danger, and obeyed without protest or objection, and was thereby injured, he would not be entitled to recover, is properly refused, since it could not be said, as a matter of law, that the danger that the head of the spike would fly off and strike plaintiff, as it did, by attempting to pull the spike in such manner, was imminent. *Illinois C. R. Co. v. Sporleder* (1900) 90 Ill. App. 590.

The rule that an employer who furnishes a proper machine is not liable to a servant injured while using it for an improper purpose (see § 342, *ante*) does not apply in the case of an injury to an inexperienced employee who was using the machine in obedience to the direction of a superior whom it was his duty to obey. *Neubury v. Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743.

⁴ *Schroeder v. Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094 (where a section man tried to get a hand car off the track when a train was approaching).

⁵ This form of expression is found in *Halliburton v. Wabash R. Co.* (1894) 58 Mo. App. 27.

⁶ *Neubury v. Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743.

⁷ *Stephens v. Hannibal & St. J. R. Co.* (1888) 96 Mo. 207, 9 S. W. 589.

⁸ *Vall v. Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 268, 28 N. E. 183, 611; *Thompson v. Chicago, M. & St. P. R. Co.*

(1883) 4 McCrary, 629, 14 Fed. 50; *Chicago Anderson Pressed Brick Co. v. Sobkowiak* (1892) 45 Ill. App. 317, affirmed in (1894) 148 Ill. 573, 36 N. W. 572 (laborer injured by fall of overhanging bank); *Steinhauser v. Sprague* (1893) 114 Mo. 551, 21 S. W. 515, 8 Tex. Civ. App. 26 S. W. 873 (section hand not negligent because he obeyed orders to take hand car off track when a train is close at hand). *Comp. v. Schroeder v. Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094.

In a case where a servant was ordered to assist in the adjustment of a shackle close to a moving circular saw which was not guarded, and who, after having suggested that the work was not safe unless the saw was stopped, complied with a second and peremptory direction to proceed with the work, and was injured owing to his clothes catching in the saw, the jury were held to have been properly instructed that the plaintiff would not be barred from recovery by the fact that the work was dangerous, unless the danger was so obvious and the injury thereby was so inevitable, that a man of ordinary prudence would have refused to obey, if ordered by his employer to do it. *Van Dusen v. Gas & Gasoline Engine Co. v. Schaefer* (1899) 61 Ohio St. 298, 55 N. E. 999.

⁹ *Higgins v. Missouri P. R. Co.* (1891) 43 Mo. App. 550.

¹⁰ *Larson v. Center Creek Min. Co.* (1897) 71 Mo. App. 512; *Last Chance Min. & Mill Co. v. Ames* (1896) Colo. 167, 47 Pac. 382.

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that a person of that average prudence and intelligence whose hypothetical conduct is the test of the existence or absence of negligence would have declined, under the given circumstances, to have complied with the order. In other words, if a danger is not so absolute or imminent that injury must almost necessarily result from obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order.¹⁴

It does not follow that, because disobedience to the order would have been justifiable, the servant was guilty of negligence in obeying it.¹⁵ Still less will the employer be permitted to escape liability on the ground that by disobeying the order the servant would have avoided injury, where it is a reasonable inference from the testimony that it was the servant's duty, under the given circumstances, to encounter the danger in question.¹⁶ Nor does it follow that, because it may

v. Murphy (1888) 115 Ind. 566, 570, 18 N. E. 30; *Lebanon v. McCoy* (1895) 12 Ind. App. 500, 40 N. E. 700 (laborer obeyed order to remove timber lying near a negligently erected bridge); *Norfolk & W. R. Co. v. Ward* (1894) 90 Va. 687, 24 L. R. A. 717, 19 S. E. 849 (day laborer injured by the caving in of the sides of a narrow excavation which the foreman ordered him to dig to a greater depth than was prudent); *East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 69, 47 Am. Rep. 319; *Huhn v. Missouri P. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937; *Shortell v. St. Joseph* (1891) 104 Mo. 114, 16 S. W. 397 (case for jury where a laborer was injured by the fall of an arch while he was taking down the supports); *Stephens v. Hannibal & St. J. R. Co.* (1888) 96 Mo. 207, 9 S. W. 589 (case for jury where section man tried to get two stones off the track when a train was approaching); *Ballard v. Chicago, R. I. & P. R. Co.* (1892) 51 Mo. App. 452 (servant jumped from moving train); *Fogus v. Chicago & A. R. Co.* (1892) 50 Mo. App. 250 (plaintiff injured by the fall of a large wheel which he was helping to move down an incline, against his better judgment); *Halliburton v. Wabash R. Co.* (1894) 58 Mo. App. 27 (plaintiff injured while following foreman's orders as to way of placing drive wheels under a locomotive).

In a case where an injury caused by a defective car was shown, an instruction that the servant was justified in going in to uncouple the car, under the conductor's order, even though he knew

of its defective condition, unless the danger was so glaring that no prudent person would have attempted it under the existing conditions, is properly given. *Harney v. Missouri P. R. Co.* (1899) 80 Mo. App. 607.

¹⁵ *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876; *St. Louis, I. M. & S. R. Co. v. Rickman* (1898) 65 Ark. 138, 45 S. W. 56; *Pagels v. Meyer* (1900) 88 Ill. App. 169.

¹⁶ *Chicago Anderson Pressed Brick Co. v. Sokkowiak* (1892) 45 Ill. App. 317, Affirmed in (1894) 148 Ill. 573, 36 N. E. 572.

¹⁷ *Stephens v. Hannibal & St. J. R. Co.* (1888) 96 Mo. 207, 9 S. W. 589; *For v. Chicago, St. P. & K. C. R. Co.* (1892) 86 Iowa, 368, 17 L. R. A. 289, 53 N. W. 259. See § 440, note 13, *infra*, for facts.

¹⁸ In *Frandsen v. Chicago, R. I. & P. R. Co.* (1873) 36 Iowa, 372, it was held that the following instruction was properly refused: "7. If the jury find that the plaintiff was instructed by the section foreman to assist in removing the hand car, at a time when a person exercising ordinary care and prudence would reasonably apprehend danger to his life or limb, he is not required to obey such instruction; and if the jury further find that he does follow such instruction and is injured, and that by disobeying the same the injury could, by the exercise of ordinary care and judgment, have been avoided, then the defendant is not liable." The court said: "Under the evidence, it was not error to refuse this instruction. We would not say that it might not prop-

be negligence for a superior servant to order his subordinate into a dangerous position into which he himself is to accompany them, they are therefore negligent in complying with the order.¹⁷

The rule as to the qualifying effect of an order is deemed to be especially applicable where the servant is an immature boy, who objects to doing the work, but ultimately did it with reluctance.¹⁸

440. Considerations upon which this doctrine is based.—The doctrine stated in the last section depends upon several different considerations. Some of these, it will be observed, are more or less operative in every case, whether directly relied on or not. Others are applicable only under special circumstances.

a. Master and servant not upon the same footing.—A fundamental principle which has already been discussed under other aspects (§ 408 *et seq.*, *ante*), and which is frequently adverted to in cases of the type reviewed in this chapter, has been thus stated in a leading decision already cited: "The servant does not stand on the same footing with the master. His primary duty is obedience, and if, when in the discharge of that duty, he is damaged through the neglect of the master, it is but meet that he should be recompensed."¹⁹ This essential inequality in the positions of the parties is deemed to warrant the deduction that "a prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound, at his peril, to set his own judgment above that of his superior."²⁰ In other words, when

erly be given in some possible case, but the bare fact that a position to which an employee is ordered for the discharge of his duty is a dangerous one will not justify his disobedience, since he was employed for that duty, and its discharge may be necessary to save the lives of others; and a failure to do his duty, or disobedience under such circumstances, might be negligence on his part, rendering the employer liable to others injured thereby. To assume a position of danger is not necessarily negligence, but it is often a clear duty, and an employee in such case, even if injured, would have no right of action, since he was employed for such position of danger and paid for assuming it."

"In *Frandsen v. Chicago, R. I. & P. R. Co.* (1873) 36 Iowa, 372, it was on this ground that a section hand should have refused to go with a hand car into a railway cutting, when a train might arrive at any moment. But the court said: "A judicial sanction to such insubordination would breed an infinity of

accidents. Although the train was behind time, this would not justify the boss and men, who constitute the repairing force, in setting off their hand car and awaiting the train. It might not arrive for hours, or possibly might itself be awaiting the arrival of the hand car with men, tools, and material to repair a breach or remove obstructions which stayed its progress. The repairing force, then, should move on both prudently and obediently, to the discharge of its full duty."

"*Kehler v. Schreck* (1892) 151 Pa. 505, 25 Atl. 130.

"*Patterson v. Pittsburgh & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412.

"*Indiana Car Co. v. Parker* (1881) 100 Ind. 181. "The master and servant do not stand upon an equal footing, even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master, and he has the right to rely upon the superior knowledge and skill of the master. The servant is not entire-

servant did not assert his judgment in opposition to the supposed better judgment or stronger will of his master, the law usually allows a jury to determine whether he was negligent, or acted in reliance upon the judgment of his master, or out of a constrained acquiescence in the rule of obedience which his relation as servant imposed.³

free to act upon his own suspicions of danger." *Shortel v. St. Joseph* (1891) 104 Mo. 114, 16 S. W. 397. "Where an employer commands his employee, whom he assumes to direct, to use a defective implement in a particular way, leaving the latter no discretion as to the time or manner of its use, the employee may rely upon the superior knowledge and experience of the employer, unless the defect is so glaring and extreme as to make the danger of using the utensil apparent to anyone." *Jennett Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 566, 18 N. E. 30.

In a case where the servant was injured by falling from a scaffold while he was engaged in taking down a shafting in an insufficiently high room, it was held proper to instruct the jury that if the work ordered to be done was not obviously dangerous, or of such a nature that the servant could see that it could not be performed with safety, or about which there could be a difference of opinion in the minds of reasonable and prudent persons, then the servant was not, at the peril of being discharged, bound to set up his judgment against that of his master. *Harri on v. Denver & R. G. W. R. Co.* (1891) 7 Utah, 523, 27 Pac. 728.

³ *Cullen v. Norton* (1889) 52 Hun, 9, 1 N. Y. Supp. 774 (servant set to work underneath an unexploded blast, which went off). This decision was reversed in (1891) 126 N. Y. 1, 26 N. E. 905, but merely on the ground that the defense of common employment was a bar to recovery.

In *Huntley v. Northern C. R. Co.* (1880) 82 N. Y. 370, the court argued thus: "We must take into account the plaintiff's position. His business was that of an engineer, and unless he obeyed orders and ran his engine he would have been obliged to abandon the defendant's service; of one thus situated the law should not be too exacting. We must assume that the officers of defendant, who had charge of the road, and must have known its condition, deemed it safe; and the plaintiff had the right to rely somewhat upon their judgment. Other employees of the road, and hun-

dreds of passengers, were daily trusting their lives upon the road, and on the day of the accident he was ordered to, and did, precede a passenger train. Under such circumstances, was the plaintiff bound to set up his judgment against that of all others, and determine for himself that the road was absolutely unsafe for the passage of his engine, and abandon his position as engineer, or take upon himself the risk caused by defendant's negligence? We think, under all the circumstances, and upon all the evidence given on both sides, that it was a question for the jury to determine, whether the plaintiff acted with reasonable prudence and discretion in venturing to run his engine over the road."

An employee injured by the falling of a scaffold, due to his changing, under the orders of the foreman representing the common master, the manner in which it was suspended, is not chargeable with the knowledge that it was unsafe, where there was evidence that scaffolds were sometimes suspended in that way by those engaged in similar work, although he objected to fastening it in that way, as rendering it "liable to come down." *Offutt v. World's Columbian Exposition Co.* (1898) 175 Ill. 472, 51 N. E. 651, Reversing (1897) 73 Ill. App. 231. A railway servant is not, as matter of law, guilty of negligence, where the method pursued by him in loading wheels on a car was adopted by him in reliance upon the judgment and experience of his foreman, and there is nothing to show that such reliance was not justifiable. *Kain v. Smith* (1880) 89 N. Y. 375. A mason is not negligent, as matter of law, in following the instructions of his foreman with regard to the proper manner of setting a certain kind of terra cotta with which he is not familiar. *Gibson v. Sullivan* (1895) 164 Mass. 557, 42 N. E. 110. A laborer in a quarry, who has stood aside while a "boat" loaded with rock is being hoisted to a ledge directly above where he is working, is not necessarily negligent in returning to the place of work in compliance with a signal from his foreman which he supposes to be an intimation that the "boat" has been swung past the

The inequality of the positions occupied by a servant and by the master or employee who controls him is usually emphasized as a circumstance indicative of the conclusion that his knowledge was relatively inferior. But under some states of facts this consideration might be material, even though both parties have the same knowledge of the danger.¹

b. Servant entitled to rely on the master's performance of his duties.—(Compare §§ 354, 355, *ante.*)—A second principle which is especially important in cases where the servant was injured as a result of his compliance with a direct order, and which naturally suggests itself as a material element under such circumstances, is that a servant is not necessarily negligent where he acts upon the presumption that his employer and his employer's agents have done, are doing, and will do, their duty.² The servant

margin of the ledge and is no longer dangerous to a person below, although, as a matter of fact, the danger is not yet over, and the laborer is ultimately injured by the falling of the boat consequent upon its striking against the ledge. *Cox v. Synette Granite Co.* (1890) 39 Mo. App. 424.

Compare also *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 459, 44 N. E. 876; *McKee v. Tourtellotte* (1896) 167 Mass. 69, 48 L. R. A. 542, 44 N. E. 1071; *Larson v. Center Creek Min. Co.* (1897) 71 Mo. App. 512; *Norfolk & W. R. Co. v. Ward* (1891) 90 Va. 687, 24 L. R. A. 717, 19 S. E. 849; *Colorado Midland R. Co. v. O'Brien* (1891) 16 Colo. 219, 27 Pac. 761 (laborer, not appreciating the risk, went on overloaded construction train); *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 675, 22 S. E. 83 (boy of sixteen years killed while riding on a hand car through a cut in a curve, which his foreman had entered without sending a man ahead with a flag,—not negligent in obeying order to get on the car); *Rogers v. Overton* (1882) 87 Ind. 410 (trackman not negligent in obeying an order of a road master to assist in bending rails without heating them).

¹It cannot be said that the master and servant are on an equal footing, even where they have equal knowledge of the danger. To so say is against common experience, and in disregard of the fact that the servant occupies a position subordinate to the master. *Stephens v. Hannibal & St. J. R. Co.* (1888) 96 Mo. 207, 9 S. W. 589.

²Where an employee, who is not a

ship carpenter, or a joiner, or a mechanic of any kind, and knows nothing about the construction of scaffolding, the forces which it would be required to resist, is put into the hold of a gunboat by his employer, and ordered to remove the chips and rubbish from beneath the scaffold, he is entitled to assume that his employer has exercised care in seeing that the scaffolding is of sufficient strength. *Conolly v. Padon* (1864) 41 Barb. 366.

A section hand engaged, under the direction of a foreman of the road, in attempting to remove a hand car from the track in order to avoid an approaching train, has the right to presume that the foreman, who is in a situation to devote his whole attention to the approaching train and the efforts of his men to get the hand car off the track, will give such directions as will protect him. *Louis, I. M. & N. R. Co. v. Rickman* (1898) 65 Ark. 138, 45 S. W. 56.

See also *Cranby v. Cutting* (1890) 165 Mass. 436, 43 N. E. 197 (servant ordered to steady a stone which is being hoisted by a derrick has a right to rely on the presumption that it is properly fastened); *McMillan Marble Co. v. Black* (1890) 89 Tenn. 118, 14 S. W. 479 (boy set to work under a dangerous projecting rock entitled to assume that it has been tested); *Cook v. St. Paul M. & W. R. Co.* (1885) 34 Minn. 45, 2 N. W. 311 (floor of depot which had been injured by fire and was under repair gave way); *McGovern v. Central Vermont R. Co.* (1890) 123 N. Y. 280, 1 N. E. 373 (laborer in a grain elevator who is sent for by the superintendent

deemed to be warranted in shaping his conduct with reference to this presumption, unless he has, or ought to have, acquired knowledge of circumstances which indicate that it is not justifiable.⁶ The juridical theory is that the order, having a natural tendency to throw the servant off his guard, may properly be considered to excuse him from the exercise of the same degree of care as would have been incumbent on him if the case had not involved this factor.⁷

and ordered to enter one of the bins through a trap door at the bottom to detach from the sides any grain that may be sticking to the sides, has a right to assume that the superintendent has previously ascertained that no grain has accumulated in such a position as to be dangerous to men working in the lower part of the bin; *Eldridge v. Atlas S. S. Co.* (1890) 58 Hun, 96, 11 N. Y. Supp. 468 (seaman entitled to assume that winch can be safely operated, — fact was specially emphasized that he was bound by his articles to obey orders); *Lebanon v. McCoy* (1895) 12 Ind. App. 500, 40 N. E. 700 (demurrer *et seq.*); *Holmes v. Meramec Iron Min. Co.* (1893) 54 Mo. App. 476 (miner injured by fall of stone from a slope above a pit where he was sent to work, the evidence being that it was impossible by any reasonable care to prevent such occurrences altogether, but that the defendant's vice principal had failed to use proper precautions, in view of the fact that he knew that stones had been falling in uncommonly large numbers on the day of the accident); *Steinhauer v. Spraul* (1893) 114 Mo. 551, 21 S. W. 515. Affirmed on Rehearing in (1893) 114 Mo. 558, 21 S. W. 859 (domestic servant, ordered to ascend ladder, entitled to assume that it is not defective); *Southern R. Co. v. Hart* (1901) 23 Ky. L. Rep. 1054, 64 S. W. 650 (servant ordered to mount on top of a stationary car under repair is not negligent in acting on the assumption that the side bearings, designed to keep it from tilting, were in their place); *Sprague v. New York & N. E. R. Co.* (1896) 68 Conn. 345, 37 L. R. A. 638, 36 Atl. 791 (engineer not negligent in starting his train on the assumption that the conductor's statement as to the time at which another train was leaving a certain station was correct); *Gulf, C. & S. F. R. Co. v. Darall* (1896) 12 Tex. Civ. App. 349, 35 S. W. 699 (inexperienced laborer ordered to remove dangerous obstruction from the track as a train was approaching); *Texas C. R. Co. v. Hicks* (1900) 24 Tex. Civ. App.

100, 59 S. W. 1125 (see subd. d, note 13, *infra*).

Southwestern Teleph. Co. v. Wroughton (1892) 56 Ark. 206, 19 S. W. 575.

An employee directed to perform a particular task has a right to assume that his employer will furnish him a reasonably safe place, or will see that the place is reasonably safe while the task is being performed, unless he is warned, or has reasonable cause to believe, or by the exercise of care and diligence should know, that it is not safe, or unless the danger is within the obvious scope of his employment as the business is carried on. *Kirk v. Seitzig* (1898) 59 Ill. App. 251, where it was held that an employee directed by a foreman to go into the bottom of an elevator shaft and pick up soap therein was not, as a matter of law, barred from recovery for an injury caused by the elevator descending upon him, where the elevator was at the fourth or fifth floor when he entered, the foreman had on other occasions told the elevator man that the employee was in the shaft, and the latter may have relied upon his doing so on the occasion in question.

An employee in a mine has a right to presume, when directed to work in an entry, that the employer has performed the duty of inspecting the same, and may proceed with his work relying on such presumption, unless a reasonably prudent and intelligent man under like circumstances would be able to discern risks which defects in the mine indicate. *Ashland Coal & I. R. Co. v. Wallace* (1897) 101 Ky. 626, 42 S. W. 744. Rehearing Denied in (1897) 101 Ky. 614, 43 S. W. 207. A servant who is sent to clear away *débris* after a blast has been set off in a rock cutting is entitled to assume that an inspection has been made for the purpose of seeing if there are any overhanging or loose fragments which may injure him. *Capasso v. Woodlark* (1898) 25 App. Div. 234, 49 N. Y. Supp. 409.

⁷ *Hackins v. Johnson* (1886) 105 Ind. 29, 55 Am. Rep. 169, 4 N. E. 172. "When

In a logical point of view the principle now under review is more properly treated as one which is distinct from, and independent of the one noticed in the preceding subdivision, since it is essentially a particular instance of the operation of a general principle which is applicable, irrespective of whether the obligations in question are imposed upon a servant of superior, equal, or inferior, grade. (See § 354-356, 409, subd. *c*, *ante*.) But it is sometimes enunciated in a form which shows that it may also be deduced from the conception that the positions of a servant and his superiors are unequal. Thus, it is laid down that the servant has a right to assume that the master, or the master's representative, with their superior knowledge of the conditions, will not expose him to unnecessary perils.⁸ From this principle, considered under this aspect, are deduced the two subsidiary rules, that obedience to an order is not contributory negligence in any case in which the servant has a right to assume that the master will warn him as to any danger which the service may involve;⁹ and that, although a servant is usually deemed to be guilty of negligence, as matter of law, if he unnecessarily put himself in a dangerous position, his culpability, under such circumstances, will be for the jury, where he was entitled to assume that he was ordered to take that position, because his duty required it.¹⁰

the master undertakes to direct specifically the performance of work in a particular manner, we cannot say, as matter of law, that the servant is not justified in relying to some extent upon the knowledge and carefulness of his employer, and in relaxing somewhat the vigilance which otherwise would be incumbent upon him. The servant's attention must be principally directed to the performance of the work in the manner in which he is ordered to perform it, and he may be in a less favorable position to see and judge of the surrounding dangers." *Haley v. Case* (1886) 142 Mass. 316, 7 N. E. 877.

⁸ *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 459, 44 N. E. 876. See also *Powers v. Fall River* (1897) 168 Mass. 60, 46 N. E. 408 (tripod, used instead of derrick for hoisting water pipes, fell into ditch which servant was digging; servant's right to rely on superintendent's experience emphasized); *Halliburton v. Wabash R. Co.* (1894) 58 Mo. App. 27.

A servant "does not stand upon the same footing as his master, as respects the matter of care in inspecting and investigating the risks to which he may be

exposed. He has a right to presume that the master will do his duty in this respect, and, therefore, when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders, without being chargeable with contributory negligence. *Cool v. St. Paul, M. & M. R. Co.* (1885) 34 Minn. 45, 24 N. W. 311.

⁹ *Lozano v. New York & Mt. Water Co.* (1890) 55 Hun. 452, 8 N. Y. Supp. 717 (inexperienced servant injured by explosion of dynamite which he was warming at a fire); *Newbury v. Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa. 441, 69 N. W. 743; *Cleveland C. Co. & St. L. R. Co. v. Brown* (1893) 6 C. C. A. 142, 18 U. S. App. 10, 56 Fed. 804 (servant, ordered to cut in two one of the supporting posts of a shed, a ignorant that the shed would fall if the posts were cut, should have been warned).

¹⁰ *Light v. Chicago, M. & St. P. R. Co.* (1894) 93 Iowa, 83, 61 N. W. 380, holding that a railroad employee is not, as a matter of law, guilty of contributory negligence in attempting to remove a coal car in obedience to the orders of his

c. Order considered to be an implied assurance that there is no abnormal danger.—It has frequently been declared that a specific order to do a certain act carries with it an implied assurance that the act may be done with reasonable safety.¹¹ It is manifest, however, that under the principles explained in chapters x., xi., *ante*, an employer who would *prima facie* be held liable for injuries caused by a defective appliance when, without making any inspection, he urged his men forward with words which showed that in his opinion there was no danger, cannot be held liable if such an inspection, made with reasonable care, would not have disclosed the fact that there was a defect in the chain.¹²

As to the effect of an express assurance of safety, see next chapter.

d. Necessity for prompt obedience.—(Compare §§ 358-361, *ante*.)

—Another circumstance which is frequently emphasized is the fact that when a servant is suddenly called upon to execute a piece of work in a particular manner, under the eye of his employer, or his employer's representative, a careful observation of the conditions is generally quite impracticable, if the direction is to be carried out with that

superior, although he might have ridden safely to the place to which he was directed to go on the footboard of the engine.

"The servant has a right to rest upon the assurance that there is no danger which is implied by such an order." *Illinois Steel Co. v. Schymanski* (1896) 162 Ill. 459, 44 N. E. 876. See also *Kearney v. Karsaugh* (1876) 62 Mo. 232; *Leland v. Hearn* (1900) 49 App. Div. 111, 63 N. Y. Supp. 204; *Dunn v. Connell* (1897) 20 Misc. 727, 46 N. Y. Supp. 684, Affirmed in (1897) 21 Misc. 295, 47 N. Y. Supp. 185.

The question whether, as a matter of fact, a trainman knew, or had an opportunity of knowing, the methods employed by the company in running its train by telegraphic orders, becomes immaterial where the superintendent gave a peremptory order that his train should proceed regardless of the movements of another train traveling in the opposite direction. *Sheehan v. New York C. & H. R. R. Co.* (1883) 91 N. Y. 332. An order by the general superintendent to engineers, "not to run faster than card time until the track can be got into better condition," was in effect a declaration that the road was not necessarily hazardous, and the engineer could continue to run over it, exercising care, and that the superintendent would remedy the defect. *Flynn v. Kansas City, St. J.*

& C. H. R. Co. (1883) Mo.) 10 West 418. Former Appeal 78 Mo. 195, 47 Am. Rep. 99. An inexperienced foreigner, imperfectly acquainted with English, who, after a machine has acted in an unexpected manner, appeals for advice to the employee whose duty it is to instruct him, and receives an answer which he supposes to amount to an instruction to go on as before, is not negligent in following that direction. *Bjbjian v. Woonsocket Rubber Co.* (1895) 164 Mass. 214, 41 N. E. 265.

A servant who drives a wagon along a particular way by the express direction of his master's representative, and is injured by the projecting bolts of a revolving shaft which, when it is too late, he finds himself unable to clear, while seated in the wagon, is not debarred from recovery by the rule that a servant must, at his peril, choose the safer of two alternative methods of doing his work. Such a direction is an implied statement that the way indicated is reasonably safe, and an instruction withdrawing the consideration of the direction from the jury is erroneous, when the question of the servant's exercise of due care is submitted to them. *Hackins v. Johnson* (1886) 105 Ind. 20, 55 Am. Rep. 169, 4 N. E. 172.

Hayman v. Dickinson (1888) 31 W. Va. 148, 6 S. E. 53.

promptitude which is expected from subordinates.¹³ The qualifying import of this circumstance is obviously not diminished by the

¹³ *Haley v. Case* (1886) 142 Mass. 316, 7 N. E. 877; *Strong v. Iowa C. R. Co.* (1895) 94 Iowa, 380, 62 N. W. 799 (for the facts of this case and comments thereon, see § 281, notes 4, 5, *ante*); *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698 (brakeman ordered to couple cars on a dark night not bound to examine coupling); *Dillingham v. Harden* (1894) 6 Tex. Civ. App. 474, 26 S. W. 914 (servant not bound to examine a skid which he is directed by his foreman to use in lowering rocks into a pit).

A carpenter employed by a railroad company, who obeys a hasty order to pick up his tools, bedding, etc., and put them on a push car and to get on, does not assume the risks arising from the fact that the car, which then starts down a heavy grade, is not provided with proper appliances to control its velocity. *Miller v. Union P. R. Co.* (1882) 4 McCrary, 115, 12 Fed. 600. It is for the jury to determine whether a boy of seventeen, who was working in a foundry, was negligent, where he was ordered to stop an engine and to hurry, this not being a part of his regular duties, and in executing the order his trousers were caught by an uncovered set screw and collar on a revolving shaft over which he stepped. *Douling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298. A servant who obeys a hurried order of his foreman to take hold of a car and push it is not, as a matter of law, guilty of contributory negligence in failing to look ahead and observe an obstruction near the track. The want of time for deliberation, and the position he would naturally assume in doing the work, are a sufficient reason for not holding him strictly to the duty of using his senses to discover danger. *Stackman v. Chicago & N. W. R. Co.* (1891) 80 Wis. 428, 50 N. W. 404.

Where a brakeman, when mounting a moving car, put his foot under it in a place where he expected to have the support of a jaw strap, and was injured owing to the fact that it was missing, it was held that, in view of the fact that he was acting under orders, and of the haste necessary under the circumstances, it was for the jury to say whether he was negligent in omitting to look and see whether there was a jaw strap, before he undertook to use it. *Coates v.*

Boston & M. R. Co. (1871) 153 297, 10 L. R. A. 69, 26 N. E. 864. though a brakeman would have been justified in refusing to obey an order to mount a moving car, because he had served that it was traveling at the rate of about 10 miles an hour, or because the lantern had gone out, or because he discovered that the ground near the track sloped in such a manner that he could not readily seize the ladder to place his foot in the stirrup, yet a brakeman may properly find him to have been negligent from negligence, where he was acting in an emergency which gave him no time for reflection. *For v. Chicago, St. & K. C. R. Co.* (1892) 86 Iowa, 368, 18 L. R. A. 289, 53 N. W. 259. A brakeman on a freight train is not guilty of negligence in attempting to make a couple between two cars of unequal height by a misshapen link which he had been directed by the conductor to take from the ground and use, when, owing to darkness and storm, he did not discover the defect in the link in time to avoid an accident. *Denver, T. & G. R. Co. v. Simpson* (1891) 16 Colo. 55, 26 Pac. 339. Where a gang of men engaged in raising a track by putting stone under it on the sudden approach of a train is ordered to take off some stone remaining on the track, and immediately attempts to do so, without opportunity to observe or calculate the distance to the train or its speed, he is not necessarily guilty of contributory negligence such as will defeat his recovery. *Stephens v. Hannibal & St. J. R. Co.* (1888) 96 Mo. 207, 12 W. 589.

In *Patton v. Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863, a train master ordered plaintiff to get off a rapidly moving train (rate of speed not shown by evidence). The court declined to apply the general rule that such an act is negligent, saying: "It seems that this command was given promptly obeyed without hesitation was rash, negligent, unreasonable, unwarranted, but the danger to be countered in obeying it was not so manifest and so great as, under the circumstances, to render a prompt obedience contributory negligence on the part of the appellant. An ordinary laborer on railroads—one of ordinary experience might make a leap without injury, might not unreasonably believe that

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very hazardous, and, ordinarily, to do
so is negligence, it is not contributory
negligence where the plaintiff—a laborer
on the railroad—is suddenly commanded
by his employer or its agent to do so, in
the course of his employment, and the
command is at once obeyed from a sense
of duty and without waiting to think of
and consider the hazard. Such a case is
exceptional. The agent of the employer
suddenly commands the laborer to do an
extra hazardous act in the course of his
duty,—one that may, though not prob-
ably, be safely done by observing due
care; one that must be done at once if
done at all. The laborer obeys the com-
mand promptly, nerved only by a faith-
ful sense of duty, and as a consequence
suffers serious bodily injury. In that
case the injured party does not, in legal
contemplation, contribute to his own in-
jury. The facts and circumstances were
such as that he might, when suddenly
called on, not unreasonably believe that
the command was a proper one, and that
he ought to obey. Although the act was
hazardous, it was not essentially danger-
ous."

On the ground that the servant had a
right to assume that the directing em-
ployee knew the extent of the danger,
and would not order him to do an act
which he could not safely do, it has been
held that in an action for injuries sus-
tained by an inexperienced section hand
in alighting from a moving train in
obedience to an order of the section fore-
man, while the train was running at the
rate of from 7 to 12 miles an hour, it
was not error to submit the issue of ob-
vious danger to the jury, where plain-
tiff's evidence showed that it was no part
of his duty to get on and off moving
trains, and that the order was impera-
tive, requiring immediate action, thus
giving him no time for deliberation.
Texas C. R. Co. v. Hicks (1900) 24 Tex.
Civ. App. 400, 59 S. W. 1125.

In *Grandstaff v. Illinois C. R. Co.*
(1870) 29 Iowa, 14, 4 Am. Rep. 181,
where a brakeman was killed owing to
the want of a ladder on a car, the court
argued thus: "Though decedent knew
of the defective car, if he acted under in-
structions and directions of a superior
the action would by no means thereby
be defeated. Under such circumstances,
compelled, as he necessarily would be, to

act with promptness and despatch, it
would be most unreasonable to demand
of him the thought, care, and scrutiny
which might be exacted where there is
more time for observation and delibera-
tion. Thus, if a ladder is usually found
upon such cars, in the haste necessarily
attendant upon uncoupling cars and
stopping the train he was not bound to
deliberate and settle in his mind that a
like means of ascending the car was on
this one, though he knew by prior obser-
vation that it was wanting."

In *Chester, R. I. & P. R. Co. v. Mc-
Carton* (1896) 49 Neb. 475, 68 N. W. 633,
the court said: "Our conclusion, after
a consideration of the subject, is that it
is a harsh and unreasonable rule which
charges a servant, when commanded to
perform an act by his master, with the
duty of at once determining whether or
not the act can be safely performed, and
then performing it at his peril, or re-
fusing to perform it at the expense of
losing his employment. The risk in-
curred by obeying a negligent command
of the master is not one ordinarily inci-
dent to the servant's employment, and
is not an assumed risk, because negli-
gence on the part of the master is not
presumed to be a feature of the employ-
ment. It is, therefore, where ample
time exists for examination and reflec-
tion a servant may not, beyond a certain
limit, continue in the service, perform-
ing dangerous acts, except at his own
risk; and it is this consideration which
governs the cases holding that the con-
tinued use of defective appliances with-
out protest and a promise by the master
to remedy them discharges the master
from liability. With the case, however,
of a command given suddenly, which
must be obeyed immediately or not at
all, a different question is presented.
The servant is confronted with a new
danger, one not contemplated when he
entered the employment, and one not
made a part of it by continued use.
The servant has certainly, in the first
place, a right to presume that the mas-
ter gave the command advisedly and in
the exercise of due care. If the servant
disobey, he forfeits his employment; and
even though he be aware of the danger,
whether or not it is negligence for him
to obey depends upon circumstances.
The act may be so flagrantly, so clearly
entailing disaster, that the only reason-
able course is to disobey. The test of
negligence is, in such cases, as in others,
whether or not a man of ordinary pru-
dence so situated would obey or refuse.

In many cases a man of ordinary pru-

that the servant had previously protested against being exposed to risk in question.¹⁴

In cases where the defense of contributory negligence is raised the consideration thus relied on will sometimes serve to excuse servant's temporary forgetfulness of a danger the existence of which he had previously ascertained.¹⁵ See § 350, *ante*. But it would seem that, according to the more logical view of the situation, the fact that his forgetfulness of a previously known danger was excusable under the circumstances will not enable him to recover, where the master relies specifically upon the defense of an assumption of risk. See § 281, *ante*.

c. *Direct order considered as tending to negative voluntary action*.—(Compare §§ 288, 289, 381, 382, *ante*.)—The fact that the master urged or coerced the servant into danger is conceded to be an evidential element which tends to negative the inference which is ordinarily drawn, where it appears that the servant undertook or remained in an employment with a knowledge of the abnormal risk from which his injury resulted.¹⁶ The cases illustrating this exception from a positive standpoint are not numerous. Where the servant is of mature years, the compulsion which it contemplates will not be inferred in circumstances of a very unusual description.¹⁷ The case of a young child is different. He cannot be expected to have

dence, compelled to decide instantly, even though aware of the existence of danger, would prefer obedience, and would take the risk."

Contrast cases cited in § 442, note 5, *infra*.

¹⁴ The action was held to be maintainable in *East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 63, 47 Am. Rep. 319 (laborer, after protest, used defective hammer, where there was need of quick action to get the track ready for an expected train); *Chicago, Anderson Pressed Brick Co. v. Sobkowiak* (1890) 38 Ill. App. 531 (servant ordered to proceed after he had objected to work on account of its danger).

¹⁵ In *Lee v. Woolson* (1885) 109 Pa. 124, where the master was personally directing the work, and giving emphatic orders to move quickly, the court said: "If an employee is, in haste, called upon to execute an order requiring prompt attention, he is not to be presumed necessarily to recollect a defect in machinery, or a particular danger connected with his employment, so as to avoid it. A prompt and faithful employee, suddenly called upon by a superior to do a par-

ticular act, cannot be supposed to remember at the moment a particular danger incident to its performance, which he had previous knowledge of; it would be most unreasonable to demand of him the thought and care which might be exacted when there is more time for observation and deliberation (servant here had failed to observe that planks had been removed over a space through which he was engaged with tackle and horse in hoisting timber). See also *Greenleaf v. Illinois C. R. Co.* (1870) 29 Iowa, 14, 4 Am. Rep. 17 (brakeman not necessarily negligent in failing to remember that a car which was about to uncouple had not the usual end ladder).

¹⁶ *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 474; *Pennsylvania Co. v. Lynch* (1878) Ill. 333; *Chicago, R. I. & P. R. Co. v. Clark* (1882) 11 Ill. App. 104.

¹⁷ In *Wells & F. Co. v. Gorton* (1893) 50 Ill. App. 445, a laborer, understanding only a foreign language, was pushed into a position of danger by a foreman, and coerced to remain there by fear of the latter, superinduced

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will power of a grown man in resisting his master's orders; and where the evidence tends to show coercive influence the opinion of the jury should be taken upon the question whether his compliance with the order was negligent.¹⁸

f. Direct order considered as tending to produce confusion of mind.

In § 437, *supra*, it has been shown that negligence may sometimes be imputed to the master on the ground that he or his representative had, at a dangerous conjuncture, issued an order which was calculated to create a confused condition of the servant's reasoning faculties, and thus diminish his capacity for making an intelligent choice between a safe and an unsafe course of action. From another standpoint it is clear that the existence of the condition thus induced, supposing it to be excusable, is a circumstance which tends to negative culpability on the servant's part. The situation is essentially identical with that which, as already stated, may result from obedience to an imperative

his language, actions, and position, which was greater than his fear of the danger of the place, and overcame his own judgment, was held entitled to recover for injuries sustained.

A railroad company is liable for injuries received by an inexperienced brakeman in making a dangerous coupling in the nighttime, where the conductor refused to allow anyone else to make it, and up to the time of the accident kept persistently urging him to expedite the task, with full knowledge of the danger to which he was exposed. *Shadd v. Georgia, C. & A. R. Co.* (1895) 116 N. C. 968, 21 S. E. 551.

But where plaintiff, after a year's service in driving a coal truck, which was barely low enough to pass under a beam in the coal bin when he was on the seat, was injured by attempting to remain on the seat while driving out under it with a new truck two feet higher than the old one, the fact that he was directed by the foreman to drive out the truck was not sufficient to show that he was coerced into taking the risk, since he acted voluntarily, and with full knowledge of the situation. *Miller v. Griene* (1900) 53 App. Div. 276, 65 N. Y. Supp. 813.

"In *Kehler v. Schorenk* (1892) 151 Pa. 505, 25 Atl. 130, where a boy of fourteen was injured, the court referred to *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412, *supra*, and said: "The principle of this decision would exonerate the plaintiff in the present case, of a charge of con-

tributory negligence in engaging in a palpably dangerous service, even if he were a full grown adult, because there was other testimony to the effect that the appliance might be used with safety although apparently dangerous; but when his youth and physical weakness are considered, and the fact that he was ordered to do this work, and that he objected to doing it, and went reluctantly to the service, it cannot be doubted that he is entirely free from any charge of contributory negligence, and also that the master became subject to all the risk of an accident. He was but little more than a child, either in years or in strength, and could not be expected to have the will power of a full grown man in resisting his master's orders. He cannot be held, therefore, as one who voluntarily engages in a dangerous service, especially by a master who specifically directed him to do the hazardous work. On the contrary, the very fact of the plaintiff's youth and weakness is one of the elements that go to make up the charge of negligence on the part of the defendant in putting such a person upon such a service. It seems to us the master, in such circumstances, and not the servant, must be held to have assumed the risks of the service." In *Tagg v. McGeorge* (1893) 155 Pa. 369, 26 Atl. 671, it was held that, where a foreman ordered a boy thirteen years old to hurry in his work of cleaning a dangerous machine in order that he might clean another machine which was ordinarily attended by another boy who

order which it is necessary to execute with great rapidity.¹⁰ See subd. *d*, *supra*.

441. Direct order not a justification where it was given without authority.—In § 435, *supra*, it has been stated that a master is not affected with liability for the consequences of an order proceeding from a coemployee of an injured person, unless that coemployee was authorized to issue it, and in so doing acted as the master's agent. The authority of the coemployee is also material in another point of view, since it is clear that, if he had no authority to give the order, and the fact was or ought to have been known to the injured servant, the latter must, in obeying the order, have been guilty of contributory negligence. The cases cited in the two preceding sections will furnish ample illustrations of the circumstances under which the authority of the directing employee has been taken for granted.

As the nature of the relations between superior and subordinate employees in different descriptions of business is usually a matter of common knowledge, the question whether the directing employee was invested with the necessary authority to issue the order is seldom a material element in the case. In the exceptional instances in which there may be a doubt as to those relations, the injured servant, if he undertakes to show that an act which, if done *proprio motu*, would have betokened carelessness, was excusable, for the reason that it was done in compliance with an order given by a party whom he was bound to obey, must prove that he had just reason for believing that his failure or refusal to obey the commands of the superior would be followed by a discharge from the employment.¹ But if

he was absent, and the boy was injured in the work, it is not improper for the court to charge that, if the boy was not aware of the danger, and his will was subjected to that of the foreman, and he obeyed him because he thought the foreman knew better, or because he was afraid to disobey, the jury might find for the plaintiff.

Whether a young apprentice was justified in obeying an order accompanied by threats is not a question which should be decided on demurrer. *W. Wilson v. W. Wilson* (1861) 23 Sc. Sess. Cas. 2d series, 1042.

Similar views seem to prevail in Quebec. *St. Armand v. Gibson* (1898) Rep. Ind. Quebec, 13 C. S. 22.

¹⁰ An employee fourteen years of age and of less than ordinary intelligence, who is injured while obeying peremptory orders to assist in operating a machine with revolving cylinders at which

he was not employed to work, the danger being partially concealed from view, cannot be said, as a matter of law, to have failed to exercise due care. *London v. Warren Cotton Mills* (1892) Mass., 283, 32 N. E. 161 (distinguishing earlier cases in which the danger was obvious and known to plaintiff). A seaman has been held entitled to recover his actual damages for injuries from falling into the hold because of the wrong way, through imperfect fitting of hatch, which, as he was new to the ship, was excusably ignorant, of a section of the hatch upon which he was standing while adjusting another section, in the direction of the boatswain, who was hurrying him in his work. *Equitt v. New York & C. Mail S. S. Co.* (1895) 50 Fed. 325.

¹ *Turner v. Goldsboro Lumber Co.* (1895) 119 N. C. 287, 26 S. E. 225. *Huson v. Richmond & D. R. Co.* (1895) 119 N. C. 287, 26 S. E. 225.

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not necessary that he should show that the superior was himself invested with the power of discharge. Any other doctrine, it has been pointed out, would enable the master to evade responsibility by providing that this power should be lodged in some person other than the immediate superior of the workman, while at the same time the power would, for practical purposes, be exercised by the superior himself, as a result of the fact that his recommendations in this regard would in practice always be followed.²

It is clear that an order given by one superior servant to do a manifestly culpable act—in the case cited, the violation of a rule—will not excuse the servant for doing that act after he has passed under the control of another superior servant, who has never given him a similar direction.³

The fact that the person from whom the order directly emanated was only a fellow servant of the injured person will not prevent recovery, if it appears that such fellow servant was simply the channel through whom the order was transmitted from an employee who had authority to give it.⁴

111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698. See note 3, *infra*.

Turner v. Goldsboro Lumber Co. (1896) 119 N. C. 387, 26 S. E. 23.

Mason v. Richmond & D. R. Co. (1894) 114 N. C. 718, 19 S. E. 362 (brakeman injured while coupling cars with his hands instead of a stick). Referring to its former judgment in the case (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698, the court said: "We still adhere to the doctrine that a brakeman is not culpable for exposing himself, in obedience to the orders of the conductor in charge of the train, to peril to which his voluntary exposure of himself would constitute contributory negligence. Our ruling was founded both upon the principle that the conductor, as middleman, had on behalf of the company waived its express regulation, and upon the idea that the known relation between a conductor and a brakeman, running on the same train as his subordinate, was such as to subject him to a well grounded fear of dismissal should he hesitate to obey such an order, and thereby relieve him of legal culpability for conduct which, but for the fact of his acting under the fear of the consequences of disobedience, would constitute negligence. But we did not intimate that a brakeman would be warranted in assuming that another conductor, under whom he had served for

several months without receiving any order modifying the written rule, would discharge him for failure to couple with his hands when a stick would not answer the purpose. And we do not think that the command of Guthrie to "hurry up," coupled with the testimony of the plaintiff that he thought Guthrie had seen him couple with his hands before that time, is tantamount to an express command, such as was given by Conductor Dick, who had previously been his superior."

*In a case where it was contended that there was no evidence that an injured brakeman was acting under the orders of the conductor, when he attempted to uncouple cars in motion, it was held that a brakeman, though inexperienced, is deemed to be acquainted with such matters pertaining to his duties as are of common knowledge, and is therefore presumed to be aware that brakemen are subject to the orders of the conductor with reference to their duties, and that such orders are often given by the conductor through one brakeman to another. It was for the jury to say, in the light of this common knowledge, and under all the circumstances of the case, whether the injured servant understood the order given him to be the order of the conductor. *Gorman v. Minneapolis & St. L. R. Co.* (1889) 78 Iowa, 569, 43 N. W. 303.

A master cannot relieve himself of responsibility for an order which is apparently within the scope of the authority of the superior servant, by showing that no such authority was conferred by the rules framed for the regulation of the business.⁵

442. — *not where a prudent man would have refused to comply with it.*—Upon general principles it is manifest that, although the servant may have been directly commanded or urged to undertake the work from which the injury resulted, he cannot claim an indemnity when the danger to be encountered was at once so obvious and so serious that no prudent man would have incurred it.¹ That is to say, the order must, if it is to serve as a justification, be in a matter with regard to which the servant has a right to rely on the superior judgment of the master.²

The courts decline to lay down a rule of law purporting to define accurately how dangerous a proposed action would have to be before a servant receiving an order from his master to perform it would be required to disobey under pain of being chargeable with negligence. But where there is no dispute as to the facts, and the dangers of obedience to an order are as apparent to the servant as to the employer or representative, there is no occasion to go to the jury to determine whether the servant should have obeyed the order.⁴

⁵The mere fact that the conductor of a train had, under the company's rules, no right to order a man off a moving train, is no defense to an action by a brakeman who is injured in obeying such an order. *Central R. Co. v. De Bray* (1883) 71 Ga. 406.

¹In *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412, the court remarked: "We are not to forget that the servant is required to exercise ordinary prudence. If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such case the law adjudges the servant guilty of concurrent negligence, and will refuse him that aid to which he otherwise would be entitled." Compare *Moline Plow Co. v. Anderson* (1885) 19 Ill. App. 417; *Shortel v. St. Joseph* (1891) 104 Mo. 114, 10 S. W. 397; *Southwestern Teleph. Co. v. Woughter* (1892) 56 Ark. 206, 19 S. W. 575; *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285 (disapproving of an unqualified instruction to the effect that an act done

in obedience to orders is not negligent). A charge is erroneous which assumes that an engineer cannot be negligent in operating his engine where he does in prompt and careful compliance with the signals of the conductor. Nonsuit cannot be predicated where an act commanded, however performed, would be a negligent one. *Alabama S. R. Co. v. Richie* (1892) 99 Ala. 312, 12 So. 612.

²*East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 69, 47 Am. R. 319.

³*Chicago Anderson Pressed Brick v. Sobkowiak* (1896) 38 Ill. App. 5.

⁴*Kean v. Detroit Copper & Brass Rolling Mills* (1887) 66 Mich. 277, N. W. 395. An employee who was injured in attempting to get upon an engine while it was running at the rate of from 6 to 12 miles an hour should not be held negligent, although he was acting under orders. *Roul v. East Tennessee, & G. R. Co.* (1890) 85 Ga. 197, 11 S. 558. Where a train is moving at rate of from 4 to 6 miles an hour, experienced trainman is not justified in obeying an order to jump from it. *Arthur Bros. Co. v. Troutt* (1900)

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In cases where the essence of the servant's justification is that the order given was so urgent and peremptory as to leave him no time for reflection or for examination into the conditions to which he was required to expose himself (see § 140, subd. *3*, *supra*), he will necessa-

III. App. 638. See, however, *Northern Roadstar v. Doe*, 22 & V. R. Co. P. R. Co. v. England (1895) 163 U. S. 93, 41 L. ed. 82, 16 Sup. Ct. Rep. 975. Cited in § 439, note 3, *supra*. A brakeman is guilty of contributory negligence in attempting to uncouple cars having double deadwoods, which render the act specially dangerous, while the train is in motion, even if ordered to do so by the foreman. *Davis v. Western R. Co.* (1894) 107 Ala. 626, 18 So. 173. A conductor who is injured by a collision will be denied recovery where he consented to the starting of his train in violation of the rules of the road, without a word of formal protest, although he had, at the time, every reason to expect that he would meet another train traveling in the opposite direction on the same track. On the one hand, if it was ordinarily his duty to obey the orders of the dispatcher, even though they were in violation of the company's rules, the order to start the train under such circumstances was so obviously wrong, and was likely to involve such frightful consequences, that it was manifestly negligent to act upon it without inquiring the reasons for it. *Wescott v. New York & V. E. R. Co.* (1891) 153 Mass. 460, 27 N. E. 10. An employee who has just got off a hand car in safety before a rapidly approaching train is under no obligation to comply with a hasty and impulsive request of the foreman to save the hand car, in view of the obvious and imminent danger. *Wright v. Southern R. Co.* (1897) 80 Fed. 260. A section hand well acquainted with his duties is guilty of contributory negligence in attempting, in response to an order of the foreman, while seated on the rear of a hand car rapidly descending a grade, to take hold of the readily moving brake handles, in the absence of a sudden emergency. *Jones v. Galveston, H. & S. A. R. Co.* (1895) 11 Tex. Civ. App. 39, 31 S. W. 793. A section hand is not bound to obey an order of the section boss to get on to and help propel an obviously overloaded hand car; and no recovery can be had for his being thrown off and killed in consequence of his obeying the order.

(1893) 11 Ky. L. Rep. 688, 21 S. W. 346. A car repairer, although he took the position by the direction of his foreman, was guilty of contributory negligence in standing upon a side track while a car could not recover for injuries from the car being put in motion by the moving of other cars by an engine which entered on the side track on the end which was not guarded by the signals furnished for such purposes, where he was an expert, well railroad hand, and had worked in his present position for seven years. It is known that that end of the track had not been guarded, and was aware that engines were likely to enter from that end. *Clemons, R. & Q. R. Co. v. McNamee* (1892) 22 Colo. 363, 37 Pac. 383.

The orders of a superior will not justify a servant in exposing himself to the risk involved in the disobedience of a known rule of a railway which it is important to observe. *Thompson v. Rock Hill R. Co.* (1897) 99 Iowa 257, 68 N. W. 474. Admitting portion of negligence, while it is in evidence. Or in the opinion of, wiping away negligence with a piece of cloth. *Allen v. West v. Randall* (1881) 100 Ind. 293, 50 Am. Rep. 758.

To go to work in a dark cellar in which the servant knows there is a deep well hole without ascertaining whether it is covered or not is culpable negligence which will prevent him from recovering for injuries caused by the want of a guard, even though he was ordered to "hurry up the work." *Taylor v. Case, Mfg. Co.* (1885) 140 Mass. 150, 3 N. E. 21.

It is negligence to obey orders to clear out the debris from a mining shaft by making an excavation from a lateral tunnel which enters it at the bottom. *Behrens v. Doe et al.* (1898) 96 Va. 41, 39 S. E. 112.

It is no license to go on to a scaffold after having observed circumstances indicating that it is unsafe. *Adams v. Shalko* (1879) 69 Me. 326.

But under the doctrine prevailing in Kentucky as to the effect of the gross negligence of a superior servant, a rail-

rily fail to make good his contention, unless he shows that the order was actually one of this description.⁵

443. — nor where the servant fully appreciated the danger. In view of the general principles developed in chapter XVIII., *ante*, it is clear that the fact of the servant's having acted under a direct order is immaterial, if it is apparent that he fully appreciated the danger which he was required to encounter. Under such circumstances the essential question to be decided,—*viz.*, whether a prudent man would have undertaken the work,—is determined with reference solely to proper deductions to be drawn from his appreciation of the danger, except, of course, in so far as the order may have temporarily induced a forgetfulness of the danger, or a confusion of the mental faculties. See § 440, *sub d. supra*, and compare remarks in § 439, *supra*. In this point of view a few cases which, upon a superficial inspection, would seem to negative the doctrine that a differential effect is to be ascribed to an order, will be found quite consistent with the facts with the rest of those cited in this chapter.²

way company is not relieved from liability for injuries to a brakeman, incurred in uncoupling cars in obedience to an order, caused by the gross negligence of the conductor or other superior employee in the control and management of the train, by the fact that the danger of going between the cars to uncouple them was open and visible. *Greer v. Louisville & N. R. Co.* (1893) 94 Ky. 169, 21 S. W. 619.

² An employer is not liable for an injury to an employee using a circular saw, merely by reason of an order that he shall not waste so much time in cleaning the logs before sawing them, when he does not in any wise so command him to proceed as to preclude him from the exercise of due care in putting the logs into proper condition to be cut up. *Wanner v. Kinde* (1893) 4 Colo. App. 168, 34 Pac. 1014. A shout by the gang foreman of "All aboard" is not an order of that peremptory character that justifies one of his subordinates in taking such a manifest risk as that of mounting a moving train. *Norrock v. Michigan C. R. Co.* (1886) 63 Mich. 121, 29 N. W. 525. An order by the skip tender of a mine, whose duty it is, under a rule of the mine, to prevent more than six men from riding in the skip at once, to an employee to get on the skip after ten other persons are on, does not relieve such employee from contributory negligence where no emergency called for sudden action on his

part. *Last Chance Min. & Mill. Co. v. Ames* (1896) 23 Colo. 167, 47 Pac. 101. In a case where a servant, in attempting to get on the front platform trolley car moving at the rate of 3 miles an hour, slipped and fell from the car, the court held that no imperative order demanding instant action was given, and affirmed the correctness of an instruction to the effect that to justify the effort of a servant to obey an order of a superior in a hazardous matter, the order must be immediate upon a sudden emergency or exigency. *Chattanooga Electric R. Co. v. Lester* (1898) 101 Tenn. 406, 47 S. W. 404.

³ *White v. Newport News Shipbuilding & Dry Dock Co.* (1897) 95 Va. 28 S. E. 577, denying recovery where the plaintiff, an employee, was not known to the directing employee, and was known to the injured employee, that the ring at the end of a chain wrapped round a heavy object was too small to be used with the object which was to support the object, and it was being lifted.

⁴ In *Baker v. Western & A. I. Co.* (1882) 68 Ga. 699, the court formulated the rule that the fact that the plaintiff knowingly undertook to use a dangerously defective tool under the immediate command of a superior employee did not give him the right to recover. But the report shows that the plaintiff had known for several months that the sledge hammer which caused the injury was out of repair. The

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444. — nor where the servant executed it in a negligent manner.—

The doctrine discussed in the present chapter is a protection to the servant *pro tanto*, only in so far as it relieves from the charge of culpability in the actual undertaking of the work which he was ordered to do. It does not relieve him of the duty of avoiding particular danger.¹ The necessary connection between the order and the act of the servant is not established, where the injury occurred owing to the manner in which the servant executed a general order which left him free to choose his own methods of carrying it out, and which might, so far as appears, have been safely performed by the selection of a different method.² Hence, a servant who relies on the orders of his su-

doctrine was again laid down in *Bell v. Western & A. R. Co.* (1883) 70 Ga. 566, where the plaintiff knew that the hand car on which he was ordered to ride was defective. See also *Nelling v. Industrial Mfg. Co.* (1886) 78 Ga. 260 (doctrine laid down, *arguendo*, on the authority of the two cases just cited); *Central R. Co. v. Hushitt* (1884) 74 Ga. 59 (brakeman knew that cogwheel of brake was defective); *Roul v. East Tennessee, V. & G. R. Co.* (1890) 85 Ga. 197, 11 S. E. 558 (order from the foreman of a roundhouse will not justify a fireman in attempting to mount a locomotive running 6 or 8 miles an hour); *Dural v. Hunt* (1894) 34 Fla. 85, 15 So. 876 (brakeman on a construction train removed all the stanchions except four from a car loaded with rails, and afterwards rode on it by the order of the foreman), following Georgia decisions.

Another reason why these cases are not to be regarded as being essentially inconsistent with those decided in other states is that they are all founded on *Western & A. R. Co. v. Adams* (1875) 55 Ga. 279, where the extent of the decision was simply that a servant suing under the Georgia statute abolishing the doctrine of common employment in the case of railway companies cannot recover damages, unless he is himself free from fault, even though, in doing the act which caused the injury, he was complying with the orders of a superior employee. The rationale of the ruling was that, as the legislature had made no distinction between the several grades of employees, the court was not authorized to recognize any such distinction, the effect of which would be to enable the servant to recover in spite of his contributory negligence.

¹*Cornwall v. Charlotte, C. & A. R. Co.* (1887) 97 N. C. 11, 2 S. E. 659; *Smith v. St. Paul & D. R. Co.* (1892) 51 Minn. 86, 52 N. W. 1068 (charge to the effect that orders would not justify a servant in going into known dangers was held not to be prejudicial error); *East Tennessee, V. & G. R. Co. v. Bridges* (1893) 92 Ga. 399, 17 S. E. 645; and cases cited in following notes.

An instruction that an order to do something which is a part of the regular routine work of the servant, and which does not increase the hazards which he is required to undergo, implies an assurance of safety, irrespective of the manner in which the work may be done, is erroneous. *McArthur Bros. Co. v. Nordstrom* (1899) 87 Ill. App. 554.

²When an employee has within his own control the manner of using an obviously defective tool, and the means of securing safety if he chooses to employ them, if he neglects the means of security to himself he elects to take the risk. In such a case, it cannot in reason be said that the employee has acted upon the confidence reposed in the employer, and that he is, therefore, entitled to remuneration. *Jenny Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 568, 18 N. E. 30. A brakeman is not relieved from contributory negligence in attempting to uncouple cars while a train is in motion by the order of the foreman to cut off a car, in the absence of any emergency requiring prompt action, as it will be presumed that it was intended that the order should be complied with in a safe manner, even if the order, if construed as one to uncouple the cars while in motion, would have such effect. *Davis v. Western R. Co.* (1895) 107 Ala. 626, 18 So. 172. A general order from a conductor to a

perior as an excuse for pursuing a dangerous course of conduct may show, not merely that he was ordered generally to go to work, but that he was ordered to pursue that particular course of conduct.³ Even an order which is couched in words indicating that it is desired to have the work performed promptly will not excuse a servant for negligently putting himself into a dangerous position, or doing the work in a dangerous manner.⁴

Flagman, to "catch" a car about to be kicked, did not justify the latter in attempting to do so when the car was moving at an unusual and obviously dangerous rate of speed, especially where the conductor, when giving the order, did not know that the speed would be unusual, and was not present when the flagman attempted to catch the car. *Whitley v. Macon & N. R. Co.* (1898) 104 Ga. 764, 30 S. E. 1003. The theory that the plaintiff's injury was caused by his obedience to an improper command is not sustainable where he was injured in jumping from a train while responding to a hasty summons to supper, where there was no command to jump from the train, and he determined for himself the particular manner in which the order should be carried out. *Piquegno v. Chicago & G. T. R. Co.* (1883) 52 Mich. 44, 50 Am. Rep. 243, 17 N. W. 232. A foreman's order to splice a short rope to the winch end of a longer rope to make it reach a pile lying on the ground, which was to be hauled into position by a pile-driver, will not render the master liable for injuries to the employee so ordered, where he undertook to make the splice in a manner not required either by order or the character of the work. *Wiggins Ferry Co. v. Heilig* (1892) 43 Ill. App. 238. An employee whose arm is caught in uncovered gearing while he is feeling the shaft, according to his instructions, to see if it is hot, is not, as a matter of law, guilty of contributory negligence. *Thompson v. Edward P. Allen Co.* (1895) 89 Wis. 523, 62 N. W. 527.

³The mere fact that a laborer engaged in excavating a bank had been ordered to return to work, after the foreman had been trying unsuccessfully to prise off a portion of it, has been held not to be a justification for his taking up a dangerous position under the bank. *Songstad v. Burlington, C. R. & N. R. Co.* (1889) 5 Dak. 517, 41 N. W. 755. In a case where a laborer was injured in getting off a slowly moving construction train (speed not mentioned), in

obedience, as was alleged, to an unauthorized order of the conductor to do this at a certain place, it was held error to refuse the defendant's request for an instruction that, if the jury found that the conductor said to the hands, "If train is going slow enough, get off with H. is at work; if not, go on to F. come back on the gravel train," and that the hands were accustomed to get off and on moving trains, and a decision was left to them whether they would jump or not, then the plaintiff could recover on account of the conductor's order. *Louisville & N. R. Co. v. . .* (1892) 91 Tenn. 86, 18 S. W. 118. Verdict for the defendant was held to have been properly directed, where brakeman, upon the signal for brakes being given, undertook, without any imperative necessity, and without any request from any person in control of the train, to ascend a side ladder, as the train was going on to a bridge, the side timbers of which were, to his knowledge, dangerously close to the track. *Bliss v. Flint & P. M. R. Co.* (1888) 67 Mich. 632, 35 N. W. 188. Where, in removing the bents of a trestle work, an employee, in obedience to the order of the boss of the gang, put his feet against a bent, and pushed it whereupon its lower end struck the trestle on which he was sitting, knocking him down, and injuring him, the negligence is that of the employee and not of the master. *Carnegie v. Penn. Bridge Co.* (1900) 47 Atl. 355, 197 Pa. 441.

⁴Where a laborer on a work train was told by the conductor to "jump on where," and that they were "behind and in a hurry," he is not justified in such an order in getting on the rear of the engine. *Baltimore & P. R. Co. v. Jones* (1877) 95 U. S. 439, 24 L. 506. An order to go ahead and push machinery used to hoist coal on a trestle which were pushed down an incline, the place of landing does not justify a servant in unnecessarily passing the front of a moving car. *Kansas Coal Co. v. Reid* (1898) 29 C. C. A.

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Where the master orders a thing to be done by a servant, he will not be exonerated from liability for injuries to the servant arising from doing the act merely because the servant does not do it in the particular way directed by the master. The question in every such case is whether the servant pursues the less dangerous course.⁴

57 U. S. App. 464, 85 Fed. 914. See *'Citizens' Gaslight & Heating Co. v. Wanner v. Kimbel* (1893) 4 Colo. 401; *O'Brien* (1886) 118 Ill. 174, 8 S. E. App. 108, 34 Pac. 1014, § 442, note 6, 310.

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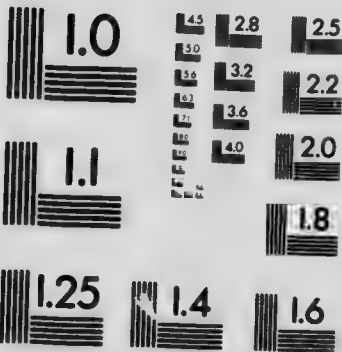
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CHAPTER XXIV.

EFFECT OF A STATEMENT BY THE MASTER OR A COEMPLOYEE THAT CERTAIN WORK MAY BE DONE SAFELY.

- 446. Introductory.
- 447. Necessity of proving that an assurance of safety was given.
- 448. — and given by the master or an employee who represented him.
- 449. — and was given negligently.
- 450. General doctrine as to the effect of an assurance of safety.
- 451. Rationale of doctrine.
- 452. Assumption of the risk, when available as a defense.
- 453. When the servant is chargeable with negligence in undertaking or continuing the work.
 - a. Negligence a question for the jury.
 - b. Negligence predicable as matter of law.
- 454. Contributory negligence in respect to the manner of performing work.

446. Introductory.—A subject closely connected with that which is discussed under the last chapter is the effect produced upon the servant's right of recovery by evidence that he received from his master or some superior coemployee an express assurance that the work undertaken by him involved no danger, or that proper precautions would be taken to protect him while he was doing the work. In many cases a specific order and an assurance of safety are both factors to be reckoned with (see § 453, note 10, *infra*); but, as this circumstance is not invariable, and each factor obviously has its own characteristic significance, it has been deemed better to treat the latter separately, even though, by so doing, we shall find ourselves brought once more into contact with conceptions similar to those already dealt with in connection with the former.

447. Necessity of proving that an assurance of safety was given. It is very seldom that any question can arise as to the actual meaning of the expressions which are relied upon by the servant as amounting to a declaration that he might safely proceed with his work.¹

¹ The language used may sometimes be such as to leave it doubtful whether it, or an assurance that the instrumentality in use was a safe one, has been held that, under such circumstances, the inference from the promise to procure a new instrumental-

As a master is under the duty of keeping the instrumentalities reasonably safe, or of giving notice of their insecurity, the invitation which is inferentially extended to servants to make use of any instrumentality which is required for the due performance of their duties may be regarded as being accompanied by an implied assurance that they will not be exposed to any danger from which ordinary care can protect them.²

448. — and given by the master or an employee who represented him.

—There is distinct and explicit authority for the view that an assurance of safety is binding upon an employer only when it was given by a vice principal.¹ This would seem to be the only logical doctrine in cases where the defendant explicitly denies the representative character of the employee from whom the assurance proceeds. Compare § 435, *ante*. But if this plea is passed over, and the defense of contributory negligence is relied upon, it seems not unreasonable to say that the employer ought not to be protected by the mere fact that the assurance was not given by a vice principal.² The essential question to be determined under such circumstances is simply whether the servant was justified in acting on the assumption that the statement made as to the conditions was correct. Such an assumption may, it would seem, be warrantable in some instances where the action would indisputably be barred if the defense of a want of authority to give the

immediately proceeding to use such appliance is that he did so, not in the belief that a new one would be furnished, but because he put faith on the master's assurance. *Perrell Will & Elevator Co. v. Kirkland* (1898) 2 Ind. Terr. 169, 47 S. W. 311.

²In *Murphy v. Boston & A. R. Co.* (1882) 88 N. Y. 116, 42 Am. Rep. 240, it was remarked that "the placing of a locomotive on the road for use would be an assurance that it was fit and safe." See also *Stahm Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141, 38 N. E. 411, for an instance of the same point of view.

¹"If the conductor who quieted the plaintiff's apprehensions of danger, and assured him of his safety and the sufficiency of the rope, was a vice principal, acting for, and in lieu of, the master in the control of the hauls, and the superintendence of the work and machinery, it is likely the defendant would have been liable notwithstanding the plaintiff may have believed the rope to be unsafe. . . . If the conductor did not occupy the position of master to the plaintiff at the time of his injury, then

what he said and did, with reference to the rope, could no more bind the master than the words or conduct of any one of the eleven laborers who were working at the log in conjunction with the plaintiff." *McGowan v. St. Louis & I. W. R. Co.* (1876) 61 Mo. 528. It was not within the scope of a foreman's authority to assure a subordinate that there was no danger in unloading from a wagon a derrick, the poles of which were wet, and therefore liable to slip during the process. *Pintorelli v. Horton* (1900) 22 R. I. 375, 48 Atl. 142.

²Evidence that a railroad employee injured by being thrown from a ladder which was struck by a passing engine was promised by another employee, who he mistakenly supposed, had control of the movement of engines, that he would protect him from injury while engaged in his work, which is relevant on the question of contributory negligence, should be submitted to the jury by an instruction withholding any consideration of it on the question of negligence of the company; but the jury should not be expressly instructed that they may consider it in deciding the question of

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he was injured by reason of his reliance upon the statement of his master or some coemployee, that he might, without undue peril, perform a certain piece of work, or go into a certain place, is that the party making that statement, being actually or constructively aware of the real conditions, exercised, by means of the statement made, a specific influence over the mind of the servant, and thus induced him to adopt a certain course of conduct from which he would possibly, or probably, have abstained if the statement had not been made. The appropriate domain of the obligation the breach of which is thus indicated is obviously found in situations identical with or closely resembling those which are presented in actions of which the gravamen is the nonperformance of the duty of instruction. See chapter XVI., *ante*. The giving of the assurance merely introduces an additional element, which enables the servant to charge the master with an act of positive misfeasance in imparting erroneous information, when, in the absence of such an assurance, he would have been compelled to rely upon the mere nonfeasance which consists in withholding information which should have been given. It will be found, therefore, that all the decisions cited in this chapter exhibit the servant as a person who was either excusably ignorant, or chargeable with knowledge of the danger in question, for one or other of the reasons explained in chapter XXI., *ante*.¹

450. General doctrine as to the effect of an assurance of safety.—

The doctrine applied in the cases cited in this chapter may be enumerated in its most general form as follows:

If the servant is shown to have entered upon the performance of

¹To assure a servant that an unlighted bin into which he was ordered to go was "all right," when in fact it had no floor, and the uncovered joists were dangerous to a person jumping into it, is negligence. *O'Brien v. Nute-Hallett Co.* (1901) 177 Mass. 422, 59 N. E. 65. It is a question for the jury whether a receiver operating a mine was in fact negligent, and whether his negligence was the proximate cause of injury to a miner, where there is evidence to show that he not only failed to warn the latter of the known presence of gas in the mine in such quantities as might cause an explosion, but that the latter was thrown off his guard and led not to expect the presence of gas by the assurance of those who employed him that the mine was safe and free from gas. *Gowen v. Bush* (1896) 22 C. C. A. 196, 76 Fed. 349, 40 U. S. App. 349. The

defendant's negligence is a question for the jury where the evidence is that the plaintiff expressed fears that the walls of the trench in which he was working might fall, but that, being a man of very limited experience in that kind of work, he continued in the employment, relying upon the assurance of the foreman in charge of the work that the same were entirely safe. *Walker v. Scott* (1900) 10 Kan. App. 413, 61 Pac. 1091. Where plaintiff, while operating defendant's machinery, being startled by an unusual sound, stopped work, observing which the defendant asked: "What is the matter?" and was answered, "The chain is going to break," upon which, without making an examination, which if made would have disclosed defects, he assured plaintiff that there was no danger, and ordered him to "go ahead on the chain,"—he is liable for injuries

certain work, or continued to perform that work, relying upon the assurance of his master or his master's representative that such would not unduly imperil his safety, the mere fact that, before he received the assurance, his apprehensions as to the possibility of injury had been excited by circumstances which had come to his knowledge will not, as matter of law, render him chargeable, either with assumption of the risk involved in the work, or with contributory negligence.¹ A reference to the ensuing sections will show that, in a great majority of the cases in which the effect of an assurance of safety has been discussed, the latter defense has been the one advanced.

451. Rationale of doctrine.— In Missouri it has been declared that an assurance from one representing the master that the machine or apparatus being used is all right, and an order from him to his servant to use it, notwithstanding a complaint of the servant as to its inefficiency, amount to a guaranty of safety.¹ But this conception, which would obviously place the master in the position of having taken upon himself the whole risk of what might happen, irrespective of the prudence or imprudence of the servant in exposing himself to the danger, is inconsistent with the general principle stated in *ante*. A more satisfactory theory, recognized in Missouri itself as well as in other states, is that, as the knowledge and means of knowledge possessed by the servant are, under normal circumstances, inferior to those possessed by the master (compare §§ 407, 440, *supra*), the former is, as a general rule, justified in relying upon any statement made by the former in respect to the extent of the danger of the employment.² In view of this disparity of information,

inflicted by the subsequent breaking of the chain. *Hoffman v. Dickinson* (1888) 31 W. Va. 142, 6 S. E. 53. *v. Jacob Dold Packing Co.* (1900) Mo. App. 565.

¹A petition averring that plaintiff called the attention of his foreman to the condition of the instrumentality in question, and of the danger which might result therefrom; that defendant, through such agent, assured plaintiff that it was all right, and to go ahead; that it was unnecessary to do anything with it; and that plaintiff, relying on such representations, was induced to continue to operate the machine,—is not insufficient in failing to show plaintiff's ignorance of the conditions of the danger to which he was exposed. *L. Stalzer v. Jacob Dold Packing Co.* (1900) Mo. App. 565. Testimony given by the plaintiff that he believed there was no danger, and that he relied on the assurance of his foreman's assurance that there was none is competent on the question of contributory negligence. *Malins v. Fuller* (1890) Mo. App. 160, 17 S. E. 83.

²*McGowan v. St. Louis & I. M. & N. Ry. Co.* (1876) 61 Mo. 532; *Sullivan v. St. Louis & I. M. & N. Ry. Co.* (1891) 107 Mo. 17 S. W. 748; *Rorland v. Missouri R. Co.* (1886) 20 Mo. App. 463.

³"When we say that a man anticipates a danger, we mean that he makes a judgment as to the future, and that his judgment is right. But if,

452. Assumption of the risk, when available as a defense.

The effect of the servant's knowledge where his assumption of the risk is relied upon is open to no doubt. If that knowledge is imperfect and excuse¹, so, the action is, upon general principles, not barred. See §§ 257, 271, *ante*. But an assurance that appliances are in good condition manifestly cannot prevent the operation of a defense which is regarded as completely made out, when it has been proved that the risk was known to and comprehended by the servant.²

son's want of vigilance. See *Pennsylvania R. Co. v. Ogier* (1860) 35 Pa. 60, 78 Am. Dec. 322. Compare also the language used in *Kinney v. Folkerts* (1889) 78 Mich. 687, 44 N. W. 152 (§ 453, note 3, *infra*); *Gowen v. Bush* (1896) 22 C. C. A. 196, 40 U. S. App. 349, 76 Fed. 349 (§ 449, note 1, *supra*).

Other cases which will be useful by way of analogy are cited in § 59, *ante*.

¹*Nelson v. St. Paul Plow Works* (1894) 57 Minn. 43, 58 N. W. 868 (superintendent told servant that a machine, the defects of which he had previously discovered, had been repaired—case held to be for jury); *Harder & H. Coal Min. Co. v. Schmidt* (1900) 43 C. C. A. 532, 104 Fed. 282 (roof of mine declared by superintendent to be safe).

²A servant "assumes the risk when he voluntarily enters into danger apparent to him, notwithstanding an agent of his employer tells him there is no danger." *Toomey v. Furica Iron & Steel Works* (1891) 89 Mich. 249, 50 N. W. 850. An employee operating a planing machine with which he is familiar assumes the risk of the belt by which it is run breaking apart, when he observes that the fastenings have partially given way, and continues to operate, although he calls the foreman's attention to it, and is told that the belt is all right and to go on. *Anderson v. H. C. Akley Lumber Co.* (1891) 47 Minn. 128, 49 N. W. 664. An employee who knows that the lights about the machinery he works on are defective, and continues in the employment, assumes the additional risk, and is not relieved from such assumption by the statement of another employee in response to his inquiry, that the lights are all right, where he says nothing about their having been repaired,—especially in the absence of evidence that the latter employee represents the master. *Colorado Fuel & Iron Co. v. Cummings* (1896) 8 Colo. App. 541, 46 Pac. 875. A statement by a foreman to a boy fifteen years

old employed on a pasting machine, that it was foolish to use a split stock to the paper between the belt of felt and a heated cylinder, and that he could use his hands without danger, is an assurance that his hand would be drawn into the machine if it came in contact with the surface of the belt and cylinder, so as to render the employer liable for an injury. *Loore v. Franklin Paper Co.* (1897) 169 Mass. 313, 47 N. E. 1000 (verdict for plaintiff set aside). See also *Rohrabach v. Woodward* (1900) 124 Mich. 125, 80 N. W. 797 (experienced employee operated planer for eleven months, knowing it to be defective); *Howey v. L. Shaw & M. S. L. Co.* (1895) 13 N. Y. 641, 34 N. Y. Supp. 1089.

Commenting upon the circumstance in *Weigrefe v. Day* (1891) 40 Ill. 256, the court said: "This case is analogous to that upon which so many authorities have been cited, of defective machinery, and notwithstanding the condition the employee is urged by his employer that he can safely proceed with it; but it is a case as to the mode of proceeding with machinery that was defective, where, as to the mode or of safely operating it, there was an honest difference of opinion between employer and employee. It cannot after such difference of opinion has manifested itself, that the employer thereafter becomes an insurer of the employee against an accident, even if it should occur through a mistaken judgment of the employer, where the employee voluntarily continues at such work. In such case it would seem that the employer, if any, thereafter would be independent to the employee's service, which he voluntarily assumes."

In *Morris v. Pfeffer* (1898) 77 App. 516, where the defendant asked an instruction that the servant assumed the risk if he knew of it, that under such circumstances it was wholly immaterial that the order was

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453. When the servant is chargeable with negligence in undertaking or continuing the work.—*a. Negligence a question for the jury.*—A large number of decisions are reported in which the contributory negligence of the servant was held to be for the jury on the ground that he relied upon an expression of opinion as to the safety of the conditions to which he would be exposed if he undertook or continued to perform the work in question.¹ Other groups of cases governed by

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he obeyed was coupled with a threat of discharge in case of disobedience, and that his foreman assured him that there was no danger, it was held that the instruction had been rightly refused, inasmuch as these elements were material in regard to the question of the servant's negligence. This ruling would certainly not be accepted as good law in every state. It is clear that, if the master elects to rely on the defense of an assumption of the risk, he cannot be compelled to deal with facts which would be material only on the supposition that the defense of contributory negligence was the one relied upon by him, or the only one available under the circumstances.

¹ An employer who ties two ladders together to make one sufficiently long to reach to the roof of his barn, and directs his employee to ascend, assuring him that it is safe, and that he is an old sailor and a skilful tier of knots, is liable where the employee relies on his assurances without examining the fastening, and is injured by its giving way because it is improperly tied. *Denning v. Gould* (1893) 157 Mass. 563, 32 N. E. 862. An employee who does not know the safe rate of speed for a grindstone turned by machinery has the right to rely on a statement by the superintendent of the employer that the speed at which it is revolving is safe. *Helfenstein v. Medart* (1896) 136 Mo. 595, 36 S. W. 863. Affirming on rehearing (1896) 136 Mo. 619, 37 S. W. 829 (1896) 136 Mo. 619, 38 S. W. 294. A carpenter employed by an electric company has a right to rely on a statement by the foreman that uninsulated wires near which he is required to work are not dangerous, where there is nothing to indicate that any electrical current is passing through them. *Chicago Edison Co. v. Hudson* (1896) 4 Ill. App. 639. Whether an experienced brakeman who was struck by an overhanging arch in defendant's freight house while he was riding on the side ladder of a car of average height, with his body partly

projecting above the car, knew or ought to have known that the arch was so situated as to expose him to danger while he was on such a car, is a question for the jury, where the foreman of the crew had told him when he went to work, "to look out for himself in going through the arch on big, high cars; that on common cars he would be all right." *Burnham v. Concord R. Co.* (1898) 69 N. H. 280, 45 Atl. 563. A brakeman induced to make a coupling by the promise of his superior to stop the car in time to avoid injury to him is justified in relying upon such promise until it becomes apparent that the superior will fail to perform his duty; and his right to recover for an injury sustained depends upon whether he could, by the exercise of ordinary prudence, have thereafter extricated himself from danger. *Louisiana Etc. Iron R. Co. v. Carstena* (1898) 19 Tex. Civ. App. 190, 47 S. W. 36. When a laborer who is set to work upon a railway track, receives an assurance, express or implied, that the use of such track is suspended, he is not guilty of negligence if he goes on working without constantly watching for coming trains. *Mcguire v. Fitchburg R. Co.* (1888) 146 Mass. 379, 15 N. E. 104 (servant was run over while he was sweeping up the grain which had fallen from cars on the track near the hoppers into which the rest of the car loads had been discharged). An employer of an inexperienced driver, who promises to furnish him with nothing but gentle teams, and assures him that a team furnished is gentle when in fact it is in the habit of running away, is liable for personal injuries sustained by the employee, without his fault, by the team becoming suddenly frightened and running away. *Wrought-Iron Range Co. v. Martin* (1894) Tex. Civ. App. 28 S. W. 557. Where defendant's superintendent assured plaintiff that an unlighted bin was "all right," and afterwards ordered him to get into it to empty sacks of grain, and plaintiff, in jumping over the side of the bin, was injured by fall-

the same principle are those in which there had been an explicit instruction by the master, or some agent for whose statements he was responsible,

ing on a joist, from the fact that the bin had no floor in it, it was not error to refuse to direct a verdict for defendant. *O'Brien v. Natick Hallett Co.* (1901) 177 Mass. 422, 59 N. E. 65. Where a servant who had little experience in the work took a hammer and finished him, which had chipped, to his foreman, and complained that it was not safe, and the foreman took it, and, instead of testing it, made a superficial examination, and returned it to plaintiff with an assurance that it was "all right," plaintiff was held to be entitled to assume it was safe, and was allowed to recover for an injury caused by a chip which subsequently flew therefrom. *Ducasi v. St. Louis Stamping Co.* (1901) 163 Mo. 607, 63 S. W. 827. In an action for personal injuries to a girl fourteen years old, while at work on a machine used for setting up lids to boxes, evidence that she objected when ordered to work on the machine, stating that she was afraid to work on it, and did not know anything about it, and that the foreman told her that he had been hurt on the machine, but that it was due to his carelessness, and that it was now arranged so that she could not be hurt; and that she was hurt after working on it for a week, requires a submission to the jury of the question of plaintiff's contributory negligence. *McIntyre v. Empire Printing Co.* (1898) 103 Ga. 288, 29 S. E. 923. A servant who was employed to whitewash a house in which a person had died of smallpox, and who contracted the disease, may recover damages, where he relied upon the employer's assurance that the house had been thoroughly disinfected. *Span v. Elu* (1876) 8 Hun. 255. An employer who tells an employee that specified machinery is not difficult to manage or dangerous, and that he will "take all the risk of any accident" that may occur to her in operating it, is liable for an injury received by her while exercising ordinary care in operating the machinery. *Phillips v. Michaels* (1895) 11 Ind. App. 672, 39 N. E. 669.

A workman who has no knowledge concerning the mechanism of a machine with which he is working, and which cannot be seen without taking the machine apart, may rely upon the representations of the foreman as to its safety, when the foreman is an expert

and familiar with the machine, and expressly charged by the employer with the duty of inspecting and repairing it. *Buonocore v. Acworth Mfg. Co.* (1899) 121 Mich. 115, 79 N. W. 1168.

See also *Reddick v. Goodwin* (1886) 104 Ind. 283, 9 N. E. 302 (master assured servant that the appliances in lowering a heavy safe were adequate for the purpose); *Leake Superior Iron Co. v. Erickson* (1878) 39 Mich. 192, 33 M. Rep. 423 (miner injured); *Daley School* (1882) 28 Hun. 314 (servant was assured that there was no danger of the fall of bricks, of which he was apprehensive); *Chadwick v. Brorshor* (1891) 39 N. Y. S. R. 718, 15 N. Y. Supp. 55 (servant, a house painter, was injured by the fall of a scaffold, the planks of which were not tied by him, in consequence of his reliance on the assurance of the master that they would hold without being tied); *Stonine v. Hartford Pipe & Brick Co.* (1899) 108 Iowa, 137, 78 W. 811 (servant, although aware that an elevator cable was defective, held him to be necessarily chargeable with an appreciation of the danger of using where superintendent had told him it was safe); *Goodrich v. Schott* (1900) 192 Ill. 509, 61 N. E. 332, Affirmed (1900) 95 Ill. App. 110 (servant was told that a defective belt which he was attempting to place on a revolving pulley was all right, and was ordered to go ahead and put it on); *Harder & H. C. Min. Co. v. Schmidt* (1900) 43 C. C. 532, 161 Fed. 282 (miner relied on superintendent's expression of opinion that the roof of a tunnel was safe); *Jepson & N. W. R. Co. v. Woods* (1900) Tex. Civ. App. 64 S. W. 830 (engineer told by a section foreman that a trolley which had been reported to be defective had been repaired); *Shadford v. Labor Street R. Co.* (1899) 121 Mich. 24, 80 N. W. 30; *Former Appeal* Mich. 390, 69 N. W. 661 (servant, being assured by foreman that there was no danger in working on the inside of the curve of a trolley wire which was held back by a vise, was injured by slipping cut); *Watson Cut Stone Co. v. Small* (1899) 181 Ill. 366, 51 N. E. 995, Affirmed (1899) 80 Ill. App. 20 (corbel stone fell, owing to condition which servant could not see); *Lase Station* (1897) 101 Ky. 67, 42 S. W. 756 (die dropped unexpectedly owing

sible, that certain dangerous conditions, of which the servant had no acquired knowledge, had been remedied; or that certain precautions to secure his safety would be taken; or that a certain future event which

of defect in capital. *S. Smith v. Gibson* (1896) 11 App. Div. 502, 63 N. Y. Supp. 438, (no liability in an action for a defect held to be for the jury, when defendant and his foreman had declared that every thing was all right about the machine, which exploded in lack of proper securing, as plaintiff testified that he had observed something to warn him of danger); *Fordell v. The Erie C. Co.* (1900) 100 Cal. 80, 2 Ind. 100, 169, 47 S. W. 311 (servant assured that a wire rope, the safety of which he suspected was unsafe); *Wade v. Pease* (1900) 22 Ky. L. Rep. 694, 58 S. W. 20, (plaintiff injured by a defective skid, while he was rolling a log-head); *Gust v. Dinsdale* (1883) 10 So. Sess. Cas. 4th Series, 1149 (turnout of engine operator's machine was so placed that the live cinders flying from it were apt to fall on the charges of powder which were used for blasting); *Anderson v. Steinrich* (1900), 32 Misc. 680, 66 N. Y. Supp. 498 (servant assured that ceiling, although cracked, was not dangerous); *Schulz v. P. Y. Busc* (1897) 21 App. Div. 592, 47 N. Y. Supp. 809 (same facts); *Wagner v. Chicago, R. I. & P. R. Co.* (1895) 63 Mo. App. 492 (servant was assured that ladder with worn rungs was safe); *Jones v. St. Louis N. & P. Packet Co.* (1891) 43 Mo. App. 398 (plaintiff called the attention of the second mate to a defect in a plank, and was assured that it could be safely used); *American Wire & Cable Co., Connally* (1893) 8 Ind. App. 35, N. E. 721 (foreman assumed that a different and more dangerous kind of work was safe); *Woods v. City, Cham & Coal Co.* (1897) 11 App. Div. 68 (minner injured by unlined shaft had been assured it was safe); *Dorsey v. Grubb* (Ohio L. J. 180) (superintendent of building projected that a building was safe, and that after the building it was all right); *Rosen v. The Erie C. Co.* (1897) 17 App. Div. 428 (plaintiff injured by a defective girder of scow, foreman that the scow was safe, which required him to be safe).

In his 1987 book, *G. C. C. A.*,
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the chair, and fell into arms under an overhang. First, notice of its appearance and removal of the foreman as to its safety. The foreman, who had previously been upon the bank, endeavoring to throw it down, went up a run, when thus appealed to, for the purpose of examining it; and he then repeated the assurance of safety, accompanied with the order which he had given when he first instructed the plaintiff to assist in the loading of the cars. The court said: "It certainly cannot be said, as a matter of law, that the plaintiff was not justified in giving some weight to, and placing some reliance upon, assurances thus given and repeated. There were other facts to be weighed in connection with the assurances given by the foreman, upon the question of contributory negligence on the part of the plaintiff, — such as the composition of the bank, the character of the overhanging crust, the fact that it had remained in its then condition since the previous day, and that it had resisted the efforts of the foreman to throw it down. Under these circumstances, we think that the questions of the assumption of the risk and of contributory negligence on the part of plaintiff were for the jury, and not for the court, and that it was error to withdraw them from the jury."

McKee v. Madison, T. & S. F. R. Co. v. McKee (1887) 37 Kan. 592, 15 Pac. 484 (superintendent told plaintiff that machine complained of had been repaired); *Laurance v. Hayneger & Co.* (1892) 93 Ky. 591, 20 S. W. 704 (servant had refused to use a saw until it was repaired, and only resumed work when informed by the machinist that it was "all right"); *Gaugh v. D. H. Osborne & Co.* (1896) 115 Cal. 137, 47 Pac. 248 (same facts); *Sopherstein v. Berlitz* (1896) 178 Pa. 401, 35 Atl. 1000 (employee, after discovering that a machine was out of order, and informing the superintendent thereof, continued to operate it after the superintendent had done some work upon it and pronounced it all right); *Nelson v. St. Paul Flour Works* (1894) 57 Minn. 13, 58 N. W. 868 (superintendent told servant that a machine the defects of which he had previously discovered had been repaired).

² A concern whose business it is to examine revolvers after they have been

was expected to happen would not happen before a certain time;⁴ or that an occurrence which would endanger his safety could only happen as a consequence of some particular thing's being done;⁵ or that he would not incur any hazard in operating an appliance in a certain manner.⁶

If the servant is otherwise entitled to rely upon the master's assurance that there is no danger, the mere fact that he was told by a fellow servant that there was danger is not enough to render him chargeable, as matter of law, with contributory negligence.⁷

In some cases the doctrine has been laid down that, although a defect is apparent, yet, if the servant proceeds to work, on an assurance given by the master that it is safe to do so, the master is liable for a resulting injury, unless the extra hazard is so palpable that no man of

tested has a right to rely to some extent on the master's assurance that he would leave no unexploded cartridges in the revolver. *Anderson v. Duckworth* (1894) 162 Mass. 251, 38 N. E. 510. Compare *Bradley v. New York C. R. Co.* (1874) 3 Thomp. & C. 284 (laborer entitled to rely on assurance of track master that warning of the approach of trains would be given).

Contributory negligence of the servant is for the jury upon evidence that the employee was injured by the descent of an elevator while he was at the bottom of the elevator well picking up paper, and that the superintendent had virtually promised to look out for him while so engaged. *Scullane v. Killogg* (1897) 160 Mass. 544, 48 N. E. 622. On the ground that, if the defendant by his own act has thrown the plaintiff off his guard, and given him reason to believe that vigilance is not needed, the lack of such vigilance on the part of the plaintiff is no bar to his claim, it has been held that one employed to fix the pipes on a blower used for removing castings from a mill, and who is injured, while putting his hand through the casing to adjust the pipe, by the employer's starting the blower without his knowledge and without giving him notice, after inducing him to believe that it would not be started until he was notified, is entitled to recover for such injury. *Kinney v. Folkerts* (1889) 78 Mich. 687, 44 N. W. 152.

Compare, generally, the cases in chapter XVI., *ante*, as to the master's duty to warn his servant; and also those cited in § 355, *ante*.

⁴That the boss or foreman of a rail-

road told a trackman that no train or engine would come over a certain bridge until a certain hour may properly be taken into consideration by the jury in determining whether he was negligent in not seeing the engine which injured him while he was crossing the bridge before that hour, in the dark, although coming in a direction opposite to that in which he himself was walking (*Brewer and Brown, JJ.*, dissented on the ground that the plaintiff was negligent, as a matter of law.) *Northern P. R. Co. v. Amato* (1892) 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740. Affirming (1899) 1 C. C. A. 468, 1 U. S. App. 113, 53 Fed. 881, Affirming (1891) 46 Fed. 561. *Floetli v. Third Ave. R. Co.* (1896) 10 App. Div. 798, 41 N. Y. Supp. 792. (Trackman went under track in reliance on statement of foreman that no cars could pass until a time much later than the time of the accident).

⁵*Blanton v. Dold* (1891) 109 Mo. 75, 18 S. W. 1149 (plaintiff not negligent as matter of law, in putting his hand inside a machine which, he was assured by the foreman, would not start without the pulling of a rope).

⁶The question of the servant's due care is for the jury, where his injury resulted from his reliance upon the assurance of his foreman that the jackscrew which he was operating might safely be lowered a certain distance. *Knight v. Overman Wheel Co.* (1899) 174 Mass. 455, 54 N. E. 890.

⁷*McKee v. Tourtellotte* (1896) 167 Mass. 69, 48 L. R. A. 542, 44 N. E. 1071.

ordinary intelligence and prudence would incur it.⁸ This doctrine would appear to be simply the logical equivalent of that which declares that the fact of a servant's incurring a known danger does not necessarily imply that he was negligent. See § 322, *ante*. If the language used means anything more than this, it cannot be reconciled

with that which is found in the cases cited in the next subdivision of this section. But it is not amiss to notice that the decisions which embody this doctrine were all rendered in Missouri, a state in which the power of the courts to control or override verdicts seems to be more sparingly exercised than in most jurisdictions. See § 301, *ante*.

In one case it was argued that the rule as to the effect of an assurance of safety should be different where the appliance was of an extremely simple character, such as a ladder; but this contention did not prevail.⁹

The servant's position is, of course, proportionally strengthened where he was not only assured that the conditions complained of did not imperil his safety, but also that they would be altered for the better,¹⁰ (see chapter XXII., *ante*); or where the fact of the servant's having acted under a specific order constitutes a distinct and additional element in the case¹¹ (see chapter XXIII., *ante*).

⁸ *Aldridge v. Midland Blast Furnace Co.* (1883) 78 Mo. 559; *Monahan v. Kansas City Clay & Coal Co.* (1894) 58 Mo. App. 68; *Jones v. St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 398.

⁹ *Warner v. Chicago, R. I. & P. R. Co.* (1895) 62 Mo. App. 192 (servant used a ladder with worn rungs).

¹⁰ Where a miner complains of being exposed to danger from the possible fall of a large stone in the roof of a tunnel, and is not only assured by the underground manager of the mine that there is no risk, but receives a promise from the same official that the stone will be very shortly removed, it is for the jury to say whether an injury which he suffers through going back to work before the manager's promise is fulfilled shall be considered due to his own rashness, or to his having implicitly relied on the assurances so given him. *Paterson v. Wallace* (1854) 1 Macq. H. L. Cas. 748. 28 Eng. L. & Eq. 48.

See also *Chicago Drop Forge & Foundry Co. v. Van Dam* (1894) 149 Ill. 337. 36 N. E. 1024. *Affirming* (1893) 50 Ill. App. 470 (inexperienced servant went on using a defective machine after the foreman had assured him that it was all right, and that he would shortly be supplied with a contrivance which would di-

minish the peril); *Warner v. Chicago, R. I. & P. R. Co.* (1895) 62 Mo. App. 191 (ladder with worn rungs); *Young v. Mercantile Steam Laundry Co.* (1901) 198 Pa. 553. 48 Atl. 497 (servant assured that certain promised repairs in a mangle had been completed before she resumed work).

¹¹ *McKee v. Tourtellotte* (1896) 167 Mass. 69. 48 L. R. A. 542. 44 N. E. 1071; *Keegan v. Kavanaugh* (1876) 62 Mo. 230 (held to be a question for the jury whether a hod carrier engaged in helping to build a wall at the foot of an embankment of earth 20 or 30 feet deep, and not shored or propped up, was negligent in obeying orders to go down, although reluctant to do so, when he was told that there was no danger); *Jackson v. Georgia R. Co.* (1886) 77 Ga. 82 (section hand, after inquiry as to danger, was ordered, with a curse, to "go or leave, and told there was no danger"); *Chicago Anderson Processed Brick Co. v. Sobkowick* (1892) 45 Ill. App. 317. *Affirming* (1894) 148 Ill. 573. 36 N. E. 572 (servant, after protest, had gone to dig under a bank of earth in response to an express order and an assurance of safety).

The contributory negligence of the plaintiff was held to be for the jury

b. Negligence predicable as matter of law.—Contributory negligence is said to be predicable, as a matter of law, of the undertaking or continuance of work involving exposure to an abnormal danger whenever the condition to which the assurance related was apparent to a person in the exercise of ordinary care;¹² or where the inadequacy of the appliances was palpable;¹³ or where the servant had equal means of knowledge, as compared with those of the person giving the assurance.¹⁴

where the evidence was that he was engaged in laying a 4-inch wall in front of an old wall, and tying the two together; that the old wall was 13 inches thick, up to 14 feet in height, with an 8-inch fire wall and gable built on top of it; that, after building the 4-inch wall up 12 feet, defendant ordered plaintiff and others to take a course of brick from the old wall; that, when plaintiff inquired, "Aren't we getting pretty high?" defendant replied, "No; that's all right;" that, in consequence of removing such course, the gable wall fell on plaintiff; and that plaintiff had worked for defendant two years prior to the injury, and according to his own testimony did not know where the 8-inch wall began. *Starr v. Kautzberger* (1900) 129 Cal. 123, 61 Pac. 787.

The defendants are not entitled to a peremptory instruction in their favor where the injury was caused by the fall of a scaffold, and it was in evidence that the accident occurred when plaintiff was helping three others carry a timber near the place on a scaffold where he had been making repairs a short time previously, and that, fearing for the strength of the staging, he had asked the foreman if it was safe, who said it was if not loaded down with timber, and ordered plaintiff to go on with his work, and not ask so many questions. *Lombert v. Missisquoi Pulp Co.* (1899) 72 Vt. 278, 47 Atl. 1085.

¹² *Lawrence v. Haynsworth & Co.* (1892) 93 Ky. 591, 20 S. W. 704; *Griffith v. Newburg Orrel Coal & Coke Co.* (1893) 38 W. Va. 273, 18 S. E. 581. In a case where plaintiff, who was employed by defendant to operate a machine used for planing boards, asked for an assistant, and his request was refused, the foreman assuring him that he could operate the machine by himself without danger, the defendant was held not to be liable for an injury resulting from a board turning over and pushing plaintiff's hand into the knives of the ma-

chine, as the knives were visible, and the danger to plaintiff from putting his hands close to the knives was plainly apparent. *Bois v. Struck* (1901) 23 F. L. Rep. 1113, 64 S. W. 729.

Where the servant knew that the place of work was unsafe, it is erroneous to give an unqualified instruction to the effect that he is entitled to recover if he had been assured by the master's representative that it was safe. *Breckinridge & P. Spoolhouse v. Murphy* (1897) 18 F. L. Rep. 915, 33 S. W. 700. An instruction is erroneous which gives the jury to understand that a mason employed by a contractor is not absolved from a care in inspecting the construction of scaffolding on which he is directed to work, merely because the foreman told him that it is all right and ready for him to work on. *Bannon v. Sams* (1896) 68 Ill. App. 164.

That the assurance of the person in charge of the work that he would guard the plaintiff against danger was not sufficient to justify his continued exposure to the known risks of the environment,—at all events where the circumstances were such that it was impossible for that person to give the plaintiff such warning as would enable him to escape the peril,—is deducible from the decision in *Reese v. Clendenen* (1892) 146 Pa. 465, 23 Atl. 246 (imposed by the fall of some heavy iron plates, propped up by bricks which plaintiff was removing). One ordered by his superior to make a car couple under such circumstances that the danger was great and apparent, although induced to act by a promise that the work should be stopped in time to avoid accident to him, cannot recover for injury sustained, if ordinary prudence would have dictated a refusal. *Louisiana Tension R. Co. v. Carstens* (1898) 7 Tex. Civ. App. 190, 47 S. W. 36.

¹³ *Booth v. Goodwin* (1884)

Ind. 286, 9 N. E. 302.

¹⁴ *Perschke v. Hoecken* (1897) 44

454. Contributory negligence in respect to the manner of performing the work.—Although the servant may have been justified in relying upon the assurance of the employer that no abnormal danger would be incurred, his action will nevertheless be barred if it is shown that,

Y. Supp. 265. Where the evidence shows that a man employed to do work on a shaft employed the deceased, who was a man of experience as a miner; that it was for that reason he was employed; that the matter of gas was told over between them; that they both knew that the shaft was leaking a little gas; and that they both thought there would not be any danger by using care,—an instruction to the effect that if the jury believe that deceased went upon a platform in the shaft by request of and under employment of defendant, and that before he went thereon defendant or his agents informed him that it was safe from explosive gases, and that he had reason to believe it was safe, as defendant had informed him, then he did not go thereon voluntarily,—is not applicable to the testimony. *Cold Run Coal Co. v. Jones* (1889) 127 Ill. 379, 8 N. E. 865, 20 N. E. 89.

As a complaint alleging that the plaintiff, a carpenter, was injured by the falling way of a window casing by which he was supporting himself while doing some work on a roof shows that he was injured by a risk as open to his own observation as that of his employer, he cannot recover. Although there are also allegations that his employer assured him of the safety of that manner of working, and commanded him to proceed in that way. *Hepeke v. Ellis* (1901) 110 Wis. 532, 86 N. W. 171.

In *Haas v. Balch* (1893) 6 C. C. A. 201, 12 U. S. App. 531, 56 Fed. 981, the cases which declare the general rule to be that, where the servant is of mature age, and of ordinary intelligence, he cannot recover for an injury caused by a known risk, even though assured by an agent or representative of the master that there is no danger, have been thus condensed upon: "In all, or nearly all, those cases the employee had equal knowledge of the risk to be apprehended with the master or his representative, and hence was not relieved from the duty of exercising his own judgment upon the question whether he would or would not subject himself to the known

dangers of the situation. There are other cases which hold the rule to be that when a servant is directed by the master or his representative to place himself in a situation of danger, the law will not charge him with the risks of the situation, or hold him guilty of contributory negligence, unless the danger is so glaring that no prudent man would subject himself thereto, even in obedience to the commands of a master. The difference observable in these cases in the weight given to an assurance of safety on the part of the master or his representative is mainly due to the different state of facts proven in the several cases upon the point of equal knowledge or means of knowledge between the master and servant of the risk to be incurred in the given instance. The fact that the assurance of safety has been given is one to be weighed in each case. The weight to be given thereto is dependent upon the circumstances of the particular case. If, in a given instance, the servant, being of mature age and of ordinary intelligence, has equal knowledge with the master of the dangers to be apprehended, and he voluntarily subjects himself thereto, knowing of their existence, the mere fact that he had received an assurance that there was no risk to be dreaded or avoided might be of little avail in relieving him from a charge of contributory negligence. On the other hand, if the master or his representative has superior knowledge or means of knowledge of a given situation and of its safety, or the contrary, and he assures the servant that he can safely undertake a given work, such an assurance may justify the servant in undertaking the work in reliance upon the superior knowledge of the master, and without being liable to the charge of negligence in so doing, unless the danger, in the language of the Supreme Court, in *District of Columbia v. McElligott* (1886) 117 U. S. 633, 29 L. ed. 949, 6 Sup. Ct. Rep. 888, is so imminent or manifest as to prevent a reasonably prudent man from risking it."

while he was engaged in the performance of the work, he failed to exercise ordinary care in avoiding an obvious peril.¹

¹On this ground it has been held that no action could be maintained where the servant inserted his hand inside the fence which surrounded a saw, and came in contact with the saw, while he was attempting to pick up a piece of chain near it. *Schultz v. C. C. Thompson Lumber Co.* (1895) 91 Wis. 626, 65 N. W. 498. Where a servant employed to dig clay by undermining it was injured, while digging a trench 8 feet wide through a bank, by clay from the rear wall falling and catching him where he stood between it and the end of a cart

which was standing in the trench, it was held that he could not recover on the theory that the foreman had assured him that he could work in safety in the trench while digging as directed, inasmuch as the danger was not in the manner of the digging, but in undermining without leaving supports, which was understood by him, and in taking his position between the wall and the cart where it was difficult to escape if the bank fell. *Cisney v. Pennsylvania Sealer Pipe Co.* (1901) 199 Pa. 519, 49 A. 309.

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CHAPTER XXV.

LIABILITY FOR INJURIES RECEIVED BY THE SERVANT IN OBEYING AN ORDER TO PERFORM DUTIES OUTSIDE THE SCOPE OF HIS ORIG- INAL CONTRACT.

- 455. Introductory.
- 456. Necessity of showing that the servant was transferred to essentially new duties.
- 457. — and that the order by which he was transferred was within the powers of the employee giving it.
- 458. — that the order was negligent.
- 459. Special grounds on which negligence is inferred.
- 460. Assumption of risks as a defense; generally.
- 461. Risks not assumed unless known.
- 462. Risks assumed, if known.
- 463. What risks fall within this description.
- 464. Indiana doctrine as to assumption of risks.
- 465. Doctrine of common employment qualified as regards servants work-
ing outside the scope of their employment.
- 466. Contributory negligence in undertaking the new work.
- 467. Absence of compulsion an essential element of assumption of risks
and contributory negligence.
 - a. Generally.
 - b. Protest or objection omitted or made.
 - c. Fear of discharge.
- 468. Contributory negligence in regard to the manner of performing the work.
- 469. Injuries due to risks entirely disconnected from the servant's duties;
right of action for.

455. Introductory.—The risks with which we have hitherto been concerned fall into two categories,—*viz.*, those ordinarily incident to the employment, and those which are extraordinary, in the sense that they would not have existed if the master had not been derelict in regard to his specific duties to furnish reasonably safe appliances and see that they are used according to a proper system. In the present chapter it is intended to collect the decisions relating to injuries caused by another class of extraordinary risks,—*viz.*, those which fall into that category for the reason that, being incident to work which

was not within the scope of the original contract of hiring, they not among those which he expected to encounter.¹

456. Necessity of showing that the servant was transferred to essentially new duties.—The evidential prerequisites to the establishment of a right of action, and the defenses available to the master, are sufficiently indicated by the headings of the ensuing sections. To locate the application of the special principles appropriate to the classes of cases now under discussion, it must, in the first place, be shown that the order really did take the servant outside the scope of his original employment, and did not merely direct the performance of duties somewhat different to those which were required from him in the usual course of his work.¹

It should be noted that these principles have no application w

¹"The hazards incident to the new work may be considered extra hazardous as being outside of the regular employment, and additional to the risks thereof." *Consolidated Coal Co. v. Hucuni* (1893) 146 Ill. 614, 35 N. E. 162.

That the element of nonanticipation (see § 273, *ante*) is the connecting link between cases involving this and the other classes of extraordinary risks is clearly brought out in the arguments of several cases. See, especially, *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739, as quoted in § 465, *infra*; *Northern P. Coal Co. v. Richmond* (1893) 7 C. C. A. 485, 15 U. S. App. 262, 58 Fed. Rep. 756.

¹In *Curran v. Merchants' Mfg. Co.* (1881) 139 Mass. 374, 39 Am. Rep. 457, it was contended that the case was taken out of the ordinary line of cases in which the servant is an adult, by the fact that the plaintiff, who was fourteen and a half years of age, and had worked in the mill two and a half years, was of tender years, and was set to work in an unusual place, doing what he was not accustomed to do. This argument was rejected on the ground that the evidence was that the work he was doing was precisely like what he had been accustomed to do from time to time during the whole term of his employment by the defendant, and that his injury did not proceed from the fact that he was working in dangerous proximity to other machinery over which he had no control.

It is not without the scope of employment of one employed in a car shop to do general work,—such as lifting, carrying timber, painting, etc.,—to assist in lifting a car upon its trucks with a steam winch, where the like service had

been rendered on other prior occasions by him and his fellows. *Findely v. Sell Wheel & Foundry Co.* (1896) Mich. 286, 66 N. W. 50 (no duty warn). The servant is not shown to have been injured in doing work outside the scope of his employment, where the evidence is that he had worked in the mine for some time as a "bottom ger," but that when rock fell from the roof of the mine he would be called to help clean it up, and occasionally, there was loose rock overhead, he would be required to help pick it off; and on the occasion of the accident a foreman in the mine directed him to go down a rock in the roof of the mine in a different place from that in which he was employed. *Coal Valley Min. & Nelson* (1900) 87 Ill. App. 180.

Findings that the plaintiff was employed to operate machinery in defendant's mill, and that it was his duty to adjust it and keep it in order, and that he was injured while repairing the machinery, show that he was injured in the line of his employment. *Travis v. Evans* (1900) 24 Ind. App. 53, 3 N. E. 725. A father cannot recover damages for the death of a minor through the negligence of a fellow servant, while he was engaged in the line of his employment, although it was outside the scope of his regular employment, if he had previously done before him the work which the father knew he was doing. *Ohio & N. R. Co. v. Mersley* (1867) 28 Ind. 371.

A complaint alleging that the plaintiff was received while the servant, a repairer, was traveling on a train from one tunnel to another under the direction of the superintendent, does not show a wrongful transfer from his gener

the duties in which the servant was engaged at the time of the accident were being performed under a contract entirely distinct from that under which he first entered the employment. The same general reasons as those which are deemed to justify the doctrine of the assumption of the ordinary risks of an employment necessarily require the inference that the servant cannot recover for injuries due to the ordinary risks of such work, although they may be greater than those which he incurred in his former capacity.²

457. — and that the order by which he was transferred was within the powers of the employee giving it.—As in the case of an order given by a superior employee in respect to matters within the scope of the original employment of the injured servant (see § 435, *ante*), the master is not bound by an order of the kind considered in the present chapter, unless it was one which the directing employee had authority to give. See, generally, chapter XXXIII., *post*.

In one case the position is taken that an order by which one employee directs another to do work outside the scope of his employment is not binding on the master, unless the directing employee occupies the position of a vice principal, either by virtue of his official rank, or by reason of the fact that the order arises out of the exercise of some non-delegable duty of the master.³ If the doctrine embodied in the cases cited in § 465, *infra*, had not been enunciated, it might be desirable to adopt this theory as one which would furnish a convenient criterion by which to define the boundary line between authorized and unauthorized orders, and which would obviate the difficulty suggested

of employment. *Copper v. Louisville, Wright* (1897) 16 Ind. App. 630, 45 N. E. & St. L. R. Co. (1885) 103 Ind. 305, 2 N. E. 749.

A servant employed to sweep the floors of a factory was allowed to recover for injuries received while he was complying with an order to wipe the belts of machinery in motion, there being no evidence to show that he appreciated the danger. *Norfolk Rock-Sugar Co. v. Hight* (1899) 59 Neb. 100, 89 N. W. 276.

An allegation that the work in which the servant was engaged, when injured, was entirely different from that which he was employed to do, and was more dangerous than such work, and had to be performed with different workmen, operating under different rules and methods, and with appliances and in a place distinct from those of the work which the servant was employed to do, is sufficient to show that he was ordered outside the scope of his original employment. *Clark County Cement Co. v. Adams* (1886) 105 I.

151, 5 N. E. 187.

In *Jones v. Lake Shore & M. S. R. Co.* (1883) 49 Mich. 573, 14 N. W. 551, it was laid down that where a servant signs a contract which binds him to obey all orders, rules, and regulations, but in which the general language applies equally to all classes of employees, the agreement to obey all orders must be construed to apply to all which are issued to him in the line of duty in which he is employed; and it does not empower the company to assign him to other duties wholly disconnected therewith and differing therefrom.

² *Rooney v. Carson* (1894) 161 Pa. 26, 28 Atl. 996 (one employed as a weaver had been laid off until a new mill was started up, and was meantime employed to assist in moving into the new mill and making alterations).

³ *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 I.

by the consideration that, if employees other than vice principals should be regarded as having authority to give an order to perform new duties, the anomalous result would follow that different conclusions might, in some instances, be arrived at, according as the definition of common employment was or was not specifically relied on. The doctrine referred to, supposing it to be one of general application which is possibly not absolutely settled, renders it unnecessary to discuss the question thus raised.

A declaration is not demurrable on the ground that it fails to state that the agent of the employer, who commanded the employee to do the act resulting in the injury, had exclusive control and authority over the injured employee, as a master may appoint as many agents as he pleases to execute any particular work, and the acts of employees within the scope of his authority, are binding on the employer, unless the authority is a joint one only.²

Where the servant, in doing work outside the scope of his employment, was acting without proper authority, it is clear that the failure to give him instructions cannot be imputed to the master as negligence.³ See § 459, "a, b, *infra*."

458. — and that the order was negligent.— Another prerequisite to the maintenance of an action on the special ground that the injury was received while the servant was performing duties outside the scope of his employment is that the order by which he was required to perform those duties should be shown to have been a negligent one.

The doctrine which is most consistent with general principles and which is supported by the great weight of authority is that such negligence is not predicable upon evidence which merely shows that the servant of mature years and of ordinary intelligence was directed to do a certain piece of work outside the range of the functions which he had agreed to perform, and that he consented to do such work without making any objection on the score of his unfitness or incapacity.²

² *Camp v. Hall* (1897) 39 Fla. 535, 22 So. 792.

³ *Leisritz v. American Zylonite Co.* (1891) 154 Mass. 382, 23 N. E. 294; *Gillen v. Rowley* (1890) 134 Pa. 209, 19 Atl. 504; *Hinckley v. Horazdowsky* (1890) 133 Ill. 359, 8 L. R. A. 490, 24 N. E. 421; *Stewart v. Patrick* (1892) 5 Ind. App. 50, 30 N. E. 814; *McCue v. National Starch Mfg. Co.* (1894) 142 N. Y. 106, 36 N. E. 809 (no liability where servant undertook *proprio motu* to repair machinery, when it was his duty merely to report to a machinist when the necessity for repairs arose).

¹ See, generally, the cases cited in and the following sections.

In *Weston Oil Co. v. Thompson* (1890) 76 Tex. 235, 13 S. W. 60, it was held proper to charge the jury that the plaintiff would be entitled to recover if the superintendent ordered him to perform a service which was dangerous and not within the scope of his employment; if in this the superintendent did not exercise due care, provided plaintiff was injured while attempting, in the exercise of his duty, to obey the command.

² *Cole v. Chicago & N. W. Ry. Co.* (1888) 71 Wis. 114, 37 N. W. 84.

order that the servant may recover, therefore, it is necessary to prove that the order, in compliance with which he undertook the new duties, was culpable for some reason independent of the fact that his employment was changed. In other words, where a servant is ordered into a service which is not within the scope of his employment, the question of the master's negligence depends upon the particular circumstances involved in the case.³ This principle is controlling even in cases where the injured person was a minor.⁴

case was approved in *Hogen v. Northern P. R. Co.* (1892) 53 Fed. 519, which was followed in *Richmond & D. R. Co. v. Finley* (1894) 12 C. C. A. 595, 25 U. S. App. 116, 63 Fed. 228. See also *Garrigan v. Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 67 N. W. 1097; *Richardson v. Swift & Co.* (1899) 37 C. C. A. 557, 96 Fed. 699; *Chicago, R. I. & P. R. Co. v. Kinnare* (1901) 190 Ill. 9, 60 N. E. 57.

"An employee of mature years who was removed from one line of employment and set to work in another, without objection, and was then injured while operating machinery with which he was unfamiliar, or which he did not know how to operate, cannot recover from his employer for such injuries, unless his employer knew that he did not know how to operate the machine, or, he having informed his employer of his inexperience, the latter failed to instruct him." *ArCADE File Works v. Juteau* (1896) 15 Ind. App. 461, 40 N. E. 818, 44 N. E. 326.

The jury is properly charged that the mere fact that an employee is ordered to perform work in addition to that which he was originally employed to do will not of itself render the employer liable for an injury received while performing such work, unless the employer was guilty of negligence, and the employee free from contributory negligence. *Hillsboro Oil Co. v. White* (1897; Tex. Civ. App.) 41 S. W. 874.

In one case it was remarked that the master is "not liable, unless the outside work is more dangerous and complicated for the plaintiff to perform than that in which he was engaged." *Martin v. Highland Park Mfg. Co.* (1901) 128 N. C. 264, 38 S. E. 876. This statement would seem to involve, by implication, the converse doctrine, that the master may be liable in cases where the new work is shown to have been of the description designated in the last clause of the sentence. If this were really the

doctrine intended to be put forward, it would be erroneous according to most of the authorities cited in this and the next sections. But the context shows that the court was speaking of cases in which the master failed to warn an ignorant servant.

³*Consolidated Coal Co. v. Hacnni* (1893) 146 Ill. 614, 35 N. E. 162, Affirming (1892) 48 Ill. App. 115; *Cole v. Chicago & N. W. R. Co.* (1888) 71 Wis. 114, 37 N. W. 84; and the cases cited in the next section.

⁴In *Anderson v. Morrison* (1875) 22 Minn. 274, the court, in rejecting the contention that a cause of action arises in favor of a minor who is injured in consequence of being set at more dangerous work, whether this change in his duties was negligent or prudent, said: "This proposition is wrong, and the charge of the court correct. If an employer should set an adult who had capacity to take care of himself, and who knew the risks, to do a dangerous work, of course the employer would not be liable for an injury occurring to the employee in doing the work. And it would be the same if the employee were a minor, but of sufficient capacity to avoid the danger, and who knew of the danger to be avoided. There could be no greater wrong in putting such a minor to do a work accompanied with risk, than in setting an adult to do it; and when it would be proper to put a minor to do such work must necessarily depend upon the particular circumstances of each case,—upon the character and degree of the danger, and the capacity of the minor to comprehend and avoid it. Putting the minor to do the work becomes a matter of discretion and care, to be exercised with reference to such circumstances; and the employer can be held liable only where he does not exercise such discretion and care,—that is, where he is negligent. The case of *Union P. Co. v. Fort* (1873) 1, Wall. 553, 21 L. ed. 739 [see § 461, *infra*], proceeds upon

In the absence of facts which were such as to indicate that the servant was not capable of performing the new duties, the master is entitled to presume that he was competent to discharge them."

In § 461, *infra*, it will be shown that a theory which is to some extent inconsistent with the general principle just enunciated has been adopted.⁶

459. Special grounds on which negligence is inferred.—A special element justifying the inference of culpability in respect to an order which transferred the servant to new duties is deemed to exist in the following situations:

(a) Where the servant was, to the knowledge of the master or of the servant who gave the order, unfitted, on account of his tender years, physical or mental weakness, lack of technical skill, or inexperience for the work to be done.¹ The master's liability in this instance

the proposition that the setting of the minor in that case to do the perilous work for which he had not been employed was an imprudent act, and not on the ground merely that the work was perilous and the employee a minor."

¹ *Arcade File Works v. Juteau* (1896) 15 Ind. App. 461, 40 N. E. 818, 44 N. E. 326.

² In *Cincinnati, H. & I. R. Co. v. Madden* (1893) 134 Ind. 402, 34 N. E. 227, negligence seems to be implied from the mere giving of an order to perform new duties. The position of the court apparently is that the extra risks are not assumed, and that this fact, of itself, implies that the act of the master which was the immediate occasion of the servant's being exposed to them must have been negligent.

"If the particular work ordered to be done is of a dangerous character, and one which requires peculiar skill in its performance, and the person directed to perform such work has not the requisite knowledge or skill for doing the work with safety, and such want of skill or knowledge is known, or might be reasonably supposed to be known, to the employer, in that case the direction of the employer to do the work might be justly held to be a violation of a duty which he owes to his employee, even though the employee undertook to do the work without objection or protest upon his part. None of the cases go further than this, and we can see no reason for holding a stricter rule." *Cole v. Chicago & N. W. R. Co.* (1888) 71 Wis. 114, 37 N. W. 84.

In *Lalor v. Chicago, B. & Q. R. Co.*

(1869) 52 Ill. 401, 4 Am. Rep. 1, a declaration alleging substantially the plaintiff's decedent was killed by coupling cars, an operation outside the scope of the work for which he was hired, and one in which he had, as known to the defendant's representative, no experience, was held not demurrable. The court said: "The deceased was to perform work only ordinarily dangerous; he was compelled to do other extra hazardous, by which he lost his life, the superintendent knowing, unskilled, and unacquainted with the manner of coupling cars, who had been ordered to perform it. And the deceased was in the service as the superintendent at his side, however, was a special one, and subordinate as to compel him to yield implicit obedience to the command of the superintendent. The engine was destructively present, by and through the officer, and must be charged to him. It was then, by the direct order of the company, the deceased was exposed to this peril, and one out of the terms of the business he had contracted to perform."

Negligence may properly be inferred where the evidence shows that a boiler fitter the boilers of a steam engine for one year, had been ordered to charge the engine, in spite of protestations that he knew nothing of running it; and that he received instructions as to the manner in which it should be run. *Goff, C. & S. F. v. Newcomb* (1901) Tex. Civ. App. 8, 790.

A servant employed as an oil

gines on one ferry-boat, in which the hatchways are always covered when not in use, and transferred temporarily to a different kind of work on another boat out of commission, on which the hatchways are customarily left open under such circumstances, should be warned of that custom. *Brown v. Ann Arbor R. Co.* (1898) 118 Mich. 205, 76 N. W. 407.

For other cases in which the servant's action was sustained, for the reason that the person giving the order understood, or ought to have understood, the unsuitableness of the servant to do the work required, see *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 39 (foreman ordered a young, inexperienced boy who had previously worked as a helper at a moulding machine, or a common hand on the floor of a railway shop, to ascend a ladder and adjust displaced machinery while a shaft close by was rapidly revolving); *Jones v. Old Dominion Cotton Mills* (1886) 82 Va. 140 (boy of thirteen years hired to "sweep, carry water, and fill buckets with quills," ordered to mend a broken belt, in a position which required him to stand on a step-ladder near four belts in rapid motion); *Newbury v. Getchell & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743 (inexperienced minor ordered, without warning or instruction, to do work more dangerous than that for which he had been engaged); *Norfolk Beet-Sugar Co. v. Hight* (1899) 59 Neb. 100, 80 N. W. 276 (common laborer in sugar factory, hired to sweep the floor of one of the rooms, was injured while wiping water from a belt with a gunny-sack); *Foley v. California Horseshoe Co.* (1896) 115 Cal. 184, 47 Pac. 42 (boy of fourteen years, employed to operate a punching machine, ordered to assist in screwing on a misplaced nut, had his sleeve caught in a cogwheel); *Erickson v. Milwaukee, L. S. & W. R. Co.* (1890) 83 Mich. 281, 47 N. W. 237 (common laborer ordered to uncouple cars, and injured by the fireman's negligence in letting off brakes without warning); *Orman v. Mannix* (1892) 17 Colo. 564, 17 L. R. A. 602, 30 Pac. 1037, (gang boss negligent in ordering a boy fourteen or fifteen years of age to run and throw away an ignited stick of giant powder); *Brazil Block Coal Co. v. Gaffney* (1889) 119 Ind. 455, 4 L. R. A. 850, 21 N. E. 1102 (inexperienced boy of ten years ordered to leave his ordinary work and assist in switching coal cars); *Kehler v. Schwenk* (1892) 151 Pa. 519, 25 Atl. 130 (boy of fourteen employed as slate pick-

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er, ordered, against his will, to drive a dump car).

A trial judge in a Federal court charged the jury that a higher degree of care is required of the master in the case of a minor employee than in the case of an adult, especially in seeing that he does not assume risks without the scope of his employment. *Robertson v. Cornelson* (1888) 34 Fed. 716.

In *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 203, the court upheld an instruction to the effect that, if they found that the deceased, at the time he was employed by the defendant, was a lad of seventeen or eighteen years of age, inexperienced in the handling of brakes; that he was unfitted for that work by reason of his unskilfulness, inexperience, and youth, and this was known to his foreman; that he was employed at the time of his death and for some months previous thereto in the capacity of a common laborer only, and was ordered by the foreman to brake on said train, out of the line of his duty as such common laborer; and that, while attempting to obey such order, he fell from the cars and was killed, without negligence on his part,—the case of the plaintiff was established and she was entitled to recover.

A complaint is not demurrable which alleges substantially that the plaintiff was employed to perform a certain service, unattended by danger; that while so employed he was ordered by defendant to perform a different and perilous service, in which he was inexperienced; that he was ignorant of the peril, and defendant negligently failed to warn him; and that the peril was not apparent to an inexperienced person. *Consolidated Stone Co. v. Redmon* (1899) 23 Ind. App. 319, 55 N. E. 454 (servant engaged as wheeler in a quarry was set to work on a channeling machine).

The fact that the servant had applied for and been given employment, and put to doing certain work, does not warrant the master in presuming that he knew the danger of other work, which, over his protest, he was thereafter, on the discharge of the person who had done it, told that he must do. *Hillsboro Oil Co. v. White* (1899; Tex. Civ. App.) 54 3. W. 432.

A simple finding of a jury that the plaintiff did not comprehend the dangers incident to the work will not render the master liable. It must also be shown that this lack of comprehension was, or ought to have been, known to the mas-

sometimes put upon the specific ground of a breach of that duty of instruction or warning, which, as already shown in a former chapter (xvii.), is always predicable under such circumstances.²

ter. *Cole v. Chicago & V. W. R. Co.* (1888) 71 Wis. 128, 37 N. W. 84.

In Quebec it has been laid down that the owner of a manufacturing establishment, who causes a workman to perform very dangerous work, especially when such work is not accustomed to such kind of work, and does not receive a salary in proportion to the risk he runs, is liable in damages for the death of the workman. *Price v. Roy* (1898) Rap. Jud. Quebec, 8 B. R. 170 (servant was ordered to assist in the task of saving a bridge which was threatened by a flood). The broad doctrine thus laid down obviously imposes a somewhat larger responsibility upon the master than that to which he is subjected in common-law jurisdictions, though it would seem that, upon the testimony, the decision rendered would not be considered improper in view of the facts that a jury would doubtless have been warranted in finding that the servant did not understand the danger, and that adequate precautions to protect him were not taken.

"The master may not lawfully expose his servant to greater risks than those pertaining to the particular service for which he has engaged, and against which the servant, through want of skill, or by reason of tender age or physical inability, could not presumably defend himself, if unappraised of the danger. He is bound to warn the servant of the danger if it be not obvious, and to instruct him how it may be avoided." *Rood v. Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186. In this case the court declared that the proposition of plaintiff's counsel, that there was liability because the vice principal, acting for the master, directed the servant to engage in an employment other than that for which he was engaged, and also more hazardous, and that there was therefore a breach of positive duty by the master, could not be sustained in the broad language in which it was asserted. The liability, it was laid down, did not arise from the direction, but from the failure to give proper warning of the risks attendant upon the employment.

"When a servant is ordered by one having authority over him to do a temporary work beyond the work which he

had engaged to do, and the superior knows, or ought to know, from all circumstances of the case, that the work which the subordinate is directed to do is of a peculiarly dangerous character and is aware, or under all the circumstances should be aware, that the nature and hazards of the work, or the proper mode of doing the work to avoid the evident risks, are not obvious, or known, and appreciated by the subordinate because of his youth, incapacity, or inexperience, it is the duty of the superior to caution and instruct such disqualified servant sufficiently to enable him to understand the dangers he will encounter and how to do the work with safety; he exercise due care himself." *Fell v. Grandy* (1900) 43 C. C. A. 442, 127 Fed. 127, holding that a refusal to direct a verdict for the defendant was proper, where a helper in a repair of a railway company was directed to go into the fire box of a locomotive which had steam up, and tighten a plug in a leaking flue of the boiler, without knowing that the plug, when screwed in, hammered it so that the threads broke and thus allowed steam to escape.

The duty of instructing inexperienced servants was also recognized in the following cases: *Brennan v. Gilman* (1899) 118 N. Y. 489, 8 L. R. A. 23, 23 N. E. 810 (common laborer put in charge of dangerous machinery); *Jones v. Rapides Lumber Co.* (1898) 50 La. Ann. 717, 44 L. R. A. 33, 23 So. 1 (minor nineteen years of age suddenly called on to work with a trip in a sawmill); *Camp v. Hall* (1900) 30 Fla. 535, 22 So. 792 (boy four years of age was employed to put together vegetable crates, and transferred to the work of pushing cars on a track); *Texarkana & Ft. S. R. Co. v. Preacher* (1900; Tex. Civ. App.) 10 W. 593 (minor employed as a messenger in a railway office was directed to couple cars); *Michael v. Rounake Mach. Co.* (1894) 90 Va. 492, 19 S. E. 261 (boy in boiler shop assigned to duties where he was exposed to danger from a machine used to move machinery); *Lofgren v. New York & M. F. Water Co.* (1900) 55 Hun. 452, 8 N. Y. Supp. 717 (servant not employed to perform that particular service was ordered to work

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(b) Where the master or his representative knew that certain specific hazards would be encountered by the servant in the new environment to which he was transferred, and the servant was not chargeable with knowledge of those hazards,³ but infrequently in this instance, also, a material element of the negligence charged is the failure to caution the servant.⁴

(c) Where new functions were superimposed upon those which the servant had been previously discharging, and the multiplicity of duties thus entailed produced a certain mental confusion and disturbance of judgment, which impaired his capacity for self-protection.⁵

(d) Where the superior employee who gave the order directly aug-

quantity of dynamite, and was injured by its explosion); *Verhulst v. M. Lumber & Mfg. Co.* (1890) 441, 69 N. W. 742; *Bridge Co. v. O'Connor* (1890) S. C. 598; *Gulf, C. & S. F. Ry. Co. v. Norman* (1901; Tex. Civ. App.) W. 790; *Quinn v. Johnson* (1892) 9 Mont. (Det.) 858.

Whether instructions should have been given was held to be a question for the jury in *Hillsboro & Co. v. White* (1899; Tex. Civ. App.) 432, where the servant was in hand to clear away notes from under a litter, a method especially dangerous under the circumstances.

A jury is properly charged that if the servant was required to do work outside the sphere of his duty, and thus subjected to a risk with which he was not acquainted, or to a peculiar and greater risk at that time, of which he was not informed or cautioned, the defendant would be liable. *Mann v. Central Print Works* (1895) 11 R. I. 1 (fireman was suddenly called upon to assist in throwing on a belt).

³*Rettig v. Fifth Ave. Transp. Co.* (1893) 6 Misc. 328, 26 N. Y. Sup. 82; *Gatigan v. Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 67 N. W. 1097 (arguendo).

In *Chicago & N. W. R. Co. v. Bay* (1877) 37 Mich. 205, one of the grounds upon which it was denied that the risk was on the servant's shoulders was that, although it was apparent to him that the service was more hazardous than that which he engaged for, this must have been better understood by the master's agent.

A minor servant, nineteen years of age, hired to spike rails and do shoveling, is entitled to recover where the man-

ager of his department sends him to put dynamites and debris in a depot, and he is injured by the giving way of the floor, the safety of which was known to such manager, but not to the servant. *Quinn v. St. Paul, M. & M. R. Co.* (1885) 31 Minn. 45, 24 N. W. 311.

See *Parsons v. Michigan C. R. Co.* (1891) 91 Mich. 281, 49 N. W. 613; *Lesch v. Boston & A. R. Co.* (1885) 139 Mass. 589, 52 Am. Rep. 733, 2 N. E. 115; *Union P. R. Co. v. Fort* (1873) 17 W. R. 253, 21 F. 739; *Gatigan v. Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 67 N. W. 1097; *Walker v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 301, 62 N. W. 1032; *Mary Lee v. R. Co. v. Chambliss* (1892) 97 Minn. 171, 11 So. 897; *Fl. Smith Oil Co. v. Shore* (1893) 58 Ark. 168, 24 S. W. 199.

A laborer who was transferred, without instructions, to a place in a ditch where there were deposits of quicksand, was held entitled to recover in *Banks v. Gougham* (1895) 63 Ill. App. 223. For other cases dealing with the duty to instruct a servant who is ordered to undertake new duties, see § 248, notes 8 ante.

In one case it was held to be for the servant to say whether or not the allotment to a boy nineteen years old, employed in a sawmill, of three different tasks, to which a considerable extent were coincident in their requirements upon his attention, caution, and prompt action, and two of which were outside of his regular employment, constituted negligence rendering the master liable for injuries which were the proximate result of the distraction of his attention by his diverse duties. *Egan v. Sawyer & A. Lumber Co.* (1896) 94 Wis. 137, 68 N. W. 756.

mented, by a wrongful act amounting to an abuse of his power, perils of the new duties.⁹

*In *Rodman v. Michigan C. R. Co.* (1884) 55 Mich. 57, 54 Am. Rep. 348, 20 N. W. 788, the court was equally divided upon the question whether a brakeman could recover for an injury caused by the conductor's undertaking to manage an engine in the absence of the engineer. This division of opinion was due simply to a divergence of views as to the principle which should control the case, and not to any difference of opinion concerning the doctrine stated in the text. Champlin, J., took the ground that it was implied, as part of the contract between the plaintiff and defendant, that the engine should be operated by a competent engineer, and that the plaintiff did not assume the risk which would be incident to the employment in case the engine should be operated by a person without the requisite skill and experience, as this would put him in a position of greatly increased peril. The learned judge then proceeded thus: "In this case it is alleged in the declaration that the conductor was the agent of defendant, and had charge of the train and command of the other employees of defendant on the train, including the plaintiff. He was put, therefore, by the defendant, in his place, to discharge the duty which the defendant owed to the plaintiff, to see that the employees of the defendant were discharging the respective duties required of them; and in the discharge of this duty the conductor was not a co-servant, but the representative of the defendant, who in that respect is bound by the acts or omissions of the conductor the same as though such acts had been done or omitted by defendant personally. And the defendant, having placed the conductor in a position of authority over the plaintiff and other servants, and made them subject to his direction and control, while the defendant is not chargeable for the consequences of directions given by such superior officer within the scope of the general employment, he is chargeable to plaintiff for an abuse of such authority, as much as he would be to a stranger. . . . Suppose the conductor had ordered a day laborer or an entire stranger to take the place of the engineer during his temporary absence, and through his negligence, carelessness, and want of skill plaintiff had received the injury complained of without fault on his part, . . .

would have constituted such an abuse of authority as to render the defendant liable. It was likewise an abuse of his authority in the conductor to order the brakeman to couple the engine in the absence of the engineer, while himself, being a person unfit, incompetent, and lacking the requisite skill and experience, attempted to manage and operate the locomotive engine in coupling such coupling. By the exercise of his authority the conductor ordered plaintiff to perform services of increased peril not contemplated by the contract with defendant. The case is no different from what it would have been had the defendant been a natural person, and, without possessing the requisite skill and experience, assuming wholly unfit and incompetent, himself undertaken to run and manage the engine, and had at the same time ordered the plaintiff to couple the engine, and the injury had resulted in consequence of the want of fitness, competency, skill, and experience of defendant. The defendant is equally answerable for the acts of his agent, the conductor as if they were his own, when such acts are an abuse of his authority, or when he stands in place of the defendant. Cooley, Ch. J., referring to the case of *Chicago & N. W. R. Co. v. Baugh* (1877) 37 Mich. 205 (see last note), which had been cited as conclusive showing the right of the plaintiff to recover, said: "That case seems altogether different from this. . . . a common laborer on a railroad was ordered by his superior to perform the duties of a brakeman, and while so was injured. He was ordered to a different service to any in which he had ever engaged, and the order was plainly wrongful. But in this case plaintiff was put to no new or different service, and the only complaint is in the very service he agreed to perform. He was exposed to a risk not peculiarly belonging to it, and therefore not contemplated by his contract of service. The risk was certainly unusual, but probably not in the minds of the parties when the plaintiff was employed; but that fact would not of itself remove the responsibility. Accidents and injuries are often, perhaps mostly, the results of unexpected causes, but if these causes arise in the course of a servant's employment, he must

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400. Assumption of risks as a defense: generally.—Since every risk which is not caused by the master's negligence is deemed to be an ordinary one (see § 3, *ante*), it is evident that the inference that the usual risks incident to new duties were assumed may sometimes seem to be a necessary deduction from the fact that there is no ground upon which the master can be charged with negligence in giving the order to undertake those duties.¹ See § 458, *supra*. As long as the rights of the parties are examined from this particular standpoint, it is apparently impossible to dispute the applicability of the general principle thus invoked. But its introduction in this connection obviously entails an embarrassing conflict of results, inasmuch as such risks, although ordinary in relation to the new duties, are extraordinary in relation to the original employment. See § 270, *ante*. If this conception be treated as the controlling one, it is clear that the investigation in cases of this class must always start from the hypothesis that these risks are *prima facie* unknown to the servant, and that the fact of his knowledge must be established by positive proof. That this is the theory upon which nearly all, if not all, the cases proceed, is, we think, indisputable.

deemed to have assumed their risks. And the only question there can be in this case is whether the plaintiff was ordered to do something which, under the circumstances, was outside of his employment, so that, had he been inclined to do so, he might rightfully have refused obedience to the order. And this, as it seems to us, must depend upon whether, when the contingency appears to the conductor to render it necessary, that official may, for the occasion, take charge of the engine, and at the same time require the brakeman to continue to perform his service. That contingencies may and do arise in which the conductor should take charge of the engine for the time is undoubted. The necessity may sometimes be as urgent as it is plain; and lives may depend upon it. This might happen from injury to the engineer, or sudden illness; and when to leave the train where the disability of the engineer occurs would endanger some other train. But there might be other reasons for the engineer leaving his post, for which the company would not be in fault; and the conductor, with the train in his charge and under obligation to avoid other trains, must act in the emergency as the necessities of the case shall require. His highest and plainest duty in some cir-

cumstances will be to take possession of the engine and operate it; and it cannot be possible that, when such is his duty, the brakeman may rightfully prevent its performance by refusing to remain at his post. . . . If, under any circumstances, the conductor may rightfully take charge of the engine, this suit must fail, as there is no allegation in the declaration to show that in this case he was not justified. And he, being the person responsible for the safety and management of the train, must be allowed a certain discretion in deciding upon emergencies, and the presumptions must favor his action. And when he acts rightfully, it is contemplated in the employment of his subordinates that they, within their several spheres, shall assist him."

This seems to have been the situation present to the mind of the court in the following passage of the opinion in a recent case: "If there is nothing particularly dangerous in the new work, and the master has no reasonable ground for believing that the servant is unaware of the dangers he will encounter or has not the requisite skill and experience to do the work with safety to himself, the servant may well be regarded, if he obey (as chargeable) with having assumed the usual and ordinary

461. Risks not assumed unless known.—The theory just adverted to obviously involves, as a corollary, the doctrine that a master who seeks to escape liability on the ground of an assumption of the risk by the servant must prove something more than the mere fact that the latter yielded obedience to an order which required him to undertake duties different from those covered by the agreement under which he entered the employment.¹ If the evidence is such as to warrant a jury in finding that the servant was neither actually nor constructively aware of the existence of the risk, a court cannot declare, as a matter of law, that the action is barred. This principle inures to the benefit where the risks to be encountered were those normally incident to the work undertaken;² and, *a fortiori*, where those risks were of abnormal nature.³

risks incident to the employment." *Felton v. Girardy* (1900) 43 C. C. A. 439, 104 Fed. 127.

¹In *Fl. Smith Oil Co. v. Glover* (1893) 58 Ark. 168, 24 S. W. 106, it was laid down, *arguendo*, that a servant, who, when requested by his superior to perform a new duty, voluntarily undertakes it, assumes all the risks incident to its performance; and also that when a servant voluntarily undertakes a duty outside the scope of his original employment, his rights and liabilities are measured by the same standard as if he had been specially engaged to perform that duty. The court seems to have been led into this unqualified language by the fact that it was discussing and condemning an instruction which followed *verbatim* the passage quoted in § 461, *infra*, from the opinion in *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187. That passage, it may be conceded, is not a correct statement of the law, as it is applied in most states. But the Arkansas court has gone to the opposite extreme of error in enunciating the propositions above set forth. In the form in which they are expressed, they are clearly incorrect, unless it is assumed that the servant was conceived of as one who appreciated the risks of the new duties; and this element was not specifically adverted to.

²*Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205. See also *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739 (see § 465, note 2, *infra*); *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115 (see § 467, note 3, *infra*); *North ern P. Coal Co. v. Richmond* (1893) 7

C. C. A. 485, 15 U. S. App. 262, 58 F. 756 (boy employed as "trapper" in mine directed to assist drawers of coal); *Helm v. O'Rourke* (1894) 46 La. A. 178, 15 So. 400 (workman killed by bursting of a boiler while he was being tested, he having been called away from his regular duties); *Michael Roanoke Mach. Works* (1894) 90 N. E. 492, 19 S. E. 261 (boiler maker's help temporarily removed to another department); *Consolidated Coal Co. v. Hume* (1893) 146 Ill. 614, 35 N. E. 162, 178 (blow-pipe fitter directed to assist in raising smoke-stack); *Mann v. Oriental P. Works* (1875) 11 R. I. 152 (one hired as a fireman suddenly called on to assist the engineer in throwing a boiler); *Felton v. Girardy* (1900) 43 C. C. A. 439, 104 Fed. 127 (boiler maker's help who was ordered to repair a leaky pipe work which should have been assigned to an experienced boiler maker); *G. C. & S. F. Ry. Co. v. Newman* (1901) 10 Tex. (Civ. App.) 64 S. W. 790 (fireman of stationary engine ordered to take charge of it); *Ft. Worth & D. C. R. Co. v. Wrenn* (1899) 20 Tex. Civ. App. 50 S. W. 210 (engine wiper ordered to couple cars).

³In *Ferris v. Old Colony R. Co.* (1887) 143 Mass. 197, 9 N. E. 100, where a blacksmith, occasionally called out from a railway shop to push a car, was injured by being crushed between a car and a building near which the track was located, it was held that appreciation of the danger was no conclusion of law, if he was called by his foreman to assist in this work which was outside of the work which he was employed to do and in a

462. Risks assumed, if known.— The converse of the principle laid down in the last section is that a servant who undertakes new work with a full appreciation of the risks which its performance involves is deemed to have accepted those risks.¹ In so far, therefore, as he comprehends, or ought to comprehend, them, he assumes all the ordinary and extraordinary risks of the new duties,² whether he be a minor or an adult.³

where he had not before done such work, and if the peril was not obvious to him, and he failed to take notice that the space between the car and the building was too narrow for him to pass through with safety, and if his attention was given to the work which he was doing, so that he did not discover the danger till it was too late to save himself.

¹*Chicago, R. I. & P. R. Co. v. Kinnares* (1901) 190 Ill. 9, 60 N. E. 57, affirming (1900) 91 Ill. App. 508 (watchman stumbled over a pile of gravel while trying to mount a moving freight train for the purpose of arresting trespasser thereon); *Cummings v. Collins* (1876) 61 Mo. 520 (complaint not demurrable which alleged that a heavy iron wheel, while it was being rolled, dropped into a concealed hole in the floor, and fell over on plaintiff); *Palmer v. Michigan C. R. Co.* (1891) 87 Mich. 281, 49 N. W. 613 (section man upon a railroad does not assume the risks incident to loading rails upon a moving train in an unusual manner); *Walker v. Lake Shore & W. S. R. Co.* (1895) 104 Mich. 606, 62 N. W. 1032 (section foreman killed by the recoil of a trolley wire which he was ordered by the roadmaster to cut. Grant, J., dissented on the ground that this consequence was a patent risk, as well as on the more general ground that no negligence on the part of the company was established in regard to the supply of improper tools for the work); *Hillsboro Oil Co. v. White* (1899) Tex. (Civ. App.) 54 S. W. 432 (servant ordered to clean notes out of a liner while it was choked up with refuse).

A servant who was ordinarily employed as the foreman of a gang of diggers, and had been temporarily placed under a foreman of carpenters to assist in handling a "dolly" used for the transport of heavy timbers, was held entitled to recover for injuries caused by the insufficiency of the number of men assigned to the work. *Supple v. Aquar* (1901) 191 Ill. 439, 61 N. E. 392, Reversing (1898) 80 Ill. App. 437.

²"If the servant is possessed of knowledge and experience sufficient to comprehend the danger, and, without objection, undertakes the service, the master is not liable for injury received by the servant in such new and more dangerous employment." *Reed v. Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186.

³*Hanson v. Hammell* (1899) 107 Iowa, 171, 77 N. W. 839 (servant's hand caught while she was cleaning the rollers of a mangle); *Prentiss v. Kent Furniture Mfg. Co.* (1886) 63 Mich. 478, 30 N. W. 109 (plaintiff injured by a split-saw, which he had undertaken to operate, after being told that he could do this or lay off); *Millar v. Madison Car Co.* (1895) 130 Mo. 517, 31 S. W. 574, where the court remarked that by its ruling it did not mean that the servant assumed the risk of a defective appliance of which he knew nothing, or dangers which were not visible, but the risks that ordinarily attended the working of a reasonably safe appliance of the same character.

A trummer in a mine, who obeyed directions to help fix a roof and take down some ground in a stope, and was injured by ore or rock falling from a roof which had just been tested in his presence and seemed to be solid, was held to be chargeable with a comprehension and an acceptance of the risks of this temporary employment, as he had been trumming for four winters in this and other stopes. *Paule v. Florence Min. Co.* (1891) 80 Wis. 350, 50 N. W. 189.

⁴See the passage cited in § 458, note 4, *supra*, from the opinion in *Anderson v. Morrison* (1875) 22 Minn. 274. So far as the language goes, *Foley v. California Horseshoe Co.* (1896) 115 Cal. 184, 47 Pac. 42, seems to be *contra* as regards minors; but the case is one of those in which the phrase "assumption of risks" is improperly used to express a want of care. See § 309, *ante*.

463. What risks fall within this description.—The risks thus deemed to be accepted are those susceptible of being described by the same words that are employed to designate those risks which, although extraordinary as respects the scope of the original contract, are held to have been undertaken, in they were appreciated. See chapter XXI., especially § 391,—*ante*. Thus, it is held that the servant cannot recover for an injury caused by a risk which was "apparent,"¹ or "obvious,"² or so "open and manifest" that an ordinary man under the same circumstances could have ascertained them by the exercise of reasonable diligence.³ So, also, it is held that no action is maintainable where the servant had, as compared with the master, an equal,⁴ or better,⁵ opportunity to see and know the extent of the danger.

As in all cases of extraordinary risks, the question whether the servant appreciated the risks of new duties is primarily for the jury.⁶ See § 390, *ante*.

Even where an assumption of the risk may be inferred, the servant may still recover if it appears that the master, by his failure to discharge his continuing duty to keep the appliances safe, had exposed the servant to additional risks after the new work had been undertaken.⁷

464. Indiana doctrine as to assumption of risks.—According to se-

¹ *Walker v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 606, 62 N. W. 1032. A servant "assumes the risk of any danger which is plain, open, and apparent to his mind, although engaged in doing extra work or work outside the scope of his employment." *Chicago, R. I. & P. R. Co. v. Kinnare* (1900) 190 Ill. 9, 60 N. E. 57.

² *Feely v. Pearson Cordage Co.* (1894) 161 Mass. 426, 37 N. E. 368; *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115 (for facts see § 467, *infra*); *Wormell v. Maine C. R. Co.* (1887) 79 Me. 397, 10 Atl. 49; *Gavigan v. Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 67 N. W. 1097 (experienced section hand engaged with others in relaying a spur track, during the progress of which it became necessary to move cars, was climbing, at the command of the section boss, upon one of the cars to set the brakes thereon, and was injured by the act of the other hands in violently bumping said car with another).

³ *East St. Louis Ice & Cold Storage Co. v. Sculley* (1896) 63 Ill. App. 147.

⁴ The fact that an employee in a quarry was called from a safe employ-

ment to that upon which he was engaged at the time of the accident will not enable him to recover for injuries from the fall on him of the stone under which he was drilling, such fall being due to seams in the stone, and the hammering by the foreman upon the wedges at the top, where such employee was experienced in quarry work, knew the existence of seams and the danger therefore, and had an equal opportunity with the master and foreman of ascertaining whether there were seams in the particular stone. *Reed v. Stockmeyer* (1892) 20 C. C. A. 381, 34 U. S. App. 727, Fed. 186. See also *North Chicago St. R. Co. v. Conway* (1898) 76 Ill. App. 621 (car oiler injured, while coupling a trailer to a motor car, owing to the fact that the hook on the latter was caught in the opening above the driver's bar).

⁵ *Houston & T. C. R. Co. v. Foster* (1882) 56 Tex. 452 (employee killed by derailment due to a washout, while traveling on a relief train).

⁶ *Foley v. California Horseshoe Co.* (1896) 115 Cal. 184, 47 Pac. 42.

⁷ *Nall v. Louisville, N. A. & C. R.* (1891) 129 Ind. 260, 28 N. E. 183, (

oral decisions in Indiana, the fact that the risk involved was as open to the observation of the servant as of the master will not, necessarily, as in cases where the work was within the scope of the employment, warrant the inference that it was assumed.¹ In support of this doctrine two separate reasons have been assigned.

¹This theory was first enunciated in the following passage: The servant's implied assumption of risks is confined to the particular work and class of work for which he is employed. There is no implied undertaking, except as it accompanies and is a part of the contract of hiring between the parties. On the other hand, if the servant, by the orders of the master, is carried beyond the contract of hiring, he is carried away from his implied undertaking as to risks. If the master orders him to work temporarily in another department of the general business, where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not, by obeying such orders, necessarily assume the risks incident to the work, and the risks of negligence on the part of such employees. *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 164, 5 N. E. 187 (minor of twenty hired to work as section hand was injured in coupling cars the first day that he was ordered to do such work). By the Indiana court of appeals the effect of this case has been said to be that the implied assumption of risk does not extend to more hazardous work outside of the servant's contract of hiring, unless he voluntarily goes into such hazardous work. *Indiana Natural & Illuminating Gas Co. v. Marshall* (1898) 22 Ind. App. 121, 52 N. E. 232 (defective spurs caused injury to a "trimmer" who was directed to climb a pole and adjust a wire).

The position of the supreme court was further defined in *Brazil Block Coal Co. v. Hoodlet* (1891) 129 Ind. 327, 27 N. E. 741, where it was held that a complaint alleging that the plaintiff, a servant who usually worked above ground, as a blacksmith, was sent down a shaft to repair a pump, and was injured by falling down a shaft which was not provided with the protecting gates required by statute, was not subject to demurrer on the ground that it showed that the risk was an obvious one.

The same doctrine was reiterated in *Natl. v. Louisville, N. A. & C. R. Co.*

(1891) 129 Ind. 260, 28 N. E. 183, 611 (employee called out to avert the threatened destruction of a bridge by a freshet); *Louisville, E. & St. L. Consol. R. Co. v. Hanning* (1892) 131 Ind. 528, 31 N. E. 187 (car repairer directed by his superior to repair a car on a switch track, instead of on the tracks provided for that special purpose and upon which no trains are run or switched). In the last cited case the court, in discussing the sufficiency of the complaint, laid down the law as follows: The servant "does not necessarily assume the additional hazard in undertaking to perform the unusual and extra service, even although the dangers attending it are obvious." When a master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed, and if he is injured the master must respond in damages.

See also *Cincinnati, H. & I. R. Co. v. Madden* (1893) 134 Ind. 462, 34 N. E. 227 (§ 458, note 5, *supra*).

The doctrine of the above cases was specifically adopted in *National Enameling & Stamping Co. v. Brady* (1901) 93 Md. 646, 49 A. 345, where the court approved of the refusal to give an instruction predicated a right to recover solely on the finding that plaintiff had been injured without fault of his own, because of the machine's defective condition. The condemnation of the instruction was based on the theory that it is incumbent on a plaintiff to establish one of two alternatives,—either that he was injured while working outside the scope of his employment, or that the defend-

On the one hand the servant's nonassumption of such a risk is deduced from the consideration that, in the absence of specific evidence to the contrary, the supposition is that new duties are undertaken voluntarily.² But it is not apparent why coercion should be predicated where a risk is extraordinary in the sense of being outside the scope of the servant's employment, any more than it is predicated where a risk is extraordinary in the sense that it was caused by the master's negligence.

On the other hand, it is said that the master's order to a servant to do work outside the scope of his original employment operates as an implied assurance that the new duties may be performed without incurring any abnormal risks.³ Under this theory it would seem that

the servant was chargeable with notice of the defect.

In *Jones v. Lake Shore & M. S. R. Co.* (1883) 40 Mich. 573, 14 N. W. 551, it was held that an inexperienced servant, who consented, rather than lose his place, to undertake a duty outside the scope of his employment, did not assume the risk. But this decision really rests upon the fact that the servant did not appreciate the risk which caused his injury.

In *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034, it was said, *arguendo*, that when the offending servant, having general power and authority to employ and discharge servants, and having authority to direct and control the injured servant, orders him to do an act not within the scope of the injured servant's employment, whereby he is exposed to danger not contemplated in his contract of service, and is injured in so doing, the master is liable for injuries received while he was acting under the order of the superior servant. But the doctrine thus indicated, if it be really intended to follow the lead of the Indiana court, is not that which is at present accepted in this state. See *Walker v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 606, 62 N. W. 1032; *Wheeler v. Berry* (1893) 95 Mich. 290, 54 N. W. 876.

² In *Brazil Block Coal Co. v. Hoodlet* (1891) 129 Ind. 327, 7 N. E. 741, the court, in dealing with the contention that the plaintiff assumed the risk, said: "The complaint avers that he did this by the express command of the appellant. But, it may be said, he need not have obeyed the command. He was free to quit the service and thus avoid the danger; and that, by voluntarily continuing

in the service and obeying the command, it must be presumed that he consented to take the additional risk. While the theory of the employee whose master furnishes appliances which both know to be defective is at liberty to quit the service and refuse to be subjected to the enhanced danger, we cannot close our eyes to the fact that the necessities of struggle for existence tend strongly to deprive the employee of that theoretical independence and freedom of action. While the service cannot be compelled in the sense that the employee is compelled to work against the very nature of the relation existing between the parties carries with it an irresistible inference of dependence upon the one side." The following passage from *Cooley, Torts*, *555, was approved: "It has been often, and very justly, remarked that a man may decline any exceptionally dangerous employment; but he voluntarily engages in it he should not complain because it is dangerous. Nevertheless, where one has entered upon the employment and assumed the incidental risks, it is not reasonable to hold that other risks which he is directed by the master to assume are to be left to rest upon his shoulders, merely because he did not take upon himself the responsibility of throwing up the employment instead of obeying the order."

³ This is very strongly put in the earliest of the Indiana cases cited above. "When a servant is thus ordered to work at a particular place, or with particular machinery, etc., outside of his employment, the master impliedly assures him not only that he has exercised reasonable care to have the place, machinery, etc., in a safe condition, but also that the work is in a safe condition and fit for

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the master is virtually converted, for the time being, into a guarantor of the servant's safety. Upon the assumption that this is the effect of the Indiana decisions, they have been condemned in Alabama.⁴

The disapproval thus expressed is, in the opinion of the present writer, well founded. There is no valid ground for departing in this instance from the general principle discussed in chapter x., *ante*. It should be observed, however, that the effect of the sweeping language used by the Indiana courts is considerably qualified by the fact that the defense of an assumption of the risks is conceded to be a bar to the action if the evidence shows that those risks were, as a matter of fact, appreciated.⁵ For practical purposes, therefore, it would seem that

business for which they are used." *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187.

By the court of appeals it has been held that a cause of action is sufficiently stated by averments that the plaintiff was employed for no other purpose than to operate machinery in defendant's mill and work on certain articles, and that he was ordered to repair certain machinery; that the work was different from, and more dangerous than, the work he was employed to do; that defendant knew the danger; and that, while doing the work, plaintiff was injured through no negligence of his own. *Errin v. Evans* (1900) 24 Ind. App. 335, 56 N. E. 725.

See also the Maryland case cited in note 1, *supra*.

⁴ In *Mary Lee Coal & R. Co. v. Chalmers* (1892) 97 Ala. 171, 11 So. 897 (fireman seventeen years old was ordered to throw a switch which had a tendency to fly back), the court thus expressed its disapproval of the rule laid down in *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187: "We think the rule declared in the case cited . . . imports into the contract of employment an obligation not within the contemplation of the parties, and one which no prudent employer would assume. . . . A railroad owes no higher duty to a passenger than that here imposed upon the master to his servant. Does not the master fully discharge his obligation in this respect to all his employees when he exercises reasonable care and diligence in seeing that the ways, works, and machinery are such as are in general use by well-regulated railroads, and that they are kept in proper condition. We know of no sound principle of law which exacts a higher degree of care

and diligence on the part of the master to his employee than reasonable care and diligence. . . . Where the evidence shows that the employment is more dangerous than that within the scope of his employment, or that the servant is called to use machinery which requires skill not possessed by the servant, and not in use in the regular course of his service of employment, the law very properly holds the master liable under proper circumstances for such injuries as may result from the increased danger; but the liability here rests upon different principles from those which would make the master an insurer that the ways, works, and machinery were absolutely perfect. It cannot be said that the master has exercised reasonable care and diligence for the safety of his servant, when by his orders the servant is exposed to greater peril than that which, by his contract of employment, he assumed; or when the master exposes his servant of immature years, or one inexperienced and unskilled, without proper instruction and warning as to the peril of machinery or ways and works dangerous in their use." The passage cited from the Indiana case undoubtedly lays down the rule too strongly against the master. That the implied "assurance of safety" deduced from a specific order is merely an assurance of safety so far as reasonable care can attain it has, we think, never been denied as regards risks within the scope of the employment; and there is no apparent reason why such an assurance should bear a different meaning where the risk is one outside the scope of the employment.

See also *Garrison v. Lake Shore & M. S. R. Co.* (1896) 140 Mich. 71, 67 N. W. 1097 (§ 467 note 5, *infra*).

⁵ In *Pittsburgh, C. & St. L. R. Co. v.*

these decisions, when analysed, merely go to the extent of laying down the doctrine that the master is *prima facie* an insurer of the servant's safety at the moment when he is transferred to the new duties, and also, as may be supposed, though it is not expressly so stated, for a period sufficient to enable the servant to observe the conditions of his new environment.

405. Doctrine of common employment qualified as regards servants working outside the scope of their employment.—An important exception to the doctrine of common employment is created by the rule that the giving of an order which requires a servant to perform duties not included in the original contract constitutes actionable negligence where such servant is plainly unfitted for the new duties. The nature and extent of this exception may be stated thus: The principle that the master is not precluded from relying on the defense of common employment by the mere fact that the plaintiff's injury was received in consequence of his complying with an order given by a superior co-servant having the right to control him as to the manner of doing his work,¹ is not applicable in cases where that order requires the performance of duties outside the scope of the plaintiff's original contract. Under these circumstances the sole question to be determined, in so far as the master's liability depends upon the representative character of the delinquent co-servant, is whether the order which occasioned the injury was one which he had authority to give.

Adams (1886) 105 Ind. 151, 5 N. E. 187, it was distinctly laid down that the liability to which the master was declared to be subject would be purged if the servant was competent to apprehend the danger.

¹ See chapter XXVIII., *post*.

² In *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739, affirming (1871) 2 Dill. 259, Fed. Cas. No. 4,952 (facts stated in § 459, note 1, *supra*), the court, after stating the rule as to common employment, said: "This rule proceeds on the theory that the employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow servants in the same employment; and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obli-

gations to make reparation to an employee in a subordinate position for injury caused by the wrongful conduct of the person placed over him, when they were fellow servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that led to such results is unsupported by reason and cannot receive our sanction."

If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the directions of his superior in might, with some plausibility, he might argue that he should have disobeyed it, and must have known that its execution would be attended with danger. Or at any rate

It is apparent, therefore, that the practical effect of the decisions, when considered with relation to this particular phase of the doctrine of common employment, is to establish the principle that the act of

if he chose to obey, that he took upon himself the risks incident to the service. But this boy occupied a very different position. How could he be expected to know the peril of the undertaking? He was a mere youth, without experience, and not familiar with machinery. Not being able to judge for himself he had a right to rely on the judgment of Collett, and, doubtless, entered upon the execution of the order without apprehension of danger."

One of the grounds on which the decision in *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205 (facts stated in § 459, note 1, *supra*), was based was thus stated by Cooley, Ch. J.: "We also think that where the superior servant, by means of a authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risks and injury, the master must respond. It is only where the risks properly pertain to the business and are incident to it that the master is excused from responsibility; and a risk of this nature not being one of the kind, the general rule applies, and he must answer for the misconduct of his agent." The court adopted the broad contention of the plaintiff that, if the master wrongfully sends his servant into a dangerous place, or exposes him to a risk not connected with the service, and in consequence he is injured, the rule which exempts the master from responsibility has no application, because the risk is not one which the servant has assumed; and that if, instead of being sent by the master in person, the servant is wrongfully exposed to danger by one whom the master has placed over him, and to whose orders he is subjected, the responsibility is the same; the wrongful act of this superior being in law the wrongful act of the master himself.

The principle of this case was again applied by two judges in *Rodman v. Michigan C. R. Co.* (1884) 53 Mich. 57, 54 Am. Rep. 348, 20 N. W. 788 (see § 458, note 5, *supra*).

In *Erickson v. Milwaukee, L. S. & W. R. Co.* (1890) 83 Mich. 281, 47 N. W. 237, the court held that a declaration was not demurrable which stated that the plaintiff, a common laborer on a construction train, was ordered by the foreman of the train to pull a coupling pin

while the cars were moving, and to jump from one of them to the other when they separated; that the foreman, without any notice to the plaintiff, let off the brake on one of the cars; that the speed of the car was thus suddenly accelerated and the distance to be jumped unexpectedly augmented; and that the plaintiff was thus caused to fall between the two cars. The court declined to pass upon the question whether the foreman was a fellow servant of the laborer, but the precise reason for this refusal is not specifically stated.

In *Walker v. Lake Shore & W. S. R. Co.* (1895) 104 Mich. 606, 62 N. W. 1032 (section foreman killed by negligence of division road master), the court explained its position as follows (p. 612): "In determining whether a servant is called upon to do work outside the scope of his employment, the question does not turn upon that of whether the master would be liable for the personal negligence of a superior servant. It becomes a question of authority; and if one having authority over the servant directs him to do an act outside the scope of his employment, the servant, in the performance of such outside work, assumes the risk only if such danger is apparent. . . . In order to bring the injured servant within the protection of the rule that, when called upon to perform a service outside of the scope of his employment, the master owes the duty of warning him against all dangers except those which are obvious to a person of his capacity, skill, and experience, it is not necessary that the order to engage in outside service be given by the *alter ego* of the defendant; it is enough if the superior servant have, in this respect, controlling authority."

In *Hayes v. Colchester Mills* (1894) 69 Vt. 1, 37 Atl. 269, the court argued as follows: "If this service was beyond the plaintiff's capacity, and so outside the scope of his employment, he did not assume the risks attendant upon it. A person of mature years might have been held to have assumed them by consenting to do the work; but the rights of a child are not permitted to depend upon his ability to discriminate promptly as to the work required of him, or to refuse obedience to the command of his superior. This limitation of the plain-

ordering a servant into a new place of work is the act of the master, and that the employee who gives the order is, for this reason, a principal, whatever may be his official rank.³ See chapter xx *post*.

In most of the cases in which this aspect of the master's liability

tiff's risk renders the doctrine of fellow servant inapplicable. In entering the defendant's service, the plaintiff assumed only such risks arising from the negligence of his coemployees as might be incurred within the scope of his employment. So it is not necessary to determine whether the nature and extent of Sturgis' authority over the plaintiff were such as to exclude him from the relation of fellow servant. The effect of his authority over the plaintiff is to be considered without reference to that relation. The defendant assigned Sturgis to the care of the machinery and placed the plaintiff under his orders. If Sturgis, acting within the sphere of his own duty, required of the plaintiff a service which was outside his employment, and which a prudent master would not have imposed upon a person of his years, strength, and judgment, the defendant is liable for the consequences of the improper order."

In *Mann v. Oriental Print Works* (1875) 11 R. L. 152, where a fireman was injured while complying with an order of the engineer to assist in throwing a belt, it was held that the jury were rightly told that, if the fireman was placed under the engineer as his superior, and this superior had a right to give orders in his department, the case did not come within the principle regulating liability in cases of fellow servants, and that the engineer must be looked upon as representing the employer. The court said: "If the person here injured had been an inferior servant, and had been injured by the negligence of a superior servant in the same department,—*c. g.*, if he had been placed under a superior fireman by whose neglect he had been injured,—the case would have been different. And it might then be argued that he must have known and calculated the risks of such employment. In the present case the fireman was not injured while working in his own particular department, but was injured by the neglect of a superior whose department was more extensive, including his (the fire) as a part of it. The engineer not only had a delegated authority or control, but it was the ex-

ercise of this delegated authority which was the cause of the injury."

In *Brazil Block Coal Co. v. Gay* (1889) 119 Ind. 455, 4 L. R. A. 850, N. E. 1102, the court, in holding a mine boss who directed a ten-year boy to leave his own work and undertake more dangerous duties, was not a fellow servant of the boy, said: "do we rest our conclusion upon maxim, *Respondent superior*. Must (if not Haines), under the circumstances of this case, was the agent of the appellant, and the superior of the appellee; it was his right to command, the appellee's duty to obey, and, considering the immature age of the appellee, we must assume that he obeyed commands of his superiors, supposing that it was his duty so to do, with regard to the dangers or hazards he would encounter, and without knowledge thereof."

See also, as illustrative of the point of view, the following cases: *Blesville Foundry & Mach. Co. v. Mann* (1891) 3 Ind. App. 521, 30 N. E. 10 (miner ordered by foreman to work for which he was unfitted); *J. v. Old Dominion Cotton Mills* (1882 Va. 140 (order given by foreman); *Orman v. Mannix* (1892) 17 Colo. 17 L. R. A. 602, 30 Pac. 1037 (order given by gang foreman).

³This conception emerges in *L. v. E. & St. L. Consol. R. Co. v. E. & St. L. Consol. R. Co.* (1891) 131 Ind. 528, 31 N. E. 103 (car repairer ordered to repair a car which was not on the track set apart for such work); *Gilmore v. North P. R. Co.* (1884) 9 Sawy. 558, 18 N. E. 860 (laborer ordered by gang boss to throw dynamite before a fire).

The language used in one South Carolina case would also seem to indicate the adoption of the theory that the transfer of a servant to work outside the scope of his original employment is a nondelegable function of the master, and that any superior servant (in the case cited a section foreman) who undertakes to order such a change of duties represents the master *ad hoc*, although he may be a mere fellow servant as to orders with respect to

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come under consideration the injured servant has been a minor, and language has sometimes been used which indicates that the benefit of this qualification of the doctrine of common employment can only be claimed by minors.⁴ But with all deference to the eminent judges who have taken this view, the present writer ventures to express an opinion that it is neither consistent with the reason of the qualification, nor sustained by the case commented on.⁵

It should be observed that the principle thus laid down does not exclude the operation of the doctrine of common employment in cases where the injury was caused, not by the servant's compliance with the order to perform new duties, but by some subsequent act of negligence committed by a subordinate coemployee while those duties were in course of performance.⁶

ordinary duties. *Couch v. Charlotte, C. & A. R. Co.* (1884) 22 S. C. 557. But the position of this court in regard to the "superior servant doctrine" is very obscure (see summary of decisions in chapter xxx., *post*), and it is therefore difficult to say what is the precise effect of this ruling in the present connection.

⁴ In *Randall v. Baltimore & O. R. Co.* (1883) 109 U. S. 483, 27 L. ed. 1005, 3 Sup. Ct. Rep. 322, Grey, J., said that the principle of *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739, was that, the servant "being a minor, he was performing, by direction of his superior, work outside of and disconnected with the contract which his father had made for him with the defendant." In *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115, also, it was remarked that the controlling factor was that plaintiff was a minor.

⁵ One of the grounds upon which the Supreme Court of the United States upheld the servant's right of action in *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739, was, as will be seen by reading the extract from the opinion in note 2, *supra*, that he "had no reason to believe he would have to encounter" the risk which caused his injury. Manifestly, this element of nonanticipation is of precisely the same evidential import in the case of adults, as in the case of servants, in so far as it operates *prima facie* to negative that knowledge which is supposed to exist with regard to the ordinary risks of work within the scope of common employment. Up to this stage of the inquiry, therefore, adults and minors stand on the same footing. The second question involved

is that which is discussed in the latter part of the opinion, *viz.*, whether this presumption of excusable ignorance was overcome by the specific evidence which was relied upon to prove actual or constructive notice of the risk. This question is wholly distinct from the other, and, in considering it, the minority of the servant undoubtedly becomes material, for exactly the same reasons as where the extraordinary risk is one within the scope of the servant's employment. To this extent, therefore, and no further, it is submitted, the tender age of the plaintiff is a controlling factor in the cases which established this limitation of the doctrine of common employment. Minority, in short, makes it more difficult for the master ultimately to prevail on the ground of an assumption of the risks of new duties; but this is only because the general inference of a nonassumption of those risks, which is drawn from the servant's nonanticipation, is more readily rebutted by specific evidence in the case of adults than in the case of minors.

In several cases in which the doctrine has been applied the servant was, so far as appears, an adult: *Mann v. Oriental Print Works* (1875) 11 R. I. 152; *Erickson v. Milwaukee, L. S. & W. R. Co.* (1890) 83 Mich. 281, 47 N. W. 237; *Walker v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 606, 62 N. W. 1032.

⁶ A servant, who, after he had been at work in railway shops for two months, performing duties which bring him continually in the neighborhood of a steam hammer, and who, voluntarily and without objection, consents to work at the hammer, cannot recover for an injury

466. Contributory negligence in undertaking the new work.—(Compare §§ 142 *et seq.*, *supra*.)—The general rule applied by most of the authorities is that, where the master or his representative commands a servant to go outside of his regular employment to do a work which is attended with special danger, and the servant, in response to the commands so received, goes and does the work in the way, and at the time directed, the fact that the servant knew that it was dangerous does not render him, as a matter of law, guilty of contributory negligence, unless the character of the danger be so patent and so extensive that no one but a foolhardy, reckless man would attempt it.¹ Special reasons which have been assigned for not imputing negligence are the following: That the servant's excusable ignorance of the danger he encountered is a reasonable inference from the fact that he had

received through the negligence of another servant in operating it. *Hanratty v. Northern C. R. Co.* (1876) 46 Md. 280.

¹ *English v. Chicago, M. & St. P. R. Co.* (1885) 24 Fed. 904, per Brewer, J.

In *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205, it was argued that, even if the superior servant who gave the order represented the company *ad hanc vicem* (see §§ 457, 460, *supra*), the act of the plaintiff in obeying was his own voluntary act, and that the case was the ordinary one of contributory negligence. This contention did not prevail. Cooley, Ch. J., said: "When one person engages in the employment of another, he undertakes to obey all lawful orders, and he subjects himself, for any failure to do so, to the double liability of being expelled from the employment and of being required to pay damages. It is true the master had no right to direct him to do anything not contemplated in the employment; but when one thus contracts to submit himself to the orders of another, there must be some presumption that the orders he receives are lawful, the giving of the orders being of itself an assumption that they are lawful; and the servant who refused to obey would take upon himself the burden of showing a lawful reason for the refusal. This, of itself, is sufficient reason for excusing the servant who declines the responsibility in any case in which doubts can possibly exist. He should assume that the order is given in good faith and in the belief that it is rightful; and if, in his own judgment, it is unwarranted, it is not for the master to insist that the servant was in the wrong in not refusing obedience. Re-

spect for the master as well as consideration for his own interest may properly induce him to waive his judgment for that of his superior instead of engaging in disputes, arguing, perhaps, ejected from his employment, to leave questions of doubt for future settlement. Now, although I think, on the facts, as the jury found them, there was no authority to send Williams to handle the brake, the point was not so clear but that the question was made of it on the ground and it would be grossly unjust to compel the servant, at his peril, to determine correctly on the validity of an apparently presumptively lawful, when the consequences of even a correct decision be apparent insubordination, and perhaps, difficulty and litigation. I think perfectly just under such circumstances to leave upon the master the responsibility he assumed in giving an unwarranted order, and to hold that the servant is not blamable in yielding obedience to his superior."

See also *Galveston Oil Co. v. Tison* (1890) 76 Tex. 235, 13 S. W. 2d 1; *Clark County Cement Co. v. Wright* (1897) 16 Ind. App. 630, 45 N. E. 187 (complaint not demurrable because shows undertaking of new and dangerous duties); *Pittsburgh, C. & A. R. Co. v. Adams* (1886) 105 Ind. 5 N. E. 187 (*arguendo*); *Clark County Cement Co. v. Wright* (1897) 16 Ind. App. 630, 45 N. E. 817; *Dallam Saalfeldt* (1898) 175 Ill. 310, 48 N. E. 753, 51 N. E. 645. Affirming *73 Ill. App. 151* (bottle washer, sixteen years old was injured while using a freight elevator); *Kehring v. Schueck* (1892) 151 Pa. 519, 2

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time for reflection or choice;² that he relied upon the superior knowl-
edge of the employee who gave the order;³ that, although he was aware
of the material conditions which were the cause of his injury, he did
not appreciate the danger created by them;⁴ that by reason of his
youth and inexperience, he was incapable of determining whether the
work required was actually within the scope of his employment,⁵ or
believed himself bound to render obedience to the order.⁶ A servant,
it is declared, is not required to weigh nicely the question whether any
particular order is one which his superior has a right to give.⁷ Nor
will a servant who is charged with various duties be held, upon uncer-
tain and refined distinctions, to have been negligent when, in good
faith, he performed a service outside of the line of his duty.⁸ But
clearly he can never be justified in obeying an order which takes him
outside his regular duties, where he has been expressly instructed to

130; *Orman v. Mannix* (1892) 17 Colo.
564, 17 L. R. A. 602, 30 Pac. 1037;
Camp v. Hall (1897) 39 Fla. 535, 22
So. 792.

² *Rush v. Missouri P. R. Co.* (1887)
36 Kan. 129, 12 Pac. 582; *Duckling v.*
Allen (1881) 74 Mo. 13, 41 Am. Rep.
298 (boy of seventeen ordered to stop
an engine, such work not being a part
of his duty, and to hurry, was caught
by an uncovered set-screw); *Hale El-*
vator Co. v. Trade (1891) 41 Ill. App.
253 (servant, in hasty response, aban-
doned his regular work to add his
strength to that of other employees to
overcome a present exigency).

A boy of fourteen who suddenly re-
ceives an order from his foreman to
pick up and throw away a stick of giant
powder which had caught fire is not, as
matter of law, negligent in obeying, as
he has neither time for the close weigh-
ing of chances, nor the opportunity to
comprehend fully the danger of the serv-
ice to which he was assigned. *Orman*
v. Mannix (1892) 17 Colo. 564, 17 L.
R. A. 602, 30 Pac. 1037.

³ *Frank v. Bullion-Beck & C. Min. Co.*
(1899) 10 Utah, 35, 56 Pac. 419 (miner
injured by a cave-in while he was com-
plying with the order of his foreman to
assist in carrying out a fellow workman
who had previously been injured by an
other cave-in).

⁴ The fact that a boy of fourteen in-
jured in a mine by stumbling over a
piece of coal lying upon the track, while
endeavoring, in pursuance of an order
of the superintendent directing him to

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a service outside the duty of his regu-
lar employment, and without the knowl-
edge of his parents, to throw off the
brake upon a coal car, had seen such
piece of coal before he was injured, does
not render him, as matter of law, guilty
of contributory negligence, since it does
not follow, as a conclusion of law, that
his judgment had reached such maturity
that he was apprised of the danger of
running alongside the tracks or seating
or removing the brakes under such cir-
cumstances. *Northern P. Coal Co. v.*
Richmond (1893) 7 C. C. A. 485, 15 U.
S. App. 262, 58 Fed. 756.

⁵ *Haney v. Colchester Mills* (1894) 69
Vt. 1, 37 Atl. 269.

⁶ *Mary Lee Con. & R. Co. v. Cham-*
bliss (1892) 97 171, 11 So. 897
(minor of seventeen years, employed as
a fireman, was ordered to throw a
switch).

⁷ *Orman v. Mannix* (1892) 17 Colo.
564, 17 L. R. A. 602, 30 Pac. 1037.

⁸ *Grannis v. Chicago, St. P. & K. C.*
R. Co. (1890) 81 Iowa, 444, 46 N. W.
1067, where the court upheld the pro-
priety of a finding that a wiper in a
roundhouse, injured while attempting to
couple an engine to a car, in assisting
to take the engine out of the round-
house, was acting within the line of his duty
in making the coupling, the proof
being that the plaintiff, although he had
never attempted such work before,
was a man of an work and required to
assist in taking engines into and bring-
ing them out of the roundhouse; and it
is shown that other wipers coupled cars.

obey the orders of the superior servant only in so far as they related to his own department."⁹

The doctrine adopted in Georgia seems to be that contributory negligence is inferable as a matter of law, where the servant knew that the abnormal risk which caused his injury was incident to the new work which he had undertaken.¹⁰ Compare §§ 298, 298a, *ante*.

A servant who is sent to do a piece of work with a machine with which he is not familiar is bound to inquire as to the proper method of operating it. The failure to seek this information will debar him from recovering for an injury caused by operating it, if it was free from defects.¹¹

As to contributory negligence, as a deduction from evidence that the servant undertook work for which he was not fitted, see § 294-note 3, *ante*.

§67. Absence of compulsion an essential element of assumption of risks and contributory negligence.—*a. Generally.*—As in cases of injuries from other kinds of extraordinary risks, neither an assumption of risks outside the scope of the original employment, nor contributory negligence in encountering those risks, can be predicated unless it is shown that the work was undertaken voluntarily. Actual compulsion will readily be inferred where the servant is a minor

⁹This doctrine is deducible from the language used in *Mann v. Oriental Print Works* (1875) 11 R. L. 152, where it was declared that, unless the plaintiff fireman had been instructed not to obey the engineer except in the line of the former's employment, the engineer was authorized to call upon him for assistance in any matter within the engineer's department, and that the defendant would be liable, even if there was another person who might more properly be called upon.

¹⁰The following headnote was written by Bleekley, J., for the case cited: A railway employee is in fault when he knowingly exposes himself to an extraordinary danger at night, by assisting to carry a train over the unsafe track of another railroad. The company does not insure his safety against reckless locomotion which he assists to conduct, with knowledge that it lies outside of his regular employment, and that it is extra hazardous on account of the unfitness of the appointments. *Galloway v. Western & A. R. Co.* (1876) 57 Ga. 512.

¹¹*Millar v. Madison Car Co.* (1895) 130 Mo. 517, 31 S. W. 574. Compare, generally, §§ 412, 413, *ante*.

¹In *Kehler v. Schreck* (1892) 1 Pa. 505, 25 Atl. 130, one of the elements of liability which was held to warrant a verdict for the plaintiff, a boy of fourteen, was that he was urged into the new service against his will.

An action is maintainable upon a complaint which alleges that a minor was not engaged in the service which he was hired to perform, but that he was "compelled" by a fellow servant to labor at a business much more perilous and was injured while so engaged. The court said: "There was, then, no opportunity to adjust the compensation with a view to the risk. There was consent to perform the service on a terms. It was a compulsory service, and, under such circumstances, neither justice nor policy requires that the matter shall be acquitted of responsibility." *Chicago & G. E. R. Co. v. Harris* (1867) 28 Ind. 30, 92 Am. Dec. 2. The rights of a child are not permitted to depend upon his ability to discriminate promptly as to the work required of him, or to refuse obedience to the command of his superior. *Hoyes v. Chester Mills* (1894) 69 Vt. 1, 37 A. 269. See also *Putnode v. Warren C.*

See §§ 289, 302, *ante*. But where he is an adult, a voluntary action will presumably be ascribed to him only under the exceptional circumstances discussed in the sections just specified.

b. Protest or objection omitted or made.—The principle that the failure of the servant to protest against the maintenance of abnormally dangerous conditions due to the master's negligence is a circumstance which points strongly, and even conclusively, to the inference that the servant was willing to assume the resulting risks (see § 290, *ante*), is equally applicable where the peril is extraordinary in the sense with which we are now concerned.²

The evidential import of a protest actually made depends both upon the defense which has been raised, and upon the views of the court as to the economical and social principles discussed in chapter VII., subtitle B, *ante*. Where the defense raised is an assumption of the risks, the general principle, which is almost universally held in the United States, that the servant cannot countervail the effect of his appreciation of the risk by showing that he entered a protest before undertaking his duties, is considered to be equally applicable, whether the work to be done is within or outside the scope of the original employment. Accordingly, we find it laid down that

Don Hillis (1892) 157 Mass. 283, 32 N. E. 161, where a servant of fourteen years of age and of less than ordinary intelligence, injured while obeying peremptory orders, given with an oath, to assist in operating a machine at which he was not employed to work, was held not negligent, as matter of law. But there imperfect knowledge was also an element in the case, as the danger incident to operating the machine was partially concealed from view.

In *Reed v. Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186, the court reasoned as follows: "It is urged that Stockmeyer, in obeying the orders of Drichble, acted under compulsion, and should not be, therefore, held to have assumed the risks of the work he was directed to perform. It is conceded that he made no objection to the order, that he did not protest any incapacity to comprehend the risk, but that he was coerced into compliance with the order through fear of discharge in case of disobedience. That, however, does not charge liability upon the master. In the absence of restrictive contract provisions, the master is at liberty to discharge the servant at any time. So, likewise, is the servant at liberty to abandon his service at will. The mas-

ter has the right to demand other service than that for which the servant has engaged. The latter may resist or decline at will. Declining, he quits his employment; accepting, he assumes the risks attending the service. The servant has been properly warned of them. The servant is not under guard'ship. He is a free man, at liberty to make such contracts as he will. That, through stress of circumstances he consents to the orders of the master rather than be discharged from employment, does not impose liability upon the master because of such demand, if he has otherwise performed the duty which the law imposes upon him with respect to the servant."

A brakeman engaged with the distinct agreement that he is not to couple cars except with a stick, and is, under no circumstances, to go between cars having an engine attached, cannot recover for injuries received in going between the cars by direction of the engineer, on the ground that the duty was outside the scope of his employment, where he makes no objection. *Richmond & D. R. Co. v. Finley* (1894) 12 C. C. A. 595, 25 U. S. App. 16, 63 Fed. 228.

To the same effect, see *Cole v. Chicago & N. W. R. Co.* (1888) 71 Wis. 114, 37 N. W. 94.

a servant of full age and adequate experience cannot cast upon his master all the risk of accident in the performance of new duties—simply protesting against being called upon to perform those duties. Under such circumstances, he has the choice of either leaving his employment, or of remaining and assuming all the risks incident to the work he knows that he is expected to do.³

c. Fear of discharge.—In two of the cases just referred to it will be noticed that the effect of the servant's protest is considered with reference to the fact that dismissal from the employment must always be taken into account, as a possible, or rather probable, consequence of disobedience, and that the servant is presumed to be influenced by this consideration.⁴ Obviously, however, neither making nor the omission of an actual protest is a necessary or variable concomitant of this element; and in some cases its bearing

³ *Wheeler v. Berry* (1893) 95 Mich. 250, 54 N. W. 876, distinguishing *Chicago & N. W. R. Co. v. Bangfield* (1877) 37 Mich. 295, as being a decision based on the youth, weakness, and inexperience of the servant. See § 460, *supra*.

To the same effect is *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115 (freight truckman acting temporarily as fireman was thrown off the footboard of a switching engine by a jolt caused by the passage of the engine over a frog). The court said: "While a person who engages for a particular service agrees to encounter only the dangers of that service, he may, perhaps, in the first instance, assume that the order given him by his superior is warranted by the legitimate scope of his employment. If, so assuming, he is induced to perform duties which, by his contract, he is not bound to perform, and is thus injured, he should be able to maintain an action for the injury against the employer. But in the case at bar the plaintiff knew that the duty of aiding as fireman on the engine was not within his original contract as a laborer. He determined to perform it as a part of his engagement with the defendant, rather than lose his position as a laborer. In so doing, he must be held to have assumed its necessary risks. . . . Morally to coerce a servant to an employment, the risks of which he does not wish to encounter, by threatening, otherwise, to deprive him of an employment he can readily and safely perform, may sometimes be

harsh; but when one has assumed employment, if an additional and more dangerous duty is added to his original labor, he may accept or refuse it. If he has an executory contract for the original service, he may refuse the additional and more dangerous service, if, for that reason, he is discharged, may avail himself of his remedy on contract. If he has no such contract and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks; and while he may require of the employer to perform his duty cannot recover for an injury which occurs only from his own inexperience.

On the other hand, in *Jones v. L. Shore & M. S. R. Co.* (1883) 49 Mich. 573, 14 N. W. 551, where a brakeman on a passenger train was ordered to do yard work, and, after a protest, complied with the order, and was injured by a projecting load of lumber, it was held that it was competent to introduce evidence of the protest as indicating a withdrawal of consent. In *Cole v. Chicago & N. W. R. Co.* (1888) 71 Wis. 114, 37 N. W. 84, the court referred to, but declined either to affirm or disaffirm, the ruling in this case.

⁴ The fact that there was no threat of dismissal in case of refusal to undertake the new duties was emphasized in *Barnard & D. R. Co. v. Finley* (1894) 161 U. S. 595, 25 U. S. App. 16, 63 L. Ed. 228, as a ground for inferring acceptance of the risks.

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upon the question of the servant's willingness is treated from a more general standpoint.⁵

468. Contributory negligence in regard to the manner of performing the work.—In cases where the injury resulted from the manner in which the work was performed, and not from the risks which were an essential incident of that work, it is clear that, under the general principle stated in §§ 319, 320, *ante*, contributory negligence is negatived by evidence which shows that the servant did not understand the danger which that method involved.¹ On the other hand, he cannot recover if, with knowledge, actual or constructive, of the risks thereby incurred, he adopts an abnormally hazardous method of doing the new work, or fails to take the precautions against accident which would have suggested themselves to a prudent man as being appropriate under the circumstances.² This rule, is, of course, no less applicable to minors than to adults.³

¹In *Garigan v. Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 67 N. W. 1097, the court rejected the contention that, by consenting to perform the service, the plaintiff did not assume the risk, inasmuch as he might be discharged if he refused to perform the service; or, in other words, that the master is to be considered an insurer of the servant performing extraordinary service by direction of a superior, whenever he chooses to obey a direction of one in charge, for fear of discharge.

See also *Dougherty v. West Superior Iron & Steel Co.* (1894) 88 Wis. 343, 60 N. W. 274.

On the other hand the supreme court of Indiana has repudiated the theory that the servant is free to quit the service and thus avoid danger, and that, by voluntarily continuing in the service and obeying the command, he consents to take the additional risk. *Brazil Black Coal Co. v. Hoodlet* (1891) 129 Ind. 327, 334, 27 N. E. 741. See § 464, note 2, *supra*.

²*Borttger v. Scherpe & K. Architectural Iron Co.* (1894) 124 Mo. 87, 27 S. W. 466 (servant hired as a common laborer is not required to possess such skill in choosing lumber for a scaffold as will debar him from recovery for injuries received through the breaking of a piece of timber used in erecting the structure); *Gulf, C. & S. F. R. Co. v. Yerman* (1901; Tex. Civ. App.) 64 S. W. 790 (fireman directed to take charge of a stationary engine was injured in trying to start it by lifting the balance wheel off its balance with an

iron rod, he having seen other employees doing this, and not being acquainted with any other method).

³*Wainell v. Maine C. R. Co.* (1887) 79 Me. 397, 19 Atl. 49 (workman whose ordinary duties were in a car shop was injured, while coupling cars under the direction of his foreman, by placing his hand where, as he could not help seeing, it must be caught by the buffer); *Jenkins v. Maginnis Cotton Mills* (1899) 51 La. Ann. 1011, 25 So. 643 (servant attempted to remove flats from the endless chain of a carding machine while it was in motion, and when the removal of the fly plate had, as he knew, exposed a rapidly moving cylinder); *English v. Chicago, M. & St. P. R. Co.* (1885) 24 Fed. 906 (servant was ordered to repair a water tank and fell from a narrow, ice-covered platform on which he stood).

An instruction that if the servant is suddenly called on to perform a duty not falling within the scope of his contractual duties, and complies with the order, he will have a right to rely on the implied assurance of the master that the dangers to be encountered are such only as can be guarded against by the exercise of ordinary care; and that, if he uses such care, the master will be liable,—is not open to the objection that it relieves the servant from the duty of exercising his faculties to protect himself from the apparent dangers incident to the work. *Norfolk Beet Sugar Co. v. Hight* (1899) 59 Neb. 100, 80 N. W. 276.

⁴*Michael v. Stanley* (1892) 75 Md. 164, 23 Atl. 1094; *Morewood Co. v.*

469. Injuries due to risks entirely disconnected from the servant's duties; right of action for.—In one English case there was applied in favor of the servant a principle which, so far as it is susceptible of precise formulation, would seem to be this—that the servant's knowledge of a risk will not warrant the inference that it was assumed, where it arose from conditions which lay wholly outside the sphere of the duties which he was engaged to discharge, and had no connection whatever with those duties.¹

Smith (1900) 25 Ind. App. 264, 57 N. E. 199 (minor of seventeen went unnecessarily near cogwheels).

¹This is apparently the rationale of the decision in *Mansfield v. Baddeley* (1876) 34 L. T. N. S. 696, where it was held that a woman employed as a dressmaker, who went into her employer's kitchen on an errand which had nothing to do with her work, was bitten by a savage dog which she supposed to be tied up, as was usually the case, was held to have been wrongly nonsuited, although she was aware of the character of the dog. In the course of his opinion, Grove, J., said: "If the plaintiff, when she entered her employment, knew the character of the dog, and that, in the ordinary course of her employment, she would have to go by the place where it was tied up, it might, perhaps, be said she took the risk. But here she was asked to do something which was no part of her service,—in fact, a mere

good-natured act, it being something *ultra* her service to go to the kitchen. The dog then rushes out and bites her. Such a risk was not incidental to the service, nor one which, by her conduct she has undertaken to bear. If there was anything exceptional in the case, the onus of proving it lay on the defendant." It should be observed, however, that the same conclusion might have been arrived at on the facts without invoking any special principle, for it is evident that the dressmaker was not chargeable with the assumption of any greater risks than those incurred from the proximity of the dog while it was tied up. The risk created by the fact that it was running loose was, in any view of the case, an abnormal one which was not assumed unless it was proved to have been known to her; and it is clear that, under the testimony, this condition precedent to the transfer of the responsibility was not satisfied.

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